

# STATE TOBACCO-TAX COLLECTIONS

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## HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-FIRST CONGRESS

FIRST SESSION

ON

### H. R. 195

AN ACT TO ASSIST STATES IN COLLECTING  
SALES AND USE TAXES ON CIGARETTES

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JUNE 15 AND 16, 1949

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Printed for the use of the Committee on Finance



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# STATE TOBACCO-TAX COLLECTIONS

WEDNESDAY, JUNE 15, 1949

UNITED STATES SENATE,  
COMMITTEE ON FINANCE,  
Washington, D. C.

The committee met at 10 a. m., pursuant to call, in room 312, Senate Office Building, Senator Walter F. George, chairman, presiding.

Present: Senators George (chairman), Connally, Hoey, Millikin, Taft, Butler, and Williams.

The CHAIRMAN. The committee will be in order, and we will proceed. We hope to have other members of the committee present by the time the hearing gets under way.

This is a hearing on H. R. 195, a bill to assist the States in collecting sales and use taxes on cigarettes, which passed the House of Representatives on May 17, 1949.

(H. R. 195 is as follows:)

[H. R. 195, 81st Cong., 1st sess.]

AN ACT To assist States in collecting sales and use taxes on cigarettes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act the term—*

(a) "person" means any individual, partnership, corporation, or association;

(b) "disposing of" means any transfer for profit;

(c) "cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco;

(d) "licensed distributor" means any person authorized by State statute or regulation to distribute cigarettes at wholesale or retail;

(e) "use", in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes;

(f) "tobacco tax administrator" means the State official duly authorized to administer the cigarette tax law of a State.

SEC. 2. Any person selling or disposing of cigarettes in interstate commerce whereby such cigarettes are shipped to other than a distributor licensed by or located in a State taxing the sale or use of cigarettes shall, not later than the 10th day of each month, forward to the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every such shipment of cigarettes made during the previous calendar month into said State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

SEC. 3. Whoever violates the provisions of this Act shall be guilty of a misdemeanor and shall be fined not more than \$1,000 or imprisoned not more than six months, or both.

Passed the House of Representatives May 17, 1949.

Attest:

RALPH R. ROBERTS, *Clerk.*

The CHAIRMAN. Senator Wherry, we will hear from you first this morning.

**STATEMENT OF HON. KENNETH S. WHERRY, A UNITED STATES SENATOR FROM THE STATE OF NEBRASKA**

Senator WHERRY. Mr. Chairman, it is my purpose in appearing before you today to urge the most careful consideration of your committee to H. R. 195, which would help plug State revenue loopholes which today exist through evasion of cigarette-tax laws in 39 of the 48 States.

Your committee is familiar with details of this measure which already has passed the House, and other witnesses will be discussing technical details of the measure. It is my wish merely to point to you the effect of this form of cigarette-tax evasion in our own State of Nebraska, which for several years has levied a 3-cent tax on each package of 20 cigarettes.

Mr. Philip K. Johnson, Nebraska State tax commissioner, advises me that taxes on cigarettes yield approximately \$4,000,000 yearly. This is one of the few sources other than general property-tax levies upon which Nebraska relies for its operating income.

Mr. Johnson and Mr. R. H. Creadick, chief of the cigarette tax division, estimate that on the basis of present cigarette consumption the State of Nebraska would collect about \$240,000 additional each year if means were available to stop the practice of direct shipment by mail or express of cigarettes in carton and larger lots from States which do not impose a State cigarette tax.

To persons accustomed to dealing with Federal spending and revenue items amounting to millions and billions, the sum of \$240,000 may appear small indeed, but in Nebraska we pride ourselves on a certain frugality and conscientious attempt at economy wherever possible in the handling of public funds. The people of Nebraska look upon a quarter of a million dollars as an item well worth saving or well worth developing as an additional revenue if it is properly provided by existing State law that such funds be collected.

Nebraska State Tax Commissioner Johnson puts it this way, and I quote from a letter received from him May 26:

With our current high property-tax burden in Nebraska, such an amount deposited in the general fund each year is of particular significance. Cigarette-tax revenues are placed in the general fund of the State, and as a result thereof they relieve the State property-tax burden to the extent of some \$4,000,000 per year. Therefore, I wish to request that you lend such support as you deem proper toward the passage of H. R. 195.

Cigarette Tax Division Chief Creadick, discussing this problem in a letter to me May 25, made certain statements which I think also should be a part of your committee record. Therefore, I quote from his letter as follows:

You will recall that this same bill was passed by the House in 1948 but was allowed to die in the Senate during the late hours before final adjournment last year. By allowing this bill to die in the hands of the Senate, Nebraska was denied the use of approximately \$240,000 in tax revenues. We in Nebraska do not wish to continue to pay a tax which is open to such flagrant violations as is now permitted by the uncontrolled mail-order business of the United States. The Jenkins bill is designed to curtail the nefarious practice of evading State cigarette taxes through mail-order shipments.

Thirty-nine States at present levy taxes on cigarettes. Nine States and the District of Columbia do not. The amount of State tax per package of cigarettes ranges from 1 cent to 8 cents, which means that the State tax on a carton of cigarettes (consisting of 10 packages) runs from 10 cents to 80 cents per carton. These

are taxes on the consumer, and every resident of a tax State who purchases cigarettes in the State is required to comply with the law and pay his share of the cigarette tax.

It must also be borne in mind that cigarettes are purchased and consumed daily. They constitute a basic item in the cost of living. Because of this fact, the consumer is particularly receptive to any inducement to save money by evading payment of the sizable State cigarette taxes. Any offer to save the consumer up to 8 cents on his daily package of cigarettes falls on fertile ground. Paradoxical as it may seem, even prominent and well-to-do persons are known to boast about their ability to evade State cigarette taxes.

It is because of this realistic aspect of human nature that numerous firms in the nontax States are using the mails, newspapers, and even the radio to invite and entice the smokers of the tax States to purchase their cigarettes tax-free for delivery via parcel post or express.

Based on trade experience and knowledge, the amount of purchases diverted in such manner affects in some States as much as 20 percent of the entire consumption. What are the inevitable ramifications?

(a) Evasion of the law is encouraged.

(b) The amount of revenue sought by the respective State legislatures in enacting cigarette-tax statutes is substantially reduced.

(c) The law-abiding citizens must of necessity be saddled with the additional yoke of bearing the entire cost of the cigarette tax and, should the yield fall short of budgetary expectations, then the legislature has no choice but to seek other and new sources of revenue.

(d) The revenue from State taxation of cigarettes has become an enormous business, approximating \$400,000,000 a year to the 39 States, and therefore if even 15 percent of the volume is diverted, these States are deprived of approximately \$60,000,000 a year. If this prodigious annual sum is not obtained from cigarette taxes, as anticipated by the various legislatures, then they have no choice but to impose new taxes or increase existing levies, thereby appreciably increasing the cost of living.

Both State Tax Commissioner Johnson and Cigarette Tax Division Chief Creadick had hoped to appear in support of this bill, H. R. 195, but official business prevented their making the trip. I would, therefore, like the committee to know that were they to have been present, they would each testify personally on behalf of the State of Nebraska their strong hope that this measure will be considered favorably and recommended for Senate adoption.

The CHAIRMAN. We have here several members of the Congress of both Houses; and since that committee is very busy, we will hear first the Representatives who are present from the House Ways and Means Committee.

Mr. Jenkins, please come forward and take that chair there.

#### STATEMENT OF HON. THOMAS A. JENKINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Representative JENKINS. If the Chair will indulge me for just a minute, I want to make the observation that we have quite a long calendar here today. I understood at the beginning that we were to have 2 hours today, and I thought that it would be an abundance of time as far as we were concerned, if we could get half of it, but I just wondered whether you had fixed the time or how you would handle the time.

The CHAIRMAN. There is no definite limitation on time. We were hopeful that we might finish today or tomorrow. We will hear you now, you and the other members of the Ways and Means Committee, so that you may be excused. I know that you are holding sessions of your committee.

Representative JENKINS. I shall want to stay here a little while, Senator, so I do not want to get preference now, but since I am the author of the bill, I do want to take a minute or two to make a brief explanation at this time.

I am sorry Mr. Doughton could not be here this morning. He asked me to extend to you and the committee his greetings. He strongly favors this legislation, and, as you know, he is the chairman of the Ways and Means Committee from which this bill comes.

Congressman Jere Cooper, of Tennessee, had intended to come, and he is a very strong supporter of the measure also. So if Mr. Cooper comes later, he will, of course, want to be heard.

The CHAIRMAN. We will be glad to hear him.

Representative JENKINS. I just want to say that this bill passed the House last year, in the last session of Congress. It passed the committee without a dissenting vote, and passed the House by a very large vote. However, it did not pass the House last year in time to be heard by the Senate. This year, again, it passed the committee without a dissenting vote, and it passed the House by a very large vote.

With that, I think I shall yield at this time, but I should like the privilege to appear later, Mr. Chairman, if that would be proper.

The CHAIRMAN. Yes; that is all right.

Representative JENKINS. I have here today my colleague, Mr. Camp, from Georgia, who as everyone knows is a very good lawyer, and is thoroughly posted on this subject.

The CHAIRMAN. Mr. Camp, we will be very glad to hear you.

#### STATEMENT OF HON. A. SIDNEY CAMP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Representative CAMP. Mr. Chairman and gentlemen of the committee, I have been interested in this subject for a number of years, dating back to my service in the House of Representatives and the State assembly of Georgia. I was one of the authors of our cigarette tax law there.

The cigarette tax in most of these States, and I think all, is based on the theory of a use tax. The attacks made on the State laws have been futile. The laws have been tested in the courts, and the tax is unquestionably a legal tax, and now is becoming one of the main sources of revenue in the States.

Most of the States allocate their cigarette tax money to some specific purpose, such as education. Our tax law in Georgia was first allocated to our tuberculosis hospital.

There is ample precedent for the passage of this law. During the various phases of our prohibition experience, our experience with national prohibition, and even prior to the enactment of the National Prohibition Act, Congress recognized the right of the States to collect such use taxes as this. We find on the statute books several laws identical to the purpose of this one, that is, to assist the States in the collection of State revenue.

We have set out in the report which accompanies this bill a brief of the laws, which I hope you will consider.

The CHAIRMAN. You refer to the report by the Ways and Means Committee?

Representative CAMP. Yes, sir. It accompanied this bill.

Senator CONNALLY. May I ask you a question there?

Representative CAMP. Yes, sir.

Senator CONNALLY. You maintain that the Federal Government has a right to impose this as a regulation of interstate commerce, even though it does not impose any taxes itself? Is that your point? In other words, you hold that within certain limits they can impose regulations.

Representative CAMP. Yes, sir; and have done it, Senator, in the past, in connection with protecting a State's prohibition act, mainly.

Senator CONNALLY. All right.

Representative CAMP. We have had acts of Congress which prohibited the movement in interstate commerce of whisky into a dry State or dry territory. Then there is the situation involved in the hot-oil cases. That is identical legislation, Senator.

Senator CONNALLY. It is not identical, but it is within the same family, probably.

Representative CAMP. Within the same family, and we hold that it is the same problem. It is a serious proposition. You will, in the course of your hearing here, hear from representatives of the State revenue departments. It is an alarming amount of revenue that these States are losing.

If I may give a personal experience, I was in a post office visiting one of the postmasters in my district, and there was a stack of packages 8 feet high in the end of the post office, all coming in there in 1 day in a town of less than 5,000 people. These dealers advertise in the papers, and we have set forth in our hearings facsimiles of advertisements which appear all over the country calling attention to the fact that these cigarettes can be ordered without paying any State tax. And they are buying them that way by the thousands all over this country. And there are not so many States that do not impose a cigarette tax.

Senator CONNALLY. Does the dealer buy them, or does he order them through the dealer?

Representative CAMP. The way it is handled down our way is this, Senator. The dealer in the State where they do not have a tax on cigarettes runs a small advertisement in a magazine or newspaper, and these people send in mail orders.

Senator CONNALLY. That is what I was thinking. It must be mail orders.

Representative CAMP. Yes, sir; at retail. And one of these users will perhaps represent himself and 8 or 10 neighbors. They will buy a month's supply, and it will be sent down by parcel post, collect. That is the way they handle it down our way. Of course, it is against the State law for a man to use cigarettes on which the tax has not been paid in Georgia; and, of course, this is an open invitation to law violation. I think that is one of the strong reasons why this law should be passed. It is plainly an encouragement and incitement to law violation.

Senator CONNALLY. But the local dealers do not engage in this practice?

Representative CAMP. No, sir; they do not violate the statute. And it is the local dealers, the drug stores, the legitimate dealers in cigarettes, who find their business dropping off month after month because of this practice. And they pay heavy taxes, most of them,

license taxes to sell cigarettes, and they have no protection whatsoever.

Senator CONNALLY. All right.

Representative CAMP. I will be followed by other gentlemen here who can give you answers to any questions that you have, or I will be glad to answer any questions that you want to put to me.

Senator WILLIAMS. Are those cigarettes sold in the same manner as cigars?

Representative CAMP. I think so.

Senator WILLIAMS. I wonder why cigars were left out?

Representative CAMP. As I understand it, there are so many men who have a private brand of cigar, and there are so many different brands of cigars, that there is quite a legitimate mail-order business in cigars. But the use of cigarettes is more universal and has been narrowed down to four or five brands.

Senator TAFT. Many States do not tax cigars at all, do they?

Representative CAMP. A great many do not tax cigars, though almost every State taxes cigarettes. I think there are about 36 or 38 States that tax cigarettes.

Senator WILLIAMS. Would there be objections to including the word "cigars" in there?

Representative CAMP. So far as I am concerned, there would not be, but I understand from the author of the act that there is objection from some sources, and he can tell you why. But, as far as I am concerned, I would not mind including cigars.

Senator CONNALLY. Well, the cigar business does not compare with the cigarette business.

Representative CAMP. Oh, it is not one-half of 1 percent.

Senator CONNALLY. That is what I say. Cigars are so high now that you can hardly sell them.

Representative CAMP. They are so high they choke one when I go to smoke them, Senator.

The CHAIRMAN. Thank you very much, Congressman.

Representative JENKINS. Mr. Chairman, this is Congressman Simpson of Pennsylvania.

The CHAIRMAN. We will be glad to hear from you, Congressman.

#### STATEMENT OF HON. RICHARD M. SIMPSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Representative SIMPSON. Mr. Chairman and members of the committee: I am a member of the Ways and Means Committee of the House, and have given this bill my complete support. I come from the Commonwealth of Pennsylvania. Frankly, my interest is to assure to the State of Pennsylvania the tax revenue they hope to get from the cigarette tax. It is estimated that we lose in the State \$2,000,000 per year by reason of the shipping into the State of cigarettes without the payment of the State tax thereon.

Senator TAFT. What is the total tax that you collect there?

Representative SIMPSON. In excess of \$30,000,000. About \$2,000,000 is lost, according to the estimate of the department of revenue in the State. It is a sizable amount of money in anyone's language. We believe that this proposed bill of Mr. Jenkins is a proper bill, and that it accomplishes a purpose which can be accomplished in no other

way. There is now no means by which the State can ascertain the names of purchasers of cigarettes outside the State, so that they might levy a tax directly against the individual. It is believed that this bill, requiring the reporting of Pennsylvania purchasers of cigarettes outside the State, the State could proceed by levying and collecting the tax from the individual user of the cigarettes. Even better than that and far more practical, is the general knowledge on the part of the consumers who could be relied upon to recognize that they were directly violating both a Federal and a State law if they do not pay the tax.

Senator MILLIKIN. Congressman, do you really believe that the State would levy against these people?

Representative SIMPSON. I believe they would send a notice.

Senator MILLIKIN. They would not do any more than that, would they, considering the political implications?

Representative SIMPSON. I believe they would send a notice, as the result of which many would pay, and others would not.

Senator MILLIKIN. Would it not follow, Congressman, that as soon as it became known that some were paying and some were not paying, they would all stop paying?

Representative SIMPSON. Of course, that is what they do today.

Senator MILLIKIN. And you cannot put a whole State in jail.

Representative SIMPSON. It is general knowledge that you can buy tax-free cigarettes outside the State. Yet by no means all people do that, but a substantial number do.

Senator MILLIKIN. I was talking about those who do.

Representative SIMPSON. I submit that the bill was desirable from the standpoint of the States which tax cigarettes. They have found their sources of revenue shrinking as the Federal Government has found it necessary to expand its revenue sources. And I believe that the Federal Government should protect those sources of taxes in the States, and the means of collecting taxes. So I, from the Committee on Ways and Means and from the State of Pennsylvania, would like to see the bill become law.

Senator CONNALLY. This would not tax Pittsburgh stogies, would it?

Representative SIMPSON. They pass as cigars.

Senator CONNALLY. They may pass for cigars, but they are not.

The CHAIRMAN. Thank you very much, Congressman.

Representative SIMPSON. Thank you, Senator.

The CHAIRMAN. Senator Long?

Senator Hendrickson?

Are the other members of the House Ways and Means Committee present at this time?

Representative JENKINS. No; not at this time.

The CHAIRMAN. We are trying to accommodate the members of the House and Senate. Are there other Members of the Senate or House present?

All right, Senator Long. You wished to be heard on this.

#### STATEMENT OF HON. RUSSELL B. LONG, A UNITED STATES SENATOR FROM THE STATE OF LOUISIANA

Senator LONG. Mr. Chairman, I appear here to endorse the provisions of H. R. 195, not because I believe it to be the only solution to

a problem which is becoming of increasing importance to the various States of the Union, but because I believe it to be the best solution yet advanced to combat a vicious, gnawing parasite on the integrity of law and order in these United States. I will not belabor you with any analysis of the bill, for I am sure that has been done.

Primarily, Mr. Chairman, I am here because Louisiana alone is being robbed of revenues approximating \$1,152,000 annually because the Federal Government, through the Post Office Department, throws its protecting arms around the business of shipping cigarettes from nontax to tax States, thereby avoiding tax payment. In Louisiana, our revenues are being protected and our losses kept to a minimum only because of a very vigorous—and costly—enforcement program.

In our Federal system, willful tax evasion is a criminal offense, and yet we find, in this instance, the irony of the Federal Government not only nurturing, but actually making possible and protecting perhaps the most widespread and costly tax evasion scheme in the Nation. Without the cooperation of the Post Office Department, these bootleggers could not exist 30 days, and they know it. They will send highly paid legal counsel before you to argue constitutionality of this bill under the interstate commerce clause; they will scream precedent and otherwise attempt to give you the impression that they are just small, legitimate businessmen who are being oppressed and brow-beaten.

The practices in which they are engaged not only inflict injury upon the revenues of the States, but they breed disrespect for law and for the obligations of citizenship. These practices absolutely destroy equality and uniformity in the administration of tobacco-tax laws. They make possible a discrimination against the conscientious citizen who discharges his tax obligations to his Government and benefit only those who are willing to inflict injury upon the State's revenues.

With your indulgence, I would like to turn to the legal camouflage which has been put up in an effort to defeat this bill.

In the first place, the claim is made that an act such as H. R. 195 would set a precedent and, therefore, flood the Congress with other bills designed to assist the States in collection of their revenues. For the sake of arguments, let us assume that it does establish a precedent then I submit that such a precedent would be a good one. It would guarantee that an arm of the Federal Government could not be used to deprive the States through organized evasion of some \$30,000,000 in annual revenues. Let me emphasize that in this proposition we have a clear case of deliberate, organized, highly financed tax evasion which is spreading itself like cancer over the body politic and which will vanish the day this bill becomes law. It is not a loophole which the States could close through legislation, since they cannot legislate against the Post Office Department. It is not an evasion which rigid enforcement could end, for, despite desperate and expensive policing, the practice persists. So, if it is a precedent, it will be in the public welfare and, therefore, a good one.

The precedents, however, are many. There were several acts having to do with liquor prior to the enactment of the Eighteenth amendment. These included the Wilson Act of August 8, 1890, and the Webb-Kenyon Act of March 1, 1913 (27 U. S. C. 122). Both acts were subsequently upheld by the Supreme Court.

Briefly, the Wilson Act subjected intoxicating liquors transported into any State to the operation of the laws of that State to the same extent as though they had been produced within the State. The latter act prohibited transportation where it was intended the liquor would be "received, possessed, sold, or in any manner used" in violation of its laws.

At least two acts having to do with treatment of convict-made goods and having application here have been upheld by the Supreme Court. They are the Hawes-Cooper Act of January 19, 1929, and the Ashurst-Sumners Act of July 24, 1935. The Hawes-Cooper Act (18 U. S. C., sec. 396a) provided that convict-made goods transported into any State should be subject to the operation of State laws as if produced within the State. The act was upheld in *Whitfield v. Ohio* (297 U. S. 431 (1936)), and I might observe that our distinguished colleague, the junior Senator from Ohio, Mr. Bricker, successfully defended the case in the Supreme Court in his then capacity of attorney general of Ohio.

In a later opinion on the Hawes-Cooper Act, Chief Justice Hughes, in *Kentucky Whip and Collar Company v. Illinois Central Railroad Company* (299 U. S. 334 (1937)), said, and I think his words are significant here:

The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid State laws affords no ground for constitutional objection.

In this connection, I would call to your attention the Connally "Hot Oil" Act. The distinguished senior Senator from Texas and member of this committee, wrote that act and I will not presume to go into detail about it. Naturally, the act was held to be constitutional by the Supreme Court.

I have noted that the very distinguished counsel who appeared for these cigarette shippers before the House committee, addressed himself to the proposition of the constitutionality of the use tax on cigarettes. He relies on slight dicta found in a case in which the Supreme Court upheld the constitutionality of a use tax. Having some knowledge of this distinguished gentleman's ability, I believe it fair to say that the cigarette interests have made an exhaustive legal study of this question without success, since certainly his best authority is no authority whatever, but rather authority for just exactly the opposite side of the case.

Now, Mr. Chairman, in conclusion, I would like to point out that the House committee, which numbers among its membership several very able attorneys, addressed itself to the question of the constitutionality of this bill in its report. Without in any way burdening the record, I would like to read to you a very brief paragraph from that report.

Your committee has given careful and judicious consideration to the constitutionality of this legislation. In your committee's opinion this bill is a proper exercise of the constitutional power of the Congress to regulate interstate commerce, and is not in conflict with any provision of the Constitution. Moreover, prior acts of Congress adopted for the specific purpose of assisting or enabling the enforcement of State laws constitute a well-established precedent for this type of legislation.

I am in complete accord with that statement.

For the benefit of this committee, Mr. Chairman, I would also like to submit for the committee's files—it would certainly be much too burdensome to put it all in the record—about 50 or 60 sample advertisements of the cigarette shippers who urge people in my State to evade the State tax laws. And I would be happy to have any member of the committee examine these many, many advertisements. Many of these advertisements very greatly stress that anyone who cares to evade the State laws can be sure that he will have complete cooperation from the cigarette shippers.

The CHAIRMAN. You may file it, Senator, for the information of the committee.

(The matter referred to will be found in the files of the committee.)

Senator LONG. I would also like to file a statement from Mr. I. D. Meredith, assistant to the collector of revenue of the State of Louisiana. He is here to testify today, but because there are so many other witnesses, I believe it would be better to just file the statement, which cites a great amount of legal authority for the constitutionality of such a tax law.

The CHAIRMAN. You may file that for the record with the stenographer.

Senator LONG. I would like to have that printed in the record, if possible.

The CHAIRMAN. All right.

(The statement referred to is as follows:)

STATEMENT OF I. D. MEREDITH, ASSISTANT TO THE COLLECTOR OF REVENUE,  
STATE OF LOUISIANA

I am I. D. Meredith, assistant to the collector of revenue of the State of Louisiana. In my official capacity I am charged with the administration, collection, and enforcement of the Louisiana tobacco tax laws. I desire to make the following statement seeking this committee's favorable consideration of H. R. 195:

The Legislature of Louisiana by Act 4 of 1932 has levied a tax upon all tobacco sold, handled, used, consumed, or distributed within the State of Louisiana. The tax is levied upon and collected from all tobacco dealers. However, it is so arranged as to put the burden of the tax directly upon the consumer and to make the tax, strictly speaking, an excise or tax on the consumption of tobacco in Louisiana. The tax is not levied upon tobacco which is exported from Louisiana in either interstate or foreign commerce.

As to the legality of the Louisiana tobacco tax law, the attorneys for the collector of revenue have advised me that the courts of Louisiana have affirmatively passed upon the constitutionality of the Louisiana tobacco tax in the case of *Lionel's Cigar Store et al. v. McFarland* (1927, 162 La. 956, 111 So. 341). While this case dealt specifically with act 197 of 1926, which was the predecessor statute to the existing tobacco tax law, the present law is substantially identical with it.

In addition, the Louisiana Court of Appeals has held that the Louisiana tobacco tax applied to tobacco which was shipped into Louisiana from some other State. In *Supervisor of Public Accounts of Louisiana v. Twelve Cases of Smoking Tobacco* (1937, 172 So. 364), the court said:

"Furthermore, the tobacco in suit was not seized while being transported in interstate commerce. The interstate shipment had come to an end. The property had come to rest within the State and was held at the warehouse of the carrier subject to the pleasure of the owner. See *State of Minnesota v. Blasius* (290 U. S. 1, 54 S. Ct. 34, 37, 78 L. Ed. 131), where this principle is recognized and approved; and also *Wiloil Corp. v. Pennsylvania* (294 U. S. 169, 55 S. Ct. 358, 79 L. Ed. 838)."

This jurisprudence of the Louisiana courts is in harmony with holdings of the United States Supreme Court which permit a use tax to be made applicable to general commodities sold in interstate commerce or brought into a State for use.

*Hereford v. Silas Mason Co.* (300 U. S. 577 (1937), 57 S. Ct. 524).

*Southern Pac. Co. v. Gallagher* (306 U. S. 167, 59 S. Ct. 389, (1939)).

*Pacific Tel. & Tel. Co. v. Gallagher* (306 U. S. 182, 59 S. Ct. 396, (1939)).

It is also in harmony with the decisions of several State courts which hold that a specific cigarette use tax applies to tobacco coming into that State.

*Ex parte Kimberline* (86 S. W. 2d, 717, Texas, (1935)).

*Sheppard v. Musser* (89 S. W. 2d 222, Texas, (1935)).

*Head v. Cigarette Sales Co.* (4 S. E., 2d 203, Georgia, (1939)).

*Mealey v. Hamm* (Alabama, Circuit Court of Montgomery, decided on December 15, 1948).

The Louisiana tobacco tax has been and is being evaded by individuals located within the State of Louisiana who use the United States mails to receive cigarettes from mail-order houses located outside of Louisiana. It is difficult to determine the exact amount of revenue which the State of Louisiana has lost by reason of this evasion. That it is a substantial amount can be shown from the following estimate.

The Louisiana individual evading the tax is the "carton purchaser," that is, the smoker who buys a full carton of cigarettes at a time rather than one or two packs. We have of record 58 mail-order houses located in various parts of the United States sending advertisements and circular materials through the mails into Louisiana soliciting the sales of cartons of cigarettes. It is estimated that each of these mail-order houses has a Louisiana customer list which contains from 200 to 800 names. Using a number of 50 mail-order houses each with an average of 500 Louisiana customers, we have 25,000 instances of tax evasion taking place each month, since most carton customers renew their orders at least once a month.

In addition, it has been established that many cigarette "bootleggers" receive their source of supply from out-of-State mail-order houses. This type of tax evader either purchases the cigarettes for resale or submits an order in his name for a group of persons. It is estimated that at least 5,000 cartons come into Louisiana through such "bootleggers" each month. This makes a total of 30,000 carton-smoking individuals, using on the average four cartons of cigarettes per month, who evade the Louisiana tobacco tax law by obtaining their cigarettes from these out-of-State mail-order houses.

In dollars and cents this estimate shows that the State of Louisiana loses, each year, revenue in the amount of \$1,152,000 because of the mail-order-house evader.

When this estimate was discussed with the Louisiana Association of Wholesale Tobacco Dealers, the Department of Revenue was informed that it was a very conservative estimate.

The inaccessibility of the United States mails precludes the revenue agents of the State of Louisiana from efficiently enforcing its tax laws. This fact is well known and is capitalized upon by the cigarette mail-order houses. I have in my hand a folder containing representative circulars sent by 58 mail-order houses into the State of Louisiana. A reading of these circulars proves, beyond any doubt, that the mail-order houses are encouraging, promoting, and cooperating in the evasion of the Louisiana tax laws. One of these solicitations reads as follows:

JOE SMITH SALES CO.,  
Joplin, Mo., August 7, 1948.

*To Our Good Customers in Louisiana:*

We have been receiving numerous newspaper clippings from our good customers in Louisiana regarding cigarettes bought by mail.

You no doubt are interested in knowing whether or not your purchases from us have been reported to the Louisiana Cigarette Tax Division. We are very happy to inform you that we have not made a single report to the Louisiana Cigarette Tax Division, neither have we made a report to any other State.

Missouri has no cigarette tax law, and they do not require any report from us, therefore, your dealings with us in the past as well as the future will be kept strictly confidential.

For your further information, the Post Office Department is not permitted to reveal any information on parcel-post shipments to any State tax commission, so you have the protection of the United States mails in this respect. We notice on the clipping that the Louisiana collector of revenue states the mail-order houses furnish information to the new Louisiana Cigarette Tax Division giving them the names of purchasers and the amounts purchased. This is not true with us as we are located in Missouri, and no reports whatsoever are made on our customers' purchases, either in Missouri or outside of Missouri.

We feel that you should have this information as you may rest assured they have no information on any of your dealings with us. This is true now, and it will also be true in the future.

Sincerely yours,

JOE SMITH SALES CO.,  
S. J. SMITH, President.

The very nature of the circular information distributed by mail-order houses has given many law-abiding Louisiana citizens the impression that when they consume tax-free cigarettes purchased through the mail they are not violating the laws of Louisiana. The agents of the Department of Revenue of the State of Louisiana have found numerous individuals who echo the statement "But I got these cigarettes through the mail for my own personal use and not to sell to anyone. If I were violating the law, the Post Office Department would not permit me to use the mail." At the present time, many of the good-faith violators are aware that this measure is pending in the United States Senate. If this body refuses to pass this legislation it will be an indication to them that their action in personally consuming tax-free cigarettes received in Louisiana via United States mail is a justifiable one. They will be incapable of distinguishing, in their own minds, a tax evasion scheme that is protected by the United States Post Office Department.

That the cigarette mail-order business is not entirely conscionable is evidenced by the surreptitious manner in which they operate even in their home States. For example, a circular bearing the name of Missouri Tobacco Co., 702 North Pearl Street, Joplin, Mo., cannot be found in the Joplin city directory, nor is it listed with the Joplin Chamber of Commerce as a place of business. If you trace the address it will be found that it is a private residence in a residential neighborhood. We have never been able to discover where the business is actually conducted. Other investigations show similar camouflage as to the location of the places of such business.

In conclusion, it is urged that:

1. The State of Louisiana has a constitutional statute levying a tax upon tobacco consumed within its boundaries.

2. This Louisiana statute is being evaded by many individuals residing in Louisiana, who receive tax-free cigarettes via the United States mail.

3. Louisiana is losing revenue in the approximate amount of \$1,152,000 per annum by reason of this evasion.

4. The passage of H. R. 195 will provide the State of Louisiana with a source of information that will aid in properly enforcing its laws.

The revenue officials of the State of Louisiana are convinced that the enactment of H. R. 195 will go a long way toward stamping out tobacco "bootlegging" and tobacco "racketeering" not only in the State of Louisiana but in the other States of the Union. They express the desire that this committee act favorably upon H. R. 195.

Senator TAFT. Is that the commissioner of taxation?

Senator LONG. Yes; the assistant to the collector in my State.

Senator TAFT. I wonder if he could be asked some questions as to his present methods of enforcement, what he is doing now, and how helpful this bill might be either now or later.

The CHAIRMAN. Come down here, Mr. Meredith. Some members of the committee would like to interrogate you about the efforts being made in the State of Louisiana to collect your State tax on cigarettes, how successful it is, and how this legislation will give help to you.

Senator CONNALLY. You manufacture a good many cigarettes there; do you not?

#### STATEMENT OF I. D. MEREDITH, ASSISTANT TO THE COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA

Mr. MEREDITH. No, sir. The Picayune cigarette used to be manufactured in New Orleans. We have cigar manufacturers in New Orleans, but we do not have any cigarette manufacturers there.

Senator CONNALLY. Who absorbed the Home Run? Did one of the big companies buy them out?

Mr. MEREDITH. I do not know. I do not recall that.

Senator CONNALLY. There used to be a cigarette manufactured, as I recall it, in New Orleans, called the Home Run. Is that right, Senator?

Senator LONG. I am afraid that was a little bit before my time. Senator Connally.

Mr. MEREDITH. I began working on the cigarette tax law in 1934, and there have not been any cigarette manufacturers since that time.

The CHAIRMAN. Senator Millikin?

Senator MILLIKIN. I would like to know what the Louisiana tax rate is.

Mr. MEREDITH. It is 8 cents per package of 20 cigarettes.

Senator MILLIKIN. What is the present collection per year?

Mr. MEREDITH. At the present rate of collection, a little better than \$16,000,000 per year.

Senator MILLIKIN. And you are losing how much because of this?

Mr. MEREDITH. Better than a million a year. That was estimated a few months ago.

Senator MILLIKIN. The State's loss is the citizen's gain to that extent?

Mr. MEREDITH. Not entirely.

Senator LONG. If I might just add one point, that is being used to help finance school lunches, so you might say the State's loss is a loss to the school children, who like to have those meals.

Senator MILLIKIN. And it is also a loss to the citizen, when he has to buy lunches, and he has to buy clothes, and has to buy food and has to pay rent, and has to do all sorts of things which he cannot do if he does not have the money. So it depends upon whether you want the State to do these things, or whether you want the citizen to do them.

Senator LONG. I would be glad to answer that question, sir, by saying that any tax evader, including those who evade your Federal income tax, gains by evading the laws; and, insofar as they can evade any tax, it is their gain and the Government's loss.

Senator MILLIKIN. I quite agree. The question is whether it is a criminal act or something within the choice of the citizen.

Senator LONG. In our case, it happens to be a criminal act.

The CHAIRMAN. Is yours a use tax?

Mr. MEREDITH. Yes, sir.

The CHAIRMAN. And you state you collect \$16,000,000?

Mr. MEREDITH. At the present rate of collection. On an annual basis, it would total a little more than \$16,000,000 annually.

The CHAIRMAN. That collection is out of the dealer, out of the retailer?

Mr. MEREDITH. The collection is made at the source, the person who originally received or manufactured taxable tobacco commodities.

The CHAIRMAN. But what effort are you making to meet this importation or shipment of untaxed cigarettes into the State?

Mr. MEREDITH. Of course, there are different means of importations. As far as the mail-order cigarettes are concerned, we have no way of meeting it. It is protected by the post-office authorities. And, unless we get some exchange of information accidentally, we can't touch it. We just can't combat it.

So far as importation by trucks is concerned, we have highway patrols, of course, and it takes a vast amount of investigative work, checking, following leads. It is a very burdensome commodity to follow. By the very nature of the commodity, it is possible to load and transport even in a five-passenger car, and that makes it a very

profitable business to bootleg. But, of course, that involves vehicular transportation into the State and not the mail-order business that is ordered through the post office.

The CHAIRMAN. Any questions, Senator?

Senator TAFT. Is that 8-cent tax the highest in the country?

Mr. MEREDITH. Yes, sir.

Senator TAFT. They run usually 2 cents per carton?

Mr. MEREDITH. I think the average is 4 cents per package. I qualify that by saying that I am not familiar with all the States' rates.

Senator TAFT. Have you succeeded in collecting any substantial sum in use taxes, as distinguished from the regular excise tax on dealers?

Mr. MEREDITH. Not a substantial sum, no, sir. That is where the problem comes in. We do not have the information. We have found a number of violators, but, as I have previously stated, there is the expensive and burdensome enforcement problem of trying to get the information.

Senator TAFT. Do you think you can get it even with this law?

Mr. MEREDITH. Yes, sir. That will provide us with a source of information whereby we know the individuals who are receiving the cigarettes in the State.

Senator TAFT. Do you think you will be able to collect money from them?

Mr. MEREDITH. Yes, sir. The information that we have received on various occasions is representative enough to give us an insight into the average citizen's opinion or attitude toward the tax. They always come out with the opinion that "I bought those cigarettes for my own personal consumption. I am not dealing. I am not selling. If I were doing anything to violate the law, the post-office authorities would not permit this thing to go on."

Senator LONG. As a matter of fact, is it not true that a great many of those advertisements that we put in the record are cases where these cigarette shippers lead these purchasers to believe that as long as they purchase through the mails it is not subject to tax by the State, even if it is a use tax?

Mr. MEREDITH. That is correct. I think I can refer you to page 4, Senator, if I may, to the exhibit of the Joe Smith Sales Co.

Senator LONG. An example of this matter of leading a man to believe that he does not owe a tax when he ships through the mails.

Senator MILLIKIN. May I ask the gentleman whether it is a criminal offense in Louisiana now not to pay the tax on cigarettes, no matter whether obtained locally or by interstate shipment?

Mr. MEREDITH. It is a criminal offense, and upon the third conviction of not paying the tax, the law makes a jail sentence mandatory.

Senator MILLIKIN. Have you ever convicted anybody?

Mr. MEREDITH. Yes, sir.

Senator MILLIKIN. How many?

Mr. MEREDITH. I do not have a tabulated list of convictions.

Senator MILLIKIN. Well, ten? fifty? a hundred?

Mr. MEREDITH. Over the span of years from 1934—I was absent several years during the war—in the early years of the tobacco tax laws, it ran heavy. And we have a number of convictions, of course there was a certain amount of education on the part of the citizenship, and violations have diminished. During the war years, or rather

immediately after, the volume of that business accelerated by leaps and bounds, and especially with the higher tax rate that we have, it made it a very attractive proposition. It made it very attractive for the out-of-State mail-order houses to flood our State with those circulars.

Senator TAFT. Do you know whether they make more profit off those sales than they do in regular business? Who gets the 8 cents? The consumer, or the shipper?

Mr. MEREDITH. The consumer in Louisiana gets that. It just makes it a more attractive proposition, for individuals in Louisiana to order them through the mail.

Senator WILLIAMS. I do not think you finished the answer to Senator Millikin's question. I was interested in it, too. How many prosecutions did you have?

Mr. MEREDITH. I stated that I did not have a tabulated list of prosecutions.

Senator MILLIKIN. How many have there been since you have been in charge of the thing?

Mr. MEREDITH. In violations, where we have collected the tax and inflicted the penalty, there have been upwards of 500 since about last June.

Senator MILLIKIN. Against the citizen, an individual consumer?

Mr. MEREDITH. Yes, sir.

Senator MILLIKIN. And how much money was involved in each of those actions, on an average?

Mr. MEREDITH. It varied according to the quantities of cigarettes involved. It would run on the average of possibly 10 cartons per month, upwards of 10 cartons a month, I would say, per individual. And, as I say, there were somewhere between 4 and 5 hundred cases.

Senator MILLIKIN. They must be pretty good smokers of cigarettes down in Louisiana. Does a man smoke 10 cartons of cigarettes in a month down there?

Mr. MEREDITH. I can explain that by this: There may be some that smoke 10 cartons a month, yes. However, they get together, pool the orders and order their cigarettes in family lots and in offices. Several get together and just have one individual on a mailing list, whereas there may be 8 or 10 involved in the order.

Senator MILLIKIN. So in that kind of a case you might be going after a sum that would not be petty. You would not throw a man in jail for not paying up 75 cents of tax, would you?

Mr. MEREDITH. No, sir; not unless he becomes a persistent and willful violator. The act requires the third conviction for a mandatory jail sentence.

Senator MILLIKIN. Then, so far as those States are concerned, where it is a criminal offense not to pay the tax, the role of the Federal Government would be that of an informer. Is that not correct?

Mr. MEREDITH. I would be of that opinion: That the out-of-State mail-order houses would be required, under this act, to furnish us with a list of those shipments going into the several States that have this tax.

Senator LONG. If I might inject a parallel case, the Federal Government is an excellent informer, you know, on violations of the criminal law in other respects. In the case of every violator of a law, it is the practice to fingerprint the individual and send the fingerprints to the

FBI, and the FBI informs of the prior criminal record of the man apprehended. That is probably the basis from which most of the evidence comes that results in heavier penalties under the habitual criminals statutes.

Senator MILLIKIN. The information there comes originally from private sources. In this particular case, it comes originally from an official public source.

Senator LONG. I would also state that the Federal Government is an excellent informer in the matter of failure to pay income taxes, in that they provide information to State income-tax authorities.

Senator MILLIKIN. There I suggest they have a joint problem. They are both trying to collect the same kind of tax. They have deductions, one from the other, which makes it necessary for them to cooperate.

Senator CONNALLY. How much is the tax in Louisiana?

Mr. MEREDITH. It is 8 cents per package.

Senator CONNALLY. Each individual package?

Mr. MEREDITH. Yes, sir.

Senator CONNALLY. You kept talking about cartons a while ago.

Mr. MEREDITH. The mail-order houses must necessarily deal in cartons, because those mail-order houses have a minimum order. It varies from 3 to 5 cartons, as a minimum order.

Senator CONNALLY. How many packs in a carton?

Mr. MEREDITH. There are ten packs in a carton.

Senator CONNALLY. Well, the dealers, the legitimate dealers pay the tax, of course, do they not?

Mr. MEREDITH. Yes, sir.

Senator CONNALLY. Do you have any trouble with them?

Mr. MEREDITH. No, sir; not to any extent. We can usually catch those through our auditing and enforcement procedures very well.

The CHAIRMAN. Senator Hoey?

Senator HOEY. You have a license tax for the dealers, do you?

Mr. MEREDITH. Yes, sir.

Senator HOEY. Then, in addition to that, they pay 8 cents on each package of cigarettes?

Mr. MEREDITH. The license tax for the dealers, I may add, is a registration. The wholesale dealers are required to register, and there is a registration fee of \$5. As to the retail dealers, it is a free registration. We require them to register, but if they register before they go into business it is free.

Senator HOEY. Then they have to report all the cigarettes they receive, and the retailer pays the tax?

Mr. MEREDITH. If he is a retailer who receives unstamped cigarettes, yes, sir. The number of retailers who receive unstamped cigarettes is a negligible amount as compared to the total.

Senator HOEY. Where do you get the largest sum of these collections from? From the wholesalers?

Mr. MEREDITH. From the wholesalers.

Senator HOEY. And they have to report the amount they receive and pay this 8-cent tax per package?

Mr. MEREDITH. Yes, sir.

Senator HOEY. Is that designated as a use tax?

Mr. MEREDITH. The levy in the tobacco tax law is on the sale, use, consumption, and distribution, which results in the tax on the consumer.

Senator HOEY. Do you have any other use tax on other articles?

Mr. MEREDITH. We have a sales tax law.

Senator HOEY. I know you have a sales tax. But a use tax?

Mr. MEREDITH. That sales tax law does have a use tax provision.

Senator HOEY. What does it apply to? What other articles besides cigarettes?

Mr. MEREDITH. It applies to all commodities. I think, though I am not entirely familiar with the sales tax statute, that ship chandler's supplies are about the only thing that I am familiar with in that connection.

Senator HOEY. Do you collect any revenues on this use tax on other articles outside of cigarettes?

Mr. MEREDITH. Yes, sir.

Senator HOEY. How much?

Mr. MEREDITH. I do not have the figures on that. Those are different taxes, which I have nothing to do with.

Senator HOEY. You do not handle that department?

Mr. MEREDITH. No, sir.

Senator HOEY. Is that an amount of any consequence?

Mr. MEREDITH. Yes, sir; it is.

Senator HOEY. Well, you did not state what articles it covers. Do you recall?

Mr. MEREDITH. The use tax?

Senator HOEY. Yes.

Mr. MEREDITH. It covers all articles, and the only specific exemption in the sales-tax statute that I know of is the ship chandler's supplies.

Senator HOEY. Now, what is the sales tax?

Mr. MEREDITH. The sales tax is 2 percent.

Senator HOEY. Two percent on the dollar?

Mr. MEREDITH. Yes, sir.

Senator HOEY. And this cigarette tax is 8 cents on the package?

Mr. MEREDITH. Yes, sir.

Senator HOEY. All right.

The CHAIRMAN. Any further questions?

Senator MILLIKIN. Do you know what it costs to make a package of cigarettes, without any tax of any kind?

Mr. MEREDITH. I have heard the figure stated of 6½ cents, I believe.

Senator MILLIKIN. The Federal tax is how much?

Mr. MEREDITH. Six of seven cents, I believe.

The CHAIRMAN. Are there any further questions?

Senator LONG, do you have anything further?

Senator LONG. No. Thank you very much for hearing us, gentlemen.

The CHAIRMAN. Senator Hendrickson, we will be very glad to hear from you.

**STATEMENT OF HON. ROBERT C. HENDRICKSON, A UNITED STATES  
SENATOR FROM THE STATE OF NEW JERSEY**

Senator HENDRICKSON. I will not belabor the committee by having too much to say, here, this morning, but I do come here to support wholeheartedly and to endorse wholeheartedly H. R. 195. On my own behalf, I sponsored a bill in the Senate (S. 879) which is a counterpart of H. R. 195, because I realize from our experience in New Jersey that the Federal Government has to step into this picture and lend some aid to the States.

I could go on and discuss the New Jersey situation here. We have revenue in New Jersey from this source amounting to approximately \$17,000,000 a year.

The CHAIRMAN. What is your rate?

Senator HENDRICKSON. I have Mr. Tilton here, Mr. Amos Tilton, supervisor of the cigarette-tax bureau, and I would like Mr. Tilton to tell the story for the State of New Jersey.

I do realize the great need, but I, of course, have no pride of authorship, and I want to see H. R. 195 go through.

May I call Mr. Tilton now?

The CHAIRMAN. Yes. Thank you very much.

**STATEMENT OF AMOS TILTON, SUPERVISOR, CIGARETTE-TAX  
BUREAU, STATE OF NEW JERSEY**

Mr. TILTON. Mr. Chairman and members of the committee, in behalf of the State of New Jersey and the division of taxation with which I am affiliated, I wish to thank your committee for its courtesy in affording me this opportunity to be heard and to express our opinions relative to legislation controlling interstate movements of cigarettes, more particularly interstate shipments of cigarettes originating in so-called tax-free States from so-called cigarette mail-order houses.

While, from the point of view of the vintage of our tax, New Jersey is the youngest State in the tobacco-tax fraternity, we are in a unique position to analyze the dangers inherent in the present uncontrolled and uncontrollable system of free movements of cigarettes across the borders of nontax and tobacco-tax States.

New Jersey's cigarette tax became effective July 1, 1948. Previous to that date, New Jersey was aptly termed the mecca of the cigarette mail-order activity. While to our knowledge there are no accurate statistics on the subject, representatives of the New Jersey cigarette mail-order activity estimated previous to July 1, 1948, that New Jersey, through the medium of the mails and through its transient business, exported one-half as many cigarettes as were then consumed in New Jersey. On a 3-cent tax rate, New Jersey will collect, this year, approximately \$17,500,000 in cigarette-tax revenue; and on a basis of our tax rate—and we are average—at least \$8,750,000 per annum in cigarette-tax revenue, and perhaps more, was lost to those States into which cigarettes flowed previous to July 1, 1948.

In substantiation of the justification of the \$8,750,000 figure just mentioned, I take the liberty of referring to a personal experience. Some 2 or 3 months previous to the effective date of our tax, and while our law was still pending before the legislature, we in the division of taxation were asked to grant audience to the representatives of some

10 or 12 substantial New Jersey cigarette mail-order firms. We acceded to this request, and a meeting was conducted, which was attended by perhaps 20 members of the so-called cigarette mail-order industry in New Jersey.

Senator CONNALLY. Have they an association? Do they all act together, or do they just act individually?

Mr. TILTON. This was where they just banded together and came to us of their own will.

No record of this meeting was made, but in essence the following was suggested by the cigarette mail-order representatives.

At the time it was estimated that New Jersey would realize approximately \$5,000,000 for each cent of cigarette tax levied. To meet existing liabilities, the State needed \$15,000,000 or more per annum. The simple proposition was this: If New Jersey would adopt a 1-cent cigarette-tax rate, the mail-order boys would contract to affix stamps to all cigarettes exported by them, and New Jersey would still collect its \$15,000,000 or very close thereto.

I am happy to state that we in New Jersey do not conduct business in that way. We respect and honor our reciprocity agreements, and our neighbors do likewise.

This committee will understand that, while previous to New Jersey's active interest in tobacco taxes, my personal interests in that field were somewhat academic; from 1942 through 1946 my activities were such as compelled my constant travel and contact with the tax authorities of all 48 States. One year of this time was spent as executive secretary of the National Tobacco Tax Association. During this period I learned, much to my personal regret, that there was no tobacco-tax State east of the Mississippi River that was immune from the New Jersey cigarette mail-order influence. When New Jersey passed its tax, I received personal telegrams and letters of congratulation from innumerable States. I confess I have just sent such a letter to Delaware, which will have a cigarette tax effective July 1, 1949.

My colleagues from associated States, representing the National Tobacco Tax Association, as well as representatives of the tobacco industry, will present factual evidence and will further represent New Jersey's position. Accordingly, I will not presume upon your time further, except to direct your attention to a few pertinent facts.

1. We in New Jersey estimate conservatively that we are losing at least \$1,000,000 per year in tax avoidance, attributable to the infiltration of nontaxed cigarettes through the mails. We estimate that this revenue loss, if permitted to run unchecked, will assume even greater proportions in future years.

2. The element of the tobacco industry over which controls of a reasonable nature are sought exists only by virtue of its ability to persuade otherwise subject taxpayers to evade their just share of taxation. It makes no difference the expedient adopted. If the tax is apportioned equally among those who patronize the cigarette mail-order business, the justification for its existence will cease to be. No branch of Government can afford to countenance or protect an activity which promotes illegal avoidance by subjects of the law at a lower governmental level.

3. The legal restrictions before this committee for consideration do no more than to place all segments of the industry upon equal competitive grounds.

4. Subject taxpayers who patronize the cigarette mail-order firms, even considering tax avoidance, are not always aided financially.

Senator MILLIKIN. What was the last thing you said?

Mr. TILTON. Subject taxpayers who patronize the cigarette mail-order firms, even considering tax avoidance, are not always aided financially, as witnessed by two simple examples:

(a) Use-tax provisions in the New Jersey law enable us to collect maximum penalties of \$500 against cigarette mail-order recipients who fail to observe our law. If the mail-order patron acts as a secretary of a club or the order taker of a group of fellow employees, he sells cigarettes under New Jersey's law and in addition to the civil penalties he commits a criminal act and upon conviction is subject to a maximum penalty of \$1,000 or 1 year in jail, or both.

(b) As witnessed by a recent case, not all cigarette mail-order houses are dependable. Recently, over 30,000 subject taxpayers found themselves the victims of a hoax. They not only lost their basic investment in orders placed by them, with payment made in advance, but in some States, including New Jersey, they will be made to pay a use tax on cigarettes imported by them previous to the failure of the object of their confidence.

Gentlemen, the better advertisement media of New Jersey has agreed not to be a party to the cigarette mail-order activities in the State. They have not made this decision solely upon Utopian precepts. They have done so because they cannot condone the principles upon which the cigarette mail-order business is founded. They have done so also because they are not certain that the "full disclosure laws" are not being violated by the so-called cigarette mail-order firms.

We do not ask that you put these firms out of business. We ask only that you help us safeguard our revenues. Thereby, you aid us also in preventing our subject taxpayers from becoming law violators.

The CHAIRMAN. Any questions? Senator Connally?

Senator CONNALLY. No questions.

The CHAIRMAN. Senator Millikin?

Senator MILLIKIN. In that \$8,000,000 of annual violations, how many violators are involved?

Mr. TILTON. That is very difficult to answer, sir. We, as you understand, have no knowledge of the number of persons patronizing these mail-order houses. It is speculative.

Senator MILLIKIN. It would involve an enormous number of violators; would it not?

Mr. TILTON. It would. Roughly speaking, the average per capita collection percent of tax will average about \$1.20 per year. That may give you an idea of the total involved.

Senator MILLIKIN. Per capita, or per smoker?

Mr. TILTON. Per capita.

Senator MILLIKIN. How much per smoker?

Mr. TILTON. Well, that I couldn't answer, sir.

Senator MILLIKIN. I should think that would be a known statistic.

Mr. TILTON. I don't think that there are any statistics which indicate just how many cigarette smokers there are.

Senator MILLIKIN. Is it not apparent that must involve a couple of hundred thousand violators?

Mr. TILTON. More than that, sir, I think.

Senator MILLIKIN. Are you going to put all those people in jail?

Mr. TILTON. We do not put people in jail, sir.

Senator MILLIKIN. So all you can do is try to scare them; is that right?

Mr. TILTON. That is right.

Senator MILLIKIN. And what is the present status of your law, so far as criminal penalties are concerned? Do you have a use statute, or what kind of law do you have?

Mr. TILTON. We have a use-tax provision in our law. No criminal penalties are involved unless the individual sells unstamped cigarettes. That then becomes a criminal act.

Senator MILLIKIN. Then the business is legitimate. In that event, your citizen has a right to order from out of the State without paying a tax. Is that right?

Mr. TILTON. He may order; yes. We feel we can't control interstate shipments under present statute.

Senator MILLIKIN. I mean, is it unlawful in the State of New Jersey to smoke up a pack of cigarettes without paying a State tax on it?

Mr. TILTON. Yes; it is.

Senator MILLIKIN. It is. Now, I did not quite get this export point. Mail-order houses in the State of New Jersey?

Mr. TILTON. This was previous to our tax law, previous to July 1, 1948.

Senator MILLIKIN. Previous to the tax law. They said they would pay what? Two cents a package?

Mr. TILTON. If we would agree to a 1-cent tax rate, rather than the 3, which we have, that they would contract to affix stamps to all cigarettes which they shipped out of the State. In other words, a 1-cent tax-revenue stamp. It was their proposition that New Jersey would realize very close to \$15,000,000 a year on a 1-cent tax rate.

Senator MILLIKIN. And what was that reciprocity arrangement to which you referred?

Mr. TILTON. The reciprocity arrangements with other States. We advise every State into which cigarettes are shipped, and they do likewise with us, so that we can be certain that we collect the tax on the cigarettes imported.

Senator MILLIKIN. Why is that not the answer?

Mr. TILTON. We can't do that with a nontax State. Those reciprocity agreements are only effective, of course, with the State that has a tax.

Senator MILLIKIN. With the tax States. I just do not quite see how these exporters in your State would get their money back.

Mr. TILTON. I would assume, Senator, that if we had agreed to their proposition, and if they had affixed a 1-cent stamp to each package of cigarettes exported by them, they quite naturally would have been forced to have increased the price, the sales price on their cigarettes. But all of them would have been in the same position, and therefore it would not have caused them any undue competition.

On one side of us was New York State, with a 3-cent tax rate, and on the other side Pennsylvania, with a 4-cent tax rate.

Senator MILLIKIN. So that you have not only the problem of nontax States, but also the problem of where the tax is less than the State of New Jersey.

Mr. TILTON. Where the tax is less, that is no great problem, because of our reciprocity agreement, as you can see. We can control that element. We can control that quite effectively. It is the existence of the nontax State which troubles us.

Senator MILLIKIN. Now, in some States, the municipalities have taxes, as distinguished from State tax.

Mr. TILTON. That is true.

Senator MILLIKIN. What problem does that give rise to? You do not have reciprocity agreements with municipalities; do you?

Mr. TILTON. No; not to my knowledge.

Senator MILLIKIN. I should not think so.

Mr. TILTON. We only have one municipality in New Jersey levying a cigarette tax.

Senator MILLIKIN. Assuming the Federal Government should pass the kind of law that you want, what would you do with the information?

Mr. TILTON. We would insist upon payment from the receiver in our State, and we would give him every opportunity to comply without invoking any sanctions against him whatsoever.

Senator MILLIKIN. Here is John Doe, we will say, who, you have learned, has bought a carton of cigarettes from X mail-order house in a nontax State, and he saved 30 cents on that carton of cigarettes. What are you going to do about it? You are going to spend 30 cents to send him a notice. When you get through sending your letters, and so on, it costs you 30 cents to send the notice. You have all the people that are following that, all the enforcement agencies, all the letter-writing, all the stamps, and everything else. It will cost you 30 cents to notify him that he has cheated you out of 30 cents.

Mr. TILTON. May I point this out, Senator. As was stated by an earlier witness, the average person importing cigarettes does not import one carton. He imports a considerable number.

Senator MILLIKIN. Have you factual support for that?

Mr. TILTON. I beg pardon?

Senator MILLIKIN. Have you factual support for that?

Mr. TILTON. I think others who will follow me might be able to give you factual support for that statement. But even more importantly, Senator, there is the fact that as soon as the consumer in our State realizes that he must pay the tax—which is only just as to the other taxpayers who are paying the tax; and even if it costs this money—then having learned that he must pay his proportionate share of the tax, he will perhaps be influenced not to acquire cigarettes in that fashion any further.

Senator MILLIKIN. Supposing I wanted to open up a hardware store, let us say, in New Jersey. Do I have to pay a State license tax?

Mr. TILTON. I assume you are speaking now of a retail dealer?

Senator MILLIKIN. Yes.

Mr. TILTON. Yes. We have a license for that.

Senator MILLIKIN. And I assume possibly a local license?

Mr. TILTON. No, entirely State.

Senator MILLIKIN. No matter what business I open up in New Jersey, I have to pay a license tax, though, of some kind?

Mr. TILTON. I can only speak for my own particular excise tax, cigarettes.

Senator MILLIKIN. I thought you said that if I opened a hardware store I would have to pay a State license tax.

Mr. TILTON. I beg your pardon. I misinterpreted your question.

Senator MILLIKIN. Are there any license taxes on the conduct of business in New Jersey?

Senator HENDRICKSON. In certain municipalities.

Senator MILLIKIN. But not at the State level?

Senator HENDRICKSON. That is right.

The CHAIRMAN. They are not State taxes.

Senator HENDRICKSON. That is quite right. They are municipal taxes.

Senator MILLIKIN. In a case of that kind, we will say Sears, Roebuck sends in a competing article. It does not pay any tax. And that is unfair competition from one slant, to the fellow who opens the hardware store and has to pay a municipal tax. What are we going to do about that?

Mr. TILTON. Perhaps I am not too qualified to go into this particular discussion, Senator. We do not have a general sales tax in the State of New Jersey.

Senator MILLIKIN. I mean from our standpoint we have got to figure what the precedent value of this is, what are the ramifications of it, what are we going to get into after we do this, if we do it.

Mr. TILTON. I am informed, sir, that the large mail-order firms, such as Sears, Roebuck and Montgomery Ward are presently paying the use tax on articles which they are importing into States having general sales tax.

Senator MILLIKIN. That is very interesting. In fact, I would like to hear some testimony on that.

Mr. TILTON. I believe that Mr. Conlon, who will later be heard, can either substantiate or refute that statement. I am not too certain of my statement.

Senator MILLIKIN. Could they do that by virtue of law, or do they do that by virtue of business policy?

Mr. TILTON. That I would rather have Mr. Conlon answer, sir, if you don't mind.

Senator MILLIKIN. Thank you very much.

Senator CONNALLY. Let me ask you one question. As to the proposal of this export of cigarettes, to put a 1-cent stamp upon shipments out of the State, that 1 cent would go to the State of New Jersey, would it?

Mr. TILTON. That would go to the State of New Jersey.

Senator CONNALLY. And the stamp is to give evidence to the purchasers that that tax has been paid.

Mr. TILTON. That is right, sir.

Senator CONNALLY. The State into which it was imported would not have gotten any tax?

Mr. TILTON. Would not have gotten any tax; no.

Senator WILLIAMS. You mentioned in New Jersey one city that had a sales tax on cigarettes.

Mr. TILTON. Yes, sir.

Senator WILLIAMS. What city is that?

Mr. TILTON. That is Atlantic City.

Senator WILLIAMS. What is the amount of that tax?

Mr. TILTON. Two cents per pack.

Senator WILLIAMS. Have you had any complaints in Atlantic City about the people in and around Atlantic City going over the borderline of the city and buying cigarettes without paying a tax?

Mr. TILTON. No, we haven't, and the Atlantic City authorities have not registered any complaints of that character with us. I assume that situation does exist, however.

Senator WILLIAMS. You assume it does exist.

Does New Jersey have a law comparable to this law which you are asking us to pass on a national scale, in which the rest of New Jersey would inform on the buyers of cigarettes?

Mr. TILTON. No, we have not, sir.

Senator WILLIAMS. Would you approve such a law in New Jersey?

Mr. TILTON. May I compare the revenue factor, sir, in the two cases? I believe that Atlantic City realizes about \$200,000 a year from its 2-cent cigarette tax, as against 17½ million dollars at the State level. It is rather an appreciable difference.

Senator WILLIAMS. But the principle is the same, is it not?

Mr. TILTON. Perhaps the principle is, but the results would not be, I don't think.

Senator WILLIAMS. Would you approve of a law for New Jersey comparable to this law, if Atlantic City had trouble and made such a request?

Mr. TILTON. I most certainly would not recommend against such a law, sir.

Senator WILLIAMS. Well, would you approve it? That is what I asked.

Mr. TILTON. It would be a matter of legislative discretion and not administrative discretion.

Senator MILLIKIN. That is our problem here.

The CHAIRMAN. Any further questions?

Senator WILLIAMS. I was just wondering also: I think you have a 3-cent gas tax in New Jersey, have you not?

Mr. TILTON. We have, sir.

Senator WILLIAMS. And of course, as you pointed out, we in Delaware never had any cigarette tax until the past couple of weeks, so our problems from New Jersey to Delaware as to cigarette business are a thing of the past, or will be in the near future. But we have had quite a little trouble in Delaware with trucks filling up with gas in New Jersey, because you have a difference in price of two or three cents cheaper than ours, because of gas tax. And I wondered if New Jersey would be willing to include in this bill gas and other commodities, if the request was made.

Mr. TILTON. Again, sir, I am afraid you lead me where I dare not tread.

Senator WILLIAMS. But it is the same principle. You will admit that, will you not?

Senator HOEY. And I wanted to ask you this: This bill provides that any person who ships cigarettes to persons other than a dealer within these States shall within 10 days thereafter send a notice to the State tax man of the tax State giving an invoice, a copy of the invoice. It makes a crime for him not to do that, and provides a penalty of a thousand dollars or 6 months in jail.

Now, who is going to enforce this law? Is the Federal Government going to go out and get an army of people to enforce the law, and assume all this expense, to find out who has made a shipment and who has not, and has not reported it?

Mr. TILTON. Frankly, sir, I am afraid that is not a question that I am qualified to answer.

Senator HOEY. It would not be any good unless you would have it enforced, would it?

Senator HENDRICKSON. I can answer that, sir; I think. The way the law is policed now, in the non-tax States, I think they could furnish an abundance of evidence for the policing authorities, Federal or otherwise.

Senator HOEY. Would it be the obligation of the Government, if you are going to constitute this a crime, to see that it is enforced?

Senator HENDRICKSON. Oh, certainly.

Senator HOEY. You could not enforce it without having a lot of people to look after it.

Senator HENDRICKSON. I think the people engaged in the enforcement of the State law could be used.

Senator HOEY. But the State government could not use the personnel of the States.

Senator HENDRICKSON. They would use them for the evidence.

Senator HOEY. How is there any obligation on the Federal Government to provide the facilities for the enforcement of the law?

Senator HENDRICKSON. The machinery is already there in the States.

Senator HOEY. That will not take care of the Federal Government's part of it.

Senator HENDRICKSON. They would turn the evidence over to the Federal Government.

Senator HOEY. But that does not avail the Federal Government. Why should the Federal Government pass an act making a certain thing a violation of the law, unless they enforce it? If they are going to enforce it, they have to have a lot of people to do it. Why should the Government spend a lot of money to enforce this?

Senator HENDRICKSON. Your United States Attorney's offices are set up to do that.

Senator HOEY. But they are not informers. And they would have to get this information. Who is going to get the information as to who ships?

Senator HENDRICKSON. I think we can guarantee in New Jersey that our State policing agencies there will furnish the information, sir.

Senator HOEY. I just wanted to know whether you thought it was a principle under which the Federal Government ought to incur a whole lot of expense to set up an agency to enforce a State law.

Senator HENDRICKSON. I think you will find that you will get ample cooperation from the machinery that is already set up in these cigarette tax States.

Senator HOEY. I do not think that is a matter of cooperation. I think it is a matter of whether the Federal Government wants to go into the business of enforcing a State law. It is a matter of taxes.

The CHAIRMAN. If there are no further questions for the gentleman, that will be all.

Senator HENDRICKSON. Thank you very much, Senator.

Mr. TILTON. Thank you very much, gentlemen, for your courtesy.

The CHAIRMAN. Is there any member of the House or the Senate here to testify who has not yet been heard?

If not, we will make a slight departure from the proceedings at this point.

Judge Thurman Arnold has a court engagement, which will make it proper to take him somewhat out of order.

Judge, we will hear from you now.

**STATEMENT OF THURMAN ARNOLD, ATTORNEY, WASHINGTON, D. C., APPEARING ON BEHALF OF THE CONSUMER MAIL ORDER ASSOCIATION OF AMERICA.**

Mr. ARNOLD. Thank you, Senator. I appreciate your taking me out of order. I have been excused from a trial in the Court of Claims to come up here.

The CHAIRMAN. You are appearing on whose behalf?

Mr. ARNOLD. I am appearing in behalf of the Consumer Mail Order Association of America, members of which are engaged in this mail-order business.

The CHAIRMAN. And you are appearing in opposition to this legislation?

Mr. ARNOLD. In opposition to the bill.

The CHAIRMAN. We will be glad to hear you.

Mr. ARNOLD. I was most interested, Mr. Chairman, in the complete conflict of philosophies between myself and the other witnesses. To them price competition is an immoral thing. There you see the whole background. The entire mail-order business is immoral. It is immoral for me to buy my gasoline in the District and avoid the tax in Virginia. That is the background.

Throughout the years I have been familiar with that attitude on the part of local groups, on the part of monopoly groups. It is a sincerely felt thing, but it seems to me in conflict with every single one of our traditions. I suffered through the NRA, being a good supporter of Roosevelt. I suffered intensely at the thought that the price competitor was an immoral man. I think he is a public benefactor.

This is an old, old fight. I remember when I was a boy my father, who had a ranch in Wyoming, ordered from Montgomery Ward, to avoid what we thought were extortionate prices from a local group. And he was approached and told that he was an immoral man, for ordering from Montgomery Ward. It is the same philosophy. It appeared in a little different guise. And he said that a free American could buy goods in interstate commerce, and he was going to do it; and there are still local merchants in Wyoming, and the mail-order houses have flourished, and there is competition.

Now, let us make no mistake about the purpose of this bill. The purpose of this bill is illustrated in an editorial in the Tobacco Leaf, which says, in plain language, what they are trying to do. I gather the Miller-Tydings Act, the unfair trade practice laws, and the Jenkins bill, have but one thing in common. They are intended to prevent price cutting.

Senator MILLIKIN. What is that publication, Judge?

Mr. ARNOLD. This is the Tobacco Leaf. It is a publication of tobacco distributors, and this is the issue of May 7, 1949.

I think it is quite clear from the testimony that that is the purpose. They do not expect to collect the taxes from these people. They expect to scare them, so that they won't buy. And I think they probably will succeed.

And so what we have here is a protective tariff between the States which in principle will destroy the mail-order business. And I can think of nothing that comes closer to economic suicide, departure from every tradition, than that sort of thing.

I personally do not like the principle of the sales tax. I do recognize that it is often a very convenient tax. It is one of the easiest taxes to collect, and it is painless. And I am not here campaigning against the sales tax.

I suggest that today there is a limit put upon any State which desires to impose an exorbitant sales tax created by competition from outside. If the sales tax is reasonable, it won't pay people to go to the trouble of ordering by mail, but once the sales tax gets too high, outside competition will come in. And I think that is a most wholesome economic consequence of the present situation.

But Mr. Chairman, this act is not going to stop here. Its proponents say that they welcome it as a precedent for destroying the mail-order business, which is one of the great competitive price levelers in this country. And when you destroy competition, I think that you destroy efficiency. There is no possible way of stopping. Why aren't cigars included? Well, I suspect that there are some cigar manufacturers in some of these States. It is the most natural thing in the world. Cigarette people want to protect themselves against price competition, but it is to me an un-American economic concept.

So much for the economic argument. I will briefly refer to the legal argument.

I have been criticized by one witness for a very positive statement as to the McLeod case in 1944, of the United States Supreme Court, which states in unequivocal language that a State cannot tax a sale in another State of goods imported into the State. A State may put a tax on use, if it is a real use tax.

The Machinery case, *Henneford v. Silas Mason Company*, had to do with a legitimate use tax. It was a tax upon machinery which was to be in the State a long time. And I can see no objection to that sort of use tax. But in that opinion the court was very careful to point out as follows:

A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objection which would be applicable to a tax upon the sale itself.

In the McLeod case, the Court gave its reasons why you could not tax a sale in another State. It said, "We would have to destroy both business and legal notions to deny" that this was a tax on a sale in another State, where there was an uninterrupted process of interstate commerce, as there is in the situation before us. And it again said:

The very purpose of the commerce clause was to create an area of free trade among the several States. The clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress not in the States.

And it said interstate commerce cannot be taxed at all.

Now, to read the opinion in such a way as to make the so-called use tax on cigarettes constitutional you are going to have to say that the court did not base its opinion on the broad principle of not taxing interstate commerce. You are going to have to construe the opinion as meaning that if you call a tax on interstate commerce a sales tax it is constitutional, and if you call it a use tax it is not constitutional. You are going to have to say that the only trouble with the tax in the McLeod case is that they used the same formula and that you can get the exact result of effectively taxing interstate commerce merely by changing the formula.

Well, of course, that has been tried in these State laws. And to me the devices seem pure hocus pocus. Most States use the device of a privilege tax and a license for dealers and distributors. And then they try to say that the fellow who buys this in interstate commerce is a dealer or a distributor. And the supreme court of Illinois, in a decision which has very recently come down, in May, has decided that that is hocus pocus; that they can't call a man who buys some cigarettes through the mail a dealer and distributor. It seems to me that is the inevitable result. I don't see how our Supreme Court could do anything else.

Another device is to say that opening up the package constitutes a first sale. I repeat, the opening up of the package constitutes a first sale. This is because the opening up of the package is done within the taxing State. For this you must have a license.

In Texas it is approximately that. And Pennsylvania has a sales tax which is a very curious evasion of this decision it seems to me. The tax is on the sale. Then there is a separate penalty for anyone who has unstamped cigarettes in his possession. And Pennsylvania tries to say, "We are not taxing the sale. We are simply making it a crime to have unstamped cigarettes in your possession." It seems to me that is a perfectly obvious device and evasion. If I were talking in terms of morality and violation of law, it seems to me that this is an evasion and a violation of the principles of the interstate commerce clause, as laid down by the Supreme Court.

Curiously enough, some States have just plain sales taxes—Kentucky for instance, and for those States this list of customers is purely a device, because this sale has not been made in Kentucky. So you turn over to the people in Kentucky, anxious to stop this interstate commerce, an entire list of the customers. And in some cases, like Michigan, Massachusetts, and Maine—this strikes me as just plain funny—an unclassified acquirers' license, is what you must get before you can buy cigarettes. You must get an unclassified acquirers' license; which does seem to me to carry regulation to an absurd extent. And that costs somewhere between \$25 and \$150, so that you can buy these cigarettes, and if you don't get that, you are subject to a penalty.

So I frankly said in the brief which I put before the committee in the House that I am very positive that the Supreme Court of the United States is not going to reverse the McLeod case through what is to me pure hocus pocus. And I don't know how confident these people are about the constitutionality. I think they must have some lingering doubts about that. But it doesn't make any difference, Mr. Chairman, if this law is passed, because there isn't, so far as the pur-

chasers are concerned, enough involved to carry anything up to the Supreme Court of the United States. And if all the purchasers are getting notices saying they are criminals, the mail-order business will be destroyed before the Supreme Court of the United States can act.

Senator MILLIKIN. I suggest, Judge, that politicians are not going to send out many of those notices.

Mr. ARNOLD. Well, I suspect that the act will be enforced in the line of its expressed purpose, to accomplish what the Tobacco Leaf says is the object—preventing price cutting. Of course, it belongs to the whole family of acts which are so repugnant to me, from the NRA down—an act which makes a competitor an immoral man. It is a philosophy held by many people, but it is a philosophy which I can't imagine the Senate of the United States would care to adopt. And it is a precedent which compels the Senate, if it is honest in its endeavors, to destroy the mail-order business in the United States, and it will do no economic good.

There was a cartoon in the Washington Post this morning which I found most amusing. It is the picture of living costs dragging the consumer up hill and the consumer pointing to stocks, commodities, and business, going downhill, saying: "Hey, they went the other way."

Well, of course, this is that kind of an act—to keep living costs, consumers' costs, high, in a time when they should decline.

I don't assert that cigarettes alone will do it, but I do assert that when the Senate of the United States goes on record as to this principle, there is no stopping place; and inevitably there will be demands, which I don't see how logically can be refused—for everything in the mail-order business to be included. This seems to me false philosophy, the philosophy that the interstate price competitor is immoral and criminal.

When it comes to revenues, Mr. Chairman, I want to correct the statement made by those favoring the bill that revenues from State sales taxes on cigarettes are falling. I want to read from Prentice-Hall Local and State Tax Bulletin No. 5-31-49. It reads as follows:

1948 State tobacco tax yield: State tobacco taxes yielded last year a record \$374,000,000 in revenues, the Federation of Tax Administrators recently announced. The gain was attributed to increased consumption of tobacco products, and new and increased taxes on these items. The largest yield, or \$50,900,000 was collected in New York, where the tax was 3 cents a package, up 1 cent from 1947. Pennsylvania, with a levy of 4 cents a package, ranked second, collecting \$30,000,000. Illinois, which was third, took in \$28,400,000 from a tax of 3 cents a pack. All State cigarette taxes are in addition to a Federal levy based upon the weight of the cigarettes.

Is it possible to put this exhibit in the record? It is very important.

The CHAIRMAN. Let me see it.

Mr. ARNOLD. It is a United States Department of Agriculture graph.

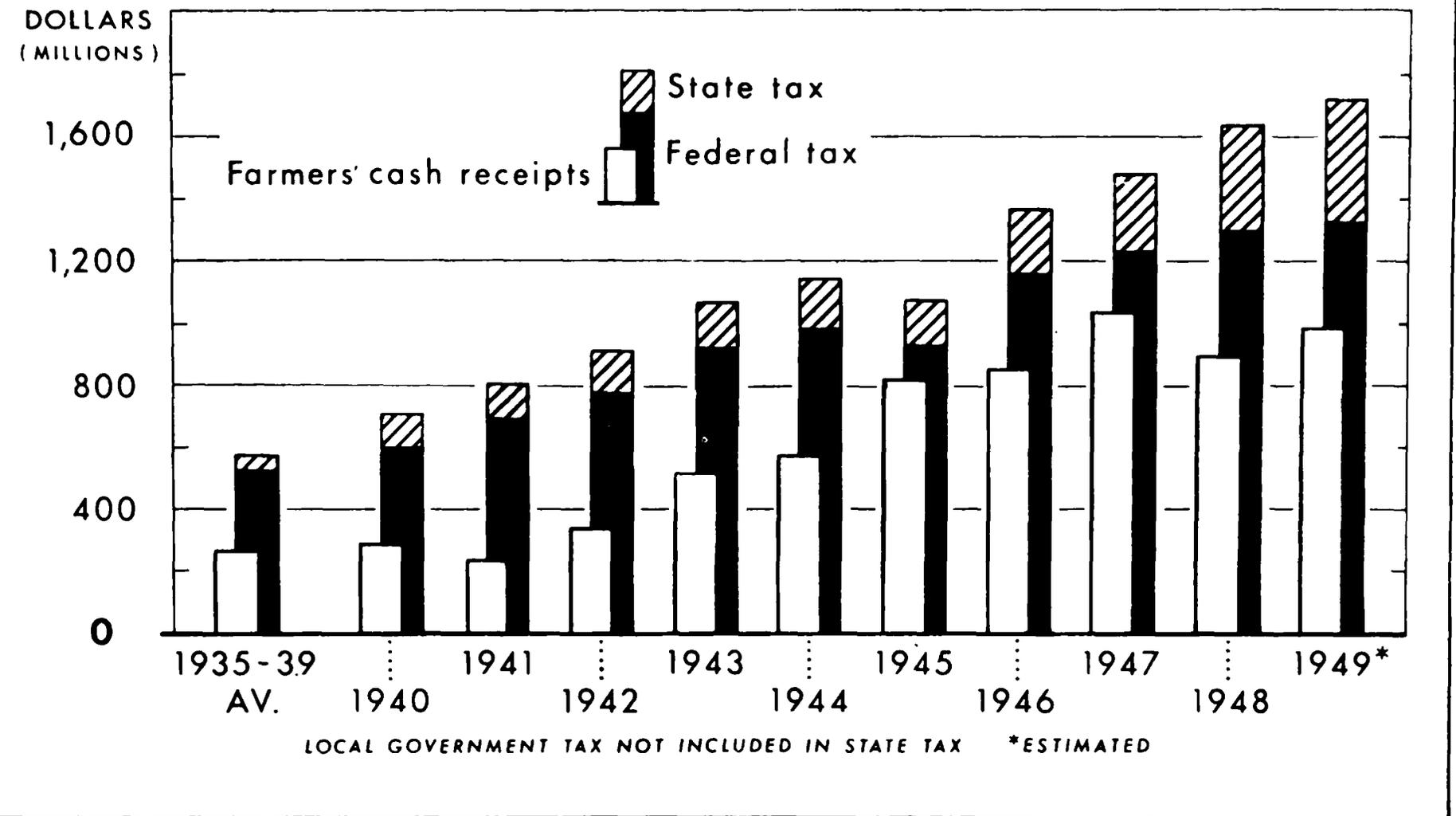
The CHAIRMAN. Oh, yes.

Mr. ARNOLD. It shows the increase graphically of the State taxes. They go up like that [indicating]. And the farmers' share, as always happens when there is too great a spread between the actual product and the cost paid, is going down. It has been going down since 1947, with the increased costs.

The CHAIRMAN. You may give that to the reporter. I think that can go in the record.

(The graph referred to is as follows:)

### FEDERAL AND STATE TAX RECEIPTS FROM TOBACCO PRODUCTS, AND FARMERS' CASH RECEIPTS FROM TOBACCO, FISCAL YEARS 1935-49



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Mr. ARNOLD. So that it is not true that their revenues have been going down. Their revenues have been going up.

As for these wild figures on how much they would collect by this method, I think they are refuted by facts within the judicial knowledge of the committee. The expense of collecting these taxes would unquestionably far exceed the taxes.

No, I think we should be frank about this thing. This is not a revenue measure at all. This is a measure, as stated in the leaflet, to raise prices for domestic consumers. And when you get the prices too high, your revenue is pretty apt to fall down. It is a tax which has the capability of stopping interstate commerce in the mail-order business. And I think it has that plain purpose, as you can see.

I think I do not have anything more to say. I have made a number of other arguments in my brief. I gather from the questions of the Senators that they have them in mind as clearly as I do. I will sum up by saying that in my belief it is economically in violation of our principles of price competition and legally it is in violation of the Constitution. Then I have only one final point.

I think all of the State taxes are unconstitutional, the ones I have read. But we will be passing an act which will make the Federal Government an informer to groups in States which could not possibly tax these commodities, because they only have a sales tax. If Congress is going to enforce State tax laws, it necessarily has the responsibility of examining those tax laws, and examining them carefully and pointing out the type of State tax law that it will enforce.

Certainly Congress would not want to allow Kentucky, by virtue of this information, to collect a sales tax which is obviously condemned by the Supreme Court of the United States.

So if this bill were passed at all, it would have to be rewritten, and the type of statute which the State had would have to be examined, so that Congress would not be passing a law to implement an unconstitutional exercise of power, to implement a law which would actually tax a sale in another State.

If Congress were to approve of the hocus-pocus which is indulged here and make some kind of a law which would help the States to collect legitimate use taxes, there would have to be a study of that subject. And it should be limited to legitimate use taxes. I think if we ever made that study, you would find that under no circumstances can you call a tax on an immediate delivery and consumption a use tax. Maybe you could constitutionally aid the State in enforcing that machinery tax in the case which I just referred to, and not aid the State in enforcing plain violations. But this bill does not do that. It is just a blanket informer's statute to enforce all State laws. And this committee hasn't had time, and I don't think can have time, to investigate those State laws. It is quite a job.

So it is just a blanket delegation of the power to control interstate commerce to States which pass such laws as they please; a kind of a delegation, it seems to me, which was so soundly condemned by the Supreme Court in the Schechter case.

The CHAIRMAN. Any questions?

Mr. ARNOLD. May I, finally, introduce in the record the opinion of the Supreme Court of Illinois of May 19, 1949?

The CHAIRMAN. Yes, you may put it in the record, judge.

(The opinion referred to is as follows:)

OPINION OF THE SUPREME COURT OF ILLINOIS, UNITED STATES OF AMERICA

Docket No. 31021—Agenda 31—March, 1949.

Julia Johnson *et al.*, Appellees, v. Richard J. Daley, Director of Revenue, *et al.*, Appellants.

Mr. Justice Crampton delivered the opinion of the court:

Plaintiffs filed suit in the superior court of Cook County against the Director of Revenue and the Attorney General of this State, praying that defendants be enjoined from enforcing against plaintiffs the Illinois Cigarette Tax Act and that the court declare invalid certain provisions thereof. An answer and reply were filed and evidence was taken, after which the court entered a decree granting the relief requested in the complaint. Defendants appeal to this court.

Plaintiffs are individuals who had purchased cigarettes by mail order from Indiana dealers, for their own use and that of their friends. None of the plaintiffs was engaged in the business of selling cigarettes for profit, and the cigarettes were not purchased for such resale. Defendants and their agents thereafter took steps to collect a tax from plaintiffs under the provisions of the Illinois Cigarette Tax Act. (Ill. Rev. Stat. 1947, chap. 120, par. 453.1 *et seq.*) The act imposes a tax upon any person engaged in business as a distributor of cigarettes. Section 1 contains definitions of terms used in the act. The word "distributor" is therein defined as including, *inter alia*, "Any person who, in any one calendar year, brings or causes to be brought into this State for consumption more than ten (10) cartons of original packages of cigarettes." The principal question herein presented is whether the quoted clause, which was added to the act by amendment in 1943, is unconstitutional and void. It is contended that the amendment constitutes an arbitrary and unreasonable classification, declares that to be a fact which is not a fact, contains a subject matter not expressed in the title of the act, and constitutes an undue interference with interstate commerce.

Defendants first assert that plaintiffs are foreclosed from attacking the validity of the clause under the doctrine of *res judicata*. They base this position on the claim that in *Rouff v. Barrett*, 396 Ill. 322, which upheld the validity of certain provisions of the Veterans' Bonus Act of 1946 and the special election held thereunder, the present questions could have been litigated and have therefore been conclusively determined against the plaintiffs in that case and all other citizens and taxpayers on whose behalf they brought the suit. As one of the sources of revenue with which to pay the principal and interest upon bonds issued thereunder, the Bonus Act amended sections 2, 3 and 29 of the Cigarette Tax Act by imposing additional taxes upon distributors of cigarettes and providing for the disposition of the proceeds thereof. The *Rouff case* cannot be extended to prevent judicial scrutiny of a statute not before the court in the prior case. Even though the validity of the amendment might have been litigated, that of the Cigarette Tax Act itself was not in issue and could not have been passed upon in that case. There is thus no merit in the contention that the complaint is barred by *res judicata*.

*Harmou v. Auditor of Public Accounts*, 123 Ill. 122, relied upon by defendants, presents a different question. In a previous suit certain taxpayers had unsuccessfully sought to enjoin a town and its officers from issuing certain bonds. The *Harmou case* was a bill seeking to enjoin the town officials from collecting taxes to pay the principal and interest thereof, and praying that they be decreed to be null and void. In the latter suit an additional ground was advanced for attacking the validity of the election authorizing their issue. We there held that the former decree was "conclusive as to all questions *with in the issue* whether formally litigated or not." In that opinion, we pointed out that "the point now raised against the bonds was presented by the pleadings and issues in the *Pinckney* suit [*Chicago and Iowa Railroad Co. v. Pinckney*, 74 Ill. 277] and might have been raised and determined in that suit." In *Rouff v. Barrett*, on the other hand, the constitutionality of the present clause in section 1 of the Cigarette Tax Act was not presented by the pleadings and issues, and could not have been litigated.

Defendants advance other grounds to foreclose constitutional objections, which we do not deem to be well taken and which it is unnecessary to discuss.

The first objection urged by plaintiffs is that the 1943 amendment, in attempting to classify as distributors persons who merely bring cigarettes into the State for consumption, deprives them of due process of law. The statute purports to impose a tax upon those engaged in the *business* of selling cigarettes. The title

describes the statute as "An Act in relation to a tax upon persons engaged in the business of selling cigarettes, and providing for collection of such tax and penalties for violations of the Act." Section 2, which contains the taxing provisions, imposes the tax "upon any person engaged in business as a distributor of cigarettes in this State." It is thus clear, from both the body and the title of the act, that the tax was intended to be an occupation tax. Can a person who, in any one calendar year, brings or causes to be brought into this State for consumption more than ten cartons of original packages of cigarettes be considered as being engaged in the occupation of distributing cigarettes? Merely to state the question is to answer it. To make such acts alone the criterion of engaging in the business of distributing cigarettes so obviously include persons who may not and cannot be in such business as to render the classification obnoxious to the constitution. See *Ohio Oil Co. v. Wright*, 386 Ill. 206.

In the case cited, this court declared unconstitutional the Oil Production Tax Act of 1941, which purported to place a tax upon the production of oil. As in the present statute, the first section contained a definition of the terms used. The terms "Producer" or "person engaged in the business of producing oil" were defined as including "any person owning oil or having a royalty interest therein at the time it is taken from the earth or water in this State, whether taken by him or some other person in his behalf." The tax was held to be beyond the power of the legislature on the ground *inter alia*, that an owner of land cannot be declared to be in the business of producing by merely accepting the value of the royalty for the oil which the lessee has, by mining operations, taken from the land. We observed that "It manifestly is not a fact that such royalty owners are in the business of producing oil any more than a stockholder by accepting the dividends from a corporation is in the corporate business, whether the dividends be cash or property in kind. The legislature does not have the power by legislation to declare that not to be a fact which everyone knows is a fact. (*Winter v. Barrett*, 352 Ill. 441), and, by the same reasoning, cannot legislate that to be a fact which everyone knows is not a fact." This reasoning applies with equal, if not greater force to the classification attempted by the 1943 amendment to the Cigarette Tax Act.

A further objection to the amendment is found in the rule that the provisions of an act must be within the subject expressed in its title. The title of the statute relates to a tax upon "persons engaged in the business of selling cigarettes." Its entire theory, as shown by its language and the body of the act itself, purports to limit its application not only to selling cigarettes but to the *business* of selling cigarettes. By inserting the amendment in the existing act there has been injected a subject matter inconsistent with the rest of the act and with its title. By no conceivable interpretation can the mere bringing of cigarettes into the State for consumption be considered a sale thereof, much less an engaging in the business of selling cigarettes. The ordinary person, from reading the title alone, would not conceive that the act which follows would contain a provision taxing any consumer who brings the designated quantity of cigarettes into the State within a year. The amendment, by the added definition of "Distributor," results in extending the tax to a class of persons not included in the original act and not consistent with its title and therefore contravenes section 13 of article IV of the constitution.

In *Stolze Lumber Co. v. Stratton*, 386 Ill. 334, we considered the validity of an amendment to section 1 of the Retailers' Occupation Tax Act, the full title of which is: "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." The amendment added to section I and additional definition of "use or consumption" which purported to include "the employment of tangible personal property by persons engaged in service occupations (including construction contracting and other service occupations of like character), trades or professions, in the rendering of services, where as a necessary incident to the rendering of such services, transfer of all or of a part of the tangible personal property employed in connection with the rendering of said services is made from the person engaged in the service occupation (including construction contracting and other service occupations of like character), trade or profession, to his customer or client." It was there pointed out that this amendment sought to change the scope of sales at retail to include transfers or sales that are made for resale where the thing sold is employed by the named classes of persons in rendering service. In holding that the sales to contractors are not sales at retail as contemplated by the title, we said: "An amendment which seeks to apply the tax to those engaged in a business other than that of making retail sales whether that business be called wholesale or by some other name, cannot be said to be included in the title to this act. This being true, appellants' contention that the amendment violates section 13 of

article IV must be sustained and the amendment must be held invalid." If an amendment is void which seeks to bring within a business named in the title persons engaged in a different business, *a fortiori* an amendment cannot be sustained which attempts to so treat persons engaged in no business at all. The amendment in the case at bar contains no requirement that the persons therein described be engaged in any business. It therefore can have no relation to the language of the title of this act.

The amendment is invalid on the further ground that it operates to impose a tax upon interstate commerce, in violation of the commerce clause of the Federal constitution. It will be observed that in effect it taxes the act of bringing or causing to be brought into this State the commodity described. Its application is not upon the transaction of sale or the operation of consumption, but is directly concerned with commerce itself. It has been held that a State cannot impose a tax on sales consummated in another State by acceptance of orders sent from the taxing State. (*McLeod v. Dilworth Co.*, 322 U. S. 327, 88 L. ed. 1304.) *A fortiori*, a tax upon the commerce itself cannot be sustained. In the words of the United States Supreme Court in the case last cited, "The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States."

Other constitutional questions are raised which, because what we have already said requires us to hold the amendment invalid, we deem it unnecessary to discuss.

For the foregoing reasons we conclude that the quoted clause of section I of the Cigarette Tax Act is beyond the power of the legislature to enact and thus void. The decree of the superior court so holding is correct and will be affirmed accordingly.

*Decree Affirmed.*

The CHAIRMAN. There being no questions, we thank you for your appearance here.

Mr. ARNOLD. Thank you.

Senator MILLIKIN. Mr. Chairman, I have a telegram from a constituent in which it is suggested that letters from the Department of Justice and the Treasury Department addressed to the House Ways and Means Committee be obtained and published as part of the record in the hearings of the Senate Finance Committee. I do not know whether those are in the House record.

The CHAIRMAN. I am informed these letters do not appear in the House hearings. However, the clerk will obtain a copy of the Department of Justice report to the House Ways and Means Committee and insert it in the record at this point, together with a letter directed to this committee by the Treasury Department, in which they state that they offer no objection to the bill.

(The letters referred to follow:)

DEPARTMENT OF JUSTICE,  
April 6, 1949.

HON. ROBERT L. DOUGHTON,  
*Chairman, Committee on Ways and Means,  
House of Representatives, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice relative to H. R. 195, a bill to assist States in collecting sales and use taxes on cigarettes.

This bill is identical with S. 2690 which failed of action in the Eightieth Congress. It provides that any person selling or disposing of cigarettes in interstate commerce, including a gift of more than 200 cigarettes, whereby such cigarettes are shipped to other than licensed distributors within a State taxing the sale or use of cigarettes, would be required to file with the State tobacco tax administrator a memorandum or a copy of the invoice covering such shipments, which memorandum or invoice would contain information of assistance to the tax administrator in the application of the State tax. A violation of the provisions of the act would be a misdemeanor and would be punishable by a fine of not more than \$1,000 or imprisonment for not more than 6 months, or both.

Such a measure may establish a precedent for similar legislation with respect to other commodities which are now or in the future may be subject to State sales or use taxes. Further, the responsibility of its enforcement would devolve upon the Department of Justice with attendant increased expenditures the amount of which it is impossible to estimate at this time. However, whether it should be enacted is a question of legislative policy concerning which this Department prefers to make no comment.

As for the text of the bill, it is suggested that the words "shall be guilty of a misdemeanor" should be deleted from section 3 as superfluous, since title 18, United States Code, section 1, provides that offenses punishable as provided by section 3 of this bill are misdemeanors.

The Director of the Bureau of the Budget has advised that there is no objection to the submission of this report.

Yours sincerely,

PEYTON FORD,  
*The Assistant to the Attorney General.*

TREASURY DEPARTMENT,  
*Washington 25, June 10, 1949.*

HON. WALTER F. GEORGE,  
*Chairman, Committee on Finance,  
United States Senate, Washington, D. C.*

MY DEAR MR. CHAIRMAN: Further reference is made to the letter of May 18, 1949, requesting, for your committee, the views of this Department on H. R. 195, a bill to assist States in collecting sales and use taxes on cigarettes.

H. R. 195 would require any person selling or disposing of cigarettes in interstate commerce whereby such cigarettes are shipped to other than a distributor licensed by or located in a State taxing the sale or use of cigarettes to forward to the tobacco tax administrator of the State into which such shipment is made, not later than the 10th day of each month, a memorandum or a copy of the invoice covering each shipment of cigarettes made during the previous calendar month into the State, including the name and address of the person to whom the shipment was made, and the brand and the quantity of cigarettes shipped. Violations would be a misdemeanor, punishable by fine of not more than \$1,000 or imprisonment of not more than 6 months, or both.

This bill is directed at a problem which develops locally from the imposition of taxes at the State level upon commodities that move in interstate commerce. The limitation of the taxing authority of the States over the movement of goods into and out of other States prevents satisfactory enforcement of such taxes by the States involved. Although cooperation between States has greatly facilitated the enforcement of State tobacco taxes, the fact that some of the States do not employ this revenue source and have no incentive to cooperate circumscribes the role of interstate comity in the solution of the States' problems in this field.

Over a period of time numerous legislative proposals similar to H. R. 195 have been made to provide some form of assistance by the Federal Government to the States in meeting this tax problem. Some of these proposals have contained a provision which would require the Treasury Department's administrative machinery to assist the States in the enforcement of State tobacco taxes. The Treasury Department has consistently opposed such a provision. It has pointed out that its machinery is geared to the manufacturer's level, and is not adapted to the identification of shippers of tobacco from one State to another which would be required for the effective enforcement of the proposed legislation. In a great majority of cases interstate tobacco shipments are made not by manufacturers but by wholesalers and jobbers and sometimes even by retailers, and the aggregate number of persons engaged in making such shipments, while not known, is undoubtedly very large.

The present bill does not contain such a proposal and is identical with H. R. 5645, Eightieth Congress, second session, which was passed by the House of Representatives on May 28, 1948, and to which no objection was interposed by the Treasury Department. Inasmuch as H. R. 195 contains no provision requiring that the Treasury enforce the measure, it would appear that there are no aspects of the bill requiring further comment by this Department.

The Director, Bureau of the Budget, has advised the Treasury Department that there is no objection to the presentation of this report.

Very truly yours,

THOMAS J. LYNCH,  
*Acting Secretary of the Treasury.*

The CHAIRMAN. I see we have time for one or two other witnesses.

Representative JENKINS. In the interests of time, I wonder if it would be all right to have Mr. Conlon come on now instead of Mr. Whitaker. If you would allow him to appear next, I think it would save time.

The CHAIRMAN. Yes, sir. We would be glad to have him.

Come forward, Mr. Conlon, and we will be glad to hear you now.

**STATEMENT OF CHARLES F. CONLON, EXECUTIVE SECRETARY,  
NATIONAL TOBACCO TAX ASSOCIATION, CHICAGO, ILL.**

Mr. CONLON. Mr. Chairman and gentlemen of the committee:

I am Charles Conlon, Executive Secretary of the National Tobacco Tax Association, which is an official organization of State officials engaged in operating tobacco tax laws.

Senator CONNALLY. State where you are from.

Mr. CONLON. My headquarters is in Chicago, sir.

You have heard from our colleagues, and there is an abundance of material in the record of the proceedings before the House Committee on Ways and Means, on the general problem involved here, of the effect on the revenue of the several States and the history of the development of these difficulties. I have a prepared statement, which I will insert in the record, which briefly covers those facts.

Now, I say that it is a good alternative to regard this general question in terms of equity rather than immorality, as Judge Arnold suggested.

What the State officials are primarily concerned with is obtaining an adequate, equitable enforcement of the tax laws which are presently on their books and which in effect require that the consumer pay a certain number of cents per pack on cigarettes consumed in their States.

We bend our activities to see that this tax is enforced in an equitable manner, so that the general tax burden is fairly distributed among all the cigarette consumers. The presence of the mail-order business affords a loophole and a means of changing the distribution so that people who patronize the mail-order houses don't pay their fair share of those taxes. Included in the exhibit which I will present to the committee are a number of advertisements, some of them the same and some of them differing in type from those already put in the record by Senator Long.

There is precedent on the part of Congress for acts which in effect assist in the enforcement of State laws. Senator Long mentioned several of them. There is the Webb-Kenyon Act, dealing with liquor. There is the Plant Inspection Act of March 4, 1915, which provided that parcels sent to the various States had to be delivered to the inspection depots by the Post Office Department for approval by State authorities before final delivery was made to the addressee.

Then there is the Post Service Act of March 3, 1917, which is another good precedent.

Senator MILLIKIN. In the case of the Webb-Kenyon Act, was not the delivery of the goods itself illegal in certain parts of the country?

Mr. CONLON. In dry States; that is correct.

Senator MILLIKIN. Is the delivery of cigarettes illegal in any of the States?

Mr. CONLON. Not today, no, sir. In the liquor case it was the possession of the goods that was illegal. Today possession of unstamped cigarettes, is illegal.

Senator MILLIKIN. I am drawing a distinction between an article which is illegal per se and an article which is not. One might call for one type of law, and obviously the other might call for a different type of law, or no type of law at all.

Mr. CONLON. Yes, sir. I cite these statutes to show that there was difficulty in enforcing the State law, and the United States stepped in to assist the States.

Senator MILLIKIN. The Connally "Hot Oil" Act started with criminal transactions commencing in the State where the oil became hot.

Mr. CONLON. Criminal and civil.

Senator MILLIKIN. So you do not have an analogy unless the cigarette is also illegal to start with.

Mr. CONLON. There was a question of the validity of and the enforcement of that State law, and Congress's legislation was ancillary. It enabled the States to more or less perfect the operation of their own law.

More important, I suggest several actions of Congress to assist the States specifically in the enforcement of the tax laws. One is the Costigan amendment to the Revenue Act of 1936, where Congress provided that the Federal income tax returns would be open to inspection by official bodies administering the State taxes. That is a privilege that is not given to the bureaus, or departments of the Government itself.

Senator MILLIKIN. There are reciprocal deductions involved, however.

Mr. CONLON. Some States have income taxes, and some States do not have income taxes, but the States which do not might have a State tax on intangibles. And despite the absence of an income tax in the State, it still has the privilege to go and check the returns which have been filed with the Bureau of Internal Revenue, by people who are resident in that State. The privilege does not depend on reciprocity in any way. And in those States which do not have an income tax, there is no reciprocity of interest as between the two taxes. The Costigan Act is ancillary; it enables the States to obtain a fuller enforcement of their own laws. It puts before the States the facilities and the enforcement machinery of the United States and allows that enforcement machinery to be used in the assistance of State laws.

Senator MILLIKIN. It does not require the Federal Government, though, to set up new machinery to accomplish the purpose.

Mr. CONLON. No, sir. I submit that this bill does not either. The enforcement machinery of the United States, through the Department of Justice and the district attorneys around the country, the United States attorneys around the country, is already in being. And it is contemplated that there is no substantial body of work involved in the enforcement of this act.

Senator MILLIKIN. I wondered how you would add a new function without substantial increase in pay roll.

Mr. CONLON. I suggest, sir, it is not a function that will require a great outlay of time. If the law is passed, the obligation under it is clear. I think that no one would deny the fact that the State adminis-

trative officials, if notice comes to them that a mail-order house is continuing business shipping cigarettes into the State and is not making the required report, will notify the United States attorney. I think there is no doubt at all that they would. Handling such complaints certainly would be a minor function in United States attorney's office.

Senator MILLIKIN. I would hope to be pleasantly surprised as to what Senator Hoey suggested usually happens in practice. You usually find it necessary to have new divisions and new pay rolls and all sorts of things to make the act effective from the Federal standpoint.

Mr. CONLON. I think there is no question of that here.

Senator MILLIKIN. As I say, I would like to be agreeably surprised.

Mr. CONLON. It may be that this is such an occasion.

To continue there is the Hayden-Cartwright Act of June 16, 1936, as amended, wherein the United States provided that where gasoline is sold through a post exchange or similar agency on Federal territory, the officer in charge, when the sale is made for civilian purposes, must collect the tax, and remit it to the State. Now, the difficulty there was that post exchange is usually located on Federal territory over which the United States has exclusive jurisdiction, and many people connected with the services, or who had access to that post exchange in one way or another were going in there and buying gasoline which was subsequently used on the highways in their private cars.

Senator MILLIKIN. There is an obvious difference, where the Federal Government is in the business of selling gasoline itself.

Mr. CONLON. Well, in those days there was a fair amount of question as to just what the status of the PX was. But anyway, Congress said the State tax on that commodity should be collected and the post exchange officers shall hereafter be under the duty of collecting it.

Senator MILLIKIN. Would you not say there is some difference, so far as the principles involved are concerned?

Mr. CONLON. Certainly a difference in the facts, Senator; but the principle, which is what I am insisting on is that the Federal Government did use its powers to assist in the collection of a State tax; this is the principle which we seek here also.

Senator MILLIKIN. The principle in the cases which you mention arises out of the facts. One set of facts might justly give rise to the principle. Another set of facts might not.

Mr. CONLON. That is so.

Senator MILLIKIN. That is our problem. It is the committee's problem.

Mr. CONLON. The third act I would like to call your attention to is that introduced by the late Mr. Buck of California, the act of October 9, 1940, wherein it is provided that any business activity taking place on Federal reservations, any business activity carried on by private persons, should be subject to State taxation to the same extent as would be the case if the business were operated on territory over which the State had exclusive jurisdiction. This again involved those many Federal areas where the United States had exclusive jurisdiction. And the United States Congress passed a law, and it applied to sales taxes, it applied to use taxes, it applied to contractors' operations, and the derivation of income in any way.

Senator MILLIKIN. The United States does not have that kind of jurisdiction over the mail-order houses.

Mr. CONLON. The United States has jurisdiction over interstate commerce.

Senator MILLIKIN. But the United States is not in the mail-order business.

Mr. CONLON. The business coming under the operation of the Buck Act was not carried on by the Government either, Senator. It was carried on by private persons; for example, a concessionaire of some kind doing business.

The CHAIRMAN. But the Government permitted him to go on its own property and there conduct business in competition with anybody else who paid a tax in that sort of business.

Mr. CONLON. Yes, sir.

The CHAIRMAN. I very well remember the trouble we had about the PX cases and the Army stores. We recognized that we were treading pretty close, in those cases. But we thought it was fair. Although the Government did not own the Army stores, did not own the PX's for instance, it did permit them to operate, and had certain supervision over them, and certain control over them on its own property; and it was felt that it was not fair for that business to be dealing with civilians under the protection of the Government of the United States. Therefore, we tried to make it possible for the local authorities to collect their taxes out of that type of business or that part of the business, just as in the case of any private business off the reservation, so to speak. That was our main purpose there.

Mr. CONLON. It served to dry up what hitherto was a sort of oasis for the avoidance of taxes. There was a segment of business which prior to that time did not pay the taxes imposed upon it.

The CHAIRMAN. Yes. But we had a responsibility in permitting that situation to go on, and therefore we undertook to correct it.

That is correct. You are correct, in that extent.

Mr. CONLON. I would like to come now to some of the particular cases that were discussed this morning before the committee.

The contention is urged that Congress should not act in this case because it wouldn't do any particular good in a number of States, because—and the Illinois case is cited particularly—the State courts themselves have said that such statutes applied to users or consumers are unconstitutional.

Now, I submit to the committee that the case that was recently decided in Illinois, growing out of the use of cigarettes by consumers who got them through mail-order sources, was decided by the supreme court of the State against the State simply because the statute had not been amended in the proper manner. The legislature did not enact an outright use tax, for reasons best known to the legislature at the time that the law was amended. It enacted instead a law which provided that a person who bought in excess of 10 cartons of cigarettes per year would be presumed to be in the business of selling cigarettes.

Now, that is a presumption that certainly could be very easily rebutted. The ordinary smoker, I suppose, smokes a carton of cigarettes a week. An ordinary smoker might smoke 50 cartons a year, and be plainly only a consumer. Now, the Illinois law said that anybody who gets over 10 will be regarded as a seller, and therefore he should be licensed in the business and should put stamps on the package, and all that sort of thing. That is the basis of the

decision in the Illinois case. The statute was not amended in the proper way.

There are 30 of the cigarette States now that have genuine use taxes in connection with the tobacco tax. The tax is either on the sale, if the cigarettes are sold by a wholesaler within the state, or, if the cigarettes are obtained from sources outside the State by unlicensed dealers, the consumers are liable for a tax on the use of them.

Now, some of those statutes were supplemented by criminal sanctions as well as the ordinary civil sanctions of interest and similar penalties for nonpayment of taxes. There is no question whatsoever that those use taxes are legal. They have been upheld in several States where they were challenged. The first one, dealing specifically with cigarettes in Texas in 1935, *ex parte Kimberlin*, and the second one, *Sheppard v. Musser*, both involved the validity of the tax on the use of cigarettes by consumers, and both of them were upheld by the State courts.

We had a similar case in Georgia in 1939, where the liability on the consumer was directly challenged, and the law was upheld in that case. And recently in Alabama in the lower courts an attempt was made to challenge the validity of the use tax on the consumer who got the cigarettes from outside the State, and it was upheld.

Now, the United States Supreme Court has consistently, from the time of the *Henneford* case, which Judge Arnold mentioned, upheld the application of a use tax to commodities that have been brought in from sources outside the State. The record of the litigation in the Supreme Court is one of a constantly expanding jurisdiction of the States to tax, and as far as the use tax is concerned, it has been consistently upheld.

One case is mentioned very often, *McLeod v. Dilworth*. Judge Arnold told you about it. It involved an Arkansas sales tax statute. In effect, the Supreme Court said, "We are not going to allow the State of Arkansas to act as if it did have a use tax statute, when in fact it does not have a use tax statute."

On the very same day that that case was decided in the United States Supreme Court, a case involving similar facts was before it from Iowa, and the State insisted that when solicitors circulated in the State and took orders from consumers in Iowa, which orders were sent back to Minnesota, the headquarters of the company, and the goods were thereafter shipped into Iowa direct to the consumers, that company was under the obligation, at the time it secured its payment for the goods, to collect the use tax on those goods, and to report it to the State and to pay it to the State. And its power to do so was upheld in the *General Trading Co.* case decided on the same day as the *Dilworth* case.

The general application of the use tax as a complement to the sales tax—

Senator CONNALLY. Let me ask you: In the decision of the Court, did the fact that these distributors have been in the State of Iowa have anything to do with the situation?

Mr. CONLON. Yes, sir. The activity of the solicitors gave the State the jurisdiction over them. The tax was a use tax, though. The primary liability for the tax was on the consumer. The liability that was placed on the company selling the goods was that of collecting the tax from the consumer and remitting it to the State. In effect, the

transaction was one which is commonly conceded to be in interstate commerce.

Now, several years before that, a substantially similar result was reached in New York, in New York City, where the sales tax there, in contemplation of law, is levied on the purchaser. He must pay the tax to the person from whom he buys the goods. In the well-known case of *McGoldrick v. Berwind-White Coal Mining Co.*, which involved the shipment of coal into New York City, the Berwind-White company disclaimed any responsibility for the collection of that tax, on the ground that they accepted the order outside the State, then shipped the coal directly to the consumer. Therefore the transaction was one in interstate commerce, and it was, the company claimed, wholly under the protection of interstate commerce, and therefore the city could not impose that obligation upon them. But the court upheld the power of New York to impose that obligation for collecting the tax on the company. And as a matter of fact, in that particular case, the majority opinion of the court said that this tax was bound up with an activity—namely, the delivery of the goods—which took place in New York City, and that therefore the city was right in its claim to collect the tax.

As a matter of fact now it is also common practice for the mail-order companies in general business to collect the use tax on shipments which are originated directly from consumers in a use tax State, sent to the mail-order company directly by mail, and shipped back directly to the consumer in the taxing State. The blanks which are furnished by the large mail-order companies doing business in States that have a use tax are designed to include the amount of tax, showing the names of the different States and the various rates of tax. The blanks show, for example, that to your orders in Iowa you add 2 percent of the amount of the goods to pay the State taxes; the company states it is required by law to do so.

Senator MILLIKIN. Does the mail-order house remit to the State?

Mr. CONLON. Yes, sir.

Representative JENKINS. Tell them about Sears, Roebuck.

Mr. CONLON. As to Sears, Roebuck and Montgomery Ward, I have here one of their order blanks, which I will be glad to leave with the committee. Within this arrow on the form, it says:

We are required by law to pay tax on sales for the following States:

If you live in Illinois or Iowa, add 2 cents tax expense for every dollar's worth of goods you order.

If you live in Michigan or Ohio, add 3 cents tax expense for every dollar's worth of goods you order.

That is the blank they use in the area thereabouts. The right of the State imposing a use tax to require such a provision was upheld by the United States Supreme Court in the case of *Roddewig v. Sears, Roebuck & Co.*, decided about 1939.

Senator MILLIKIN. Why is that not the answer to the problem?

Mr. CONLON. Because in the case of the large mail-order companies, they are, in addition to sending the material directly by mail in response to orders received directly by mail, maintaining some type of business activity in the State. I mean they have an order office in the State, or they have representatives there, and it is by virtue of that jurisdiction that this condition——

The CHAIRMAN. You do not tax the manufacturers.

Mr. CONLON. No, sir. The tobacco-tax liability is on the wholesaler, who receives them, within the State. The manufacturers do business through warehouses here and there. There is no liability on the manufacturer under the State tax laws unless the cigarettes are manufactured in the State. Rather the State looks to the first receiver in the State, who is usually the wholesaler.

A wholesaler who does business in more than one State, in compliance with the law affixes the stamps to the cigarettes, and the tax is thus collected from him. But as to shipments from any nontax State into the taxing State, there isn't any nexus within the taxing State between the activity of shipping those cigarettes by parcel post, and the solicitation of the order, other than by those advertisements which circulate in the newspapers or on the radio. Therefore the State tax administrator is left with his primary claim on a number of scattered consumers. He can't go back to the central source, as he can in the case of the large mail-order houses, and get someone to collect the tax for the State from the consumer.

That is the purpose for which H. R. 195 is introduced, to concentrate this information from a few central sources, and make it available to the administrator so that he can collect his tax.

Senator WILLIAMS. As to the mail-order houses, if a man orders something from Illinois, we will say, and fails to include this State tax from Illinois with his order, is his order rejected?

Mr. CONLON. Sir, I don't know what the mail-order practice on it is. However, there is no question of their liability for tax. They have to pay that. I should imagine if it is a substantial amount, such as a \$50 or \$60 order, where the tax would be a dollar or a dollar and a half, depending on the rate of tax.

Senator WILLIAMS. I was wondering if they had a policy of rejecting it in that event?

Mr. CONLON. At any rate, there is no complaint raised with the operation of this procedure in any way. It has been going on now since that Sears, Roebuck case was decided in Iowa in 1939 or 1940, and they have been able to carry on with this law and carry on and expand their business every year.

Senator MILLIKIN. What is the legal basis for the opinion of Sears, Roebuck that it must comply with the use tax of a particular State?

Mr. CONLON. A specific decision of the United States Supreme Court, in a case to which Sears, Roebuck was a party, and in which it had resisted the action of the State in attempting to get it to collect this money.

Senator MILLIKIN. What did Sears, Roebuck in that case do within the State?

Mr. CONLON. They maintained order offices within the State, to which consumers might come and select merchandise from a catalog.

Senator MILLIKIN. Did the particular tax that was involved in the case arise from that kind of an order, or was it just plain mail order?

Mr. CONLON. Plain mail order, sir. They did not contend very vigorously against their tax liability, where they maintained a mail-order place and the customer came in there and selected from a catalog, but they said that, "All those transactions which originate within the State but are sent to us directly at our out-of-State place of business are not subject to the Iowa use tax, and we don't have to collect it from them."

That was the point that they carried to the United States Supreme Court, and the United States Supreme Court said that by virtue of these business activities carried on in the State, the State had a perfect right to append that condition to the privilege of carrying on business.

And as far as interstate commerce was concerned, the tax was legally on the consumer, and commerce was at an end; even though the act which ended the commerce was the delivery, to the consumer.

The CHAIRMAN. We are going to have to suspend until tomorrow morning at 10 o'clock. I hope it will be convenient for the members of the committee to come back at that time.

In connection with the legislation before the Senate this afternoon, I am advised that some votes are likely, and therefore it will be necessary for us to be on or very near the floor.

You may finish tomorrow, if you have not finished your statement, or if there are any further questions.

Mr. CONLON. Thank you, sir.

The CHAIRMAN. The other witnesses will be excused until tomorrow at 10 o'clock.

Before we recess, I wish to insert into the record a statement by Hon. C. Emory Glander, tax commissioner of Ohio, and president of the National Association of Tax Administrators, in support of H. R. 195. Commissioner Glander was unable to attend the hearing and has submitted this statement in lieu of his appearance.

I also have for the record the statement of the Mail Order Association of America, which was submitted by Mr. D. D. Richards, secretary-treasurer of the association, which is in opposition to the passage of H. R. 195.

Likewise, I submit for the record a telegram from Mr. Mark Aspinwall, supervisor of the cigarette tax division of the Tax Commission of the State of Washington, advocating favorable consideration of this bill.

Hon. Charles D. Redwine, tax commissioner of my own State, Georgia, had intended to appear in support of this bill, but other pressing business made it impossible for him to attend, but he does wish to be recorded as being in favor of the passage of the bill.

Senator Kem was unable to appear in person this morning, but at his request I am inserting into the record the statement of Mr. S. J. Smith, of the Joe Smith Sales Co., of Joplin, Mo., who is opposed to the passage of this bill. Senator Kem states he has received numerous statements from citizens of his State opposing this measure.

(The statements referred to are as follows:)

STATEMENT OF C. EMORY GLANDER, TAX COMMISSIONER OF OHIO AND PRESIDENT OF THE NATIONAL ASSOCIATION OF TAX ADMINISTRATORS

The State of Ohio imposes a sales and use tax on cigarettes which yields approximately \$18,000,000 annually. Since the law became effective on September 1, 1931, there has been serious evasion through the interstate shipment of tax-free cigarettes, principally by means of mail order and parcel post. These shipments are made by establishments conceived and operated for the specific purpose of developing a trade in tax-free cigarettes with consumers within Ohio. The State of Ohio is losing hundreds of thousands of dollars annually from such evasion of cigarette taxes, which means that over a period of years Ohio has lost millions of dollars through this vicious racket in spite of a vigorous enforcement program.

The situation in Ohio follows the pattern of other States. It is not necessary to recite the historical difficulties or suggested solutions of the problem in this memorandum. They are clearly and specifically set forth in the publication entitled "State Tobacco Taxes and the Mail Order Problem" submitted by the

committee on cigarette tax enforcement of the National Tobacco Tax Association. This study contains a thoroughgoing analysis of present revenue losses and recommendations for remedial legislation. H. R. 195, the Jenkins bill, embodies this suggested legislation and the provisions thereof are carefully explained.

The purpose of this memorandum is to answer the principal objections that have been advanced with respect to this legislation.

## II

The objection has been raised that such a measure as House Resolution 195 "may set a precedent for similar legislation with respect to other items upon which the States have imposed, or may impose a sales or use tax."

As to this argument it is respectfully submitted that a precedent would not be established. On the contrary, the Congress actually has established the precedent for such action by enacting legislation to aid the States in the enforcement of certain State laws.

The Wilson Act of August 8, 1890 (26 Stat. L. 313, ch. 728), subjected intoxicating liquors transported into any State to the operation of State laws to the same extent as though they had been produced within the State, although still in the original package. This act was upheld by the Supreme Court in *Re Rahrer* (140 U. S. 545, 35 L. Ed. 572, 11 S. Ct. 865).

The Wilson Act did not apply until the transportation was completed by actual delivery to the consignee. Thus Congress enacted the Webb-Kenyon Act of March 1, 1913 (37 Stat. L. 699, ch. 90). This act prohibited the transportation of intoxicating liquors into any State where it was intended that they should be "received, possessed, sold, or in any manner used" in violation of its laws. The Supreme Court upheld this act in *Clark Distilling Company v. Western Maryland R. Co.* (242 U. S. 311, 61 L. Ed. 326, 37 S. Ct. 180).

Justice White, speaking for the Court on page 324, said: "Reading the Webb-Kenyon law in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set such laws at naught."

The Hawers-Cooper Act of January 19, 1929 (45 Stat. L. 1084, ch. 79, 49 W. S. C. A., par. 65), provided that convict-made goods transported into any State should be subject upon arrival, whether in the original package or not, to the operation of State laws as if produced within the State. This act was upheld in *Whitfield v. Ohio* (297 U. S. 431, 80 L. Ed. 778, 56 S. Ct. 532). The Court in this case held that this was not a delegation of congressional power to the States but was a removal of impediment to State control presented by the broken package doctrine. The Court also held that there was no violation of the privileges and immunities clause of the Federal Constitution where the statute also prohibited sale in open market of goods made in Ohio by convict labor.

The Hawes-Cooper Act was followed by the Ashhurst-Summers Act of July 24, 1935 (49 Stat. L. 494, ch. 412, 49 U. S. C. A., pars. 61, 62). This act relates to the interstate transportation of convict-made goods and has about the same provisions as those of the Webb-Kenyon Act with respect to intoxicating liquors. It also required that packages containing convict-made goods be labeled, disclosing the nature of the contents, the name and location of the penal institutions where the goods were produced, and the names and addresses of shippers and consignees. The act was upheld by the Supreme Court in *Kentucky Whip & Collar Company v. Illinois Central Railroad Company* (299 U. S. 334, 81 L. Ed. 270, S. Ct. 277). The opinion in this case, written by Mr. Chief Justice Hughes, contains an excellent review of congressional enactments "designed to prevent the use of interstate transportation to hamper the execution of state policy \* \* \*." The opinion stated: "\* \* \* while the power to regulate commerce resides in the Congress, which must determine its own policy, the Congress may shape that policy in the light of the fact that transportation in interstate commerce, if permitted, would aid in the frustration of valid State laws for the protection of persons and property \* \* \*. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid State laws affords no ground for constitutional objection."

Another instance of action by the Congress in order to protect the declared policy of the States is the enactment into law of prohibitions on the interstate transportation of lottery tickets, lists, etc. This legislation was upheld in the

famous case of *Champion v. Ames* (23 S. Ct. 321, 188 U. S. 321). Justice Hughes, speaking for the Court, said: "In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end."

By the enactment of the Connally Act (15 U. S. C. 715), Congress declared its policy to be that of protecting interstate and foreign commerce from the diversion and obstruction of and the burden and harmful effect upon such commerce caused by contraband oil. In this act, contraband oil was defined as petroleum, any constituent part of which was produced, transferred, or withdrawn from storage in excess of the amounts permitted to be produced, transferred, or withdrawn from storage under the laws of a State. The constitutionality of this enactment was upheld in the case of *Griswold v. The President of the United States* (82 F. 2d 922). The Court said the purpose of the act was to aid the States in enforcing laws limiting the amount of oil permitted to be produced from wells in designated fields by prohibiting shipments of excess oil commonly known as hot oil in interstate commerce. It is settled that the law is a valid enactment of Congress to effect that purpose. In the case of *United States v. Skeen* (118 F. 2d 58), the Court said the statute authorizing district courts to enjoin persons dealing interstate in contraband oil from doing so is not invalid as an invasion of State powers or as improper legislation of interstate commerce, since the act dealt only with interstate commerce for the purpose of supplementing State legislation. It takes up where State policy ends, and by supplementing its legislation it makes effective the general will of the people of Texas expressed in its conservation laws.

Congress again aided the States in the enforcement of their laws by enacting a law prohibiting game birds killed contrary to State laws from being shipped in interstate commerce and prohibited transportation from one State to a State where the importation is prohibited by State law. In *Bogle v. White* (61 Fed. 2d 930), the Court said the definition of the offense is the taking, capture, etc., of birds contrary to laws of the State and makes this section of the Federal law coextensive with and effective to enforce their acts [the acts of the States].

There are many other instances where Congress has regulated interstate commerce to prevent the use of that commerce as an impediment to State policy. Congress has provided for penalties for transportation or distribution in commerce of misbranded wool products (15 U. S. C. 68 (a)); has set up standards for shipment of goods or dry commodities in barrels of less capacity than standard barrels as defined (15 U. S. C. 235); has provided against the shipment of falsely marked gold or silver ware manufactured after June 13, 1907 (15 U. S. C. 331); has provided against the shipment of firearms in interstate commerce (18 U. S. C. 361); has provided against the introduction into interstate commerce of adulterated or misbranded food products (21 U. S. C. 331); has provided against advertising securities without disclosing consideration (15 U. S. C. 77 q (b)); has provided against the transportation of contraceptive drugs (18 U. S. C. 396). In the *Eureka Productions v. Lehman* (17 F. Supp. 259), the Court stated that the purpose of this section (18 U. S. C. 396) was to supplement State legislation.

The courts have upheld the regulation by Congress of interstate commerce to supplement State laws. As in the case of *Reid v. Colorado* (187 U. S. 137), it was held that Congress could prevent diseased stock from entering into interstate commerce. In the Lottery case (188 U. S. 321), it held Congress could prevent the transmission of lottery tickets in interstate commerce. In the *Hipopolite Egg Co. v. United States* (200 U. S. 45), it was held that Congress could prevent the transportation of adulterated articles if it would deceive or injure purchasers.

These instances are merely examples of Congress exercising police power within the field of interstate commerce for the benefit of the people. Congress can regulate interstate commerce to the extent of punishing and forbidding its use as an agency to promote immorality, dishonesty, or the spread of any evil or harm from one State to the people of another State (*Brooks v. United States* (267 U. S. 432)).

The unregulated sale of cigarettes in interstate commerce promotes violation of the law; and, therefore, the sale of cigarettes in interstate commerce from a nontaxing State to a taxing State where the seller does not collect the tax or

advise the State of those to whom he sells, but actually solicits business on the basis that the people of the State can evade their tax laws by purchasing from him, would be a proper case for Congress to act to prevent these sellers from aiding and abetting tax evasions by the citizens of a taxing State. The *Kentucky Whip case* (299 U. S. C. 34) states: "Congress has the power to prohibit the movement of harmless and useful goods in interstate commerce. The social interest of protection of life and welfare in business is sufficient to satisfy the due-process requirement of the Constitution."

One who successfully evades his legal obligations obtains a competitive advantage over his law-abiding competitor. In the interest of fair competition among the sellers selling to those in taxing States, Congress should pass such legislation as proposed in H. R. 195. Congress should not let interstate commerce be used as a shield by the seller to secure an unfair competitive advantage over those sellers who must collect and do collect taxes under State law. For Congress to deny the right to supplement State tax laws in this instance would be to deny merchants an equal competitive basis under the law, and unfair competition would be fostered, as would tax evasion.

The opponents of H. R. 195 have questioned the constitutionality of such an act in that it would be a burden on interstate commerce and that such an enactment is not a valid exercise of Federal power.

The requirement set forth in H. R. 195 to require all out-of-State sellers to furnish the tax administrator of the State in which shipment is made with names and addresses of their purchasers, together with the cigarettes and the quantity thereof, is not a burden on interstate commerce in that he may either do this or collect and remit the tax, as other sellers within the State. There is no discrimination in that the State imposes a tax on cigarettes sold in the State as well as a tax on the use of cigarettes which are brought in from outside the State and consumed in the State. The United States Supreme Court has upheld the right of a State to require an out-of-State seller to collect the use tax (*General Trading Co. v. Iowa* (322 U. S. 335)). The effect of the law would not be to burden interstate commerce but, instead, would serve to alleviate unfair competition, as in the case of a resident seller who must collect the tax, whereas the out-of-State seller does not and, as a result, continually undersells the local dealer. However, Congress, within the limits of the fifth amendment, has the authority to burden commerce if it deems it a desirable means of accomplishing a permitted end (*Morgan v. Commonwealth of Virginia* (66 S. Ct. 1050)).

The opponents to H. R. 195 further state that they have a property right in the names and addresses of the customers and that H. R. 195 would violate the provisions against unlawful search and seizure. The same question was raised by Kentucky dealers under a Kentucky statute which required cigarette sellers to report alleged exempted sales to the tax commissioner. Such a list of customers and addresses was furnished Ohio under an agreement for mutual assistance in enforcing the Kentucky cigarette tax on Ohio use tax. *Dixie Wholesale v. Martin* (278 Ky. 275) held that transmitting such report to the commissioner was no violation of Federal Constitution. Such act would not constitute (1) interference with interstate commerce nor (2) illegal search and seizure, inasmuch as there would be no proceeding of any kind against the seller on the basis of information furnished, and he may refuse to furnish the names and addresses of his customers by collecting the cigarette use tax. Certiorari was denied by the United States Supreme Court (308 U. S. 609).

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MAIL ORDER ASSOCIATION OF AMERICA,  
Washington, D. C., June 10, 1949.

SENATOR WALTER F. GEORGE,  
Chairman, Senate Finance Committee, United States Senate,  
Washington, D. C.

DEAR SENATOR GEORGE: I am addressing you as chairman of the Senate Finance Committee on a matter which I believe to be of vital concern to the members of the Mail Order Association of America, as well as hundreds of others in our country who sell merchandise by mail. I am referring to H. R. 195, a bill to assist States in collecting sales and use taxes on cigarettes.

The mail-order-house members of the Mail Order Association of America do not sell cigarettes by mail, so we have no direct interest in H. R. 195 other than that it tends to establish a principle which would be extremely detrimental to those millions of persons in our Nation who buy merchandise by mail. We oppose the principle established, whereby Federal law would be used to assist States

in collecting sales taxes on anything bought by mail. We believe that the whole principle of sales by mail is being jeopardized in this proposed measure.

We believe it is dangerous for the United States Government to lend aid to the enforcement of any State law, including State laws which place special taxes on cigarettes.

Our organization, in 1939, opposed H. R. 3835, a bill authorizing the Post Office Department to cooperate with the several States in the collection of State taxes. At that time, a representative of this organization appeared before the committee in opposition to the bill. We referred to the Sadowski bill of 1934, which would have permitted those States having sales taxes to levy an equivalent tax on any such goods purchased outside the State. We also pointed out that the measure was raising barriers at State lines, and that the Interstate and Foreign Commerce Committee of the House, at that time, refused to approve that bill. Other measures have since been introduced, and each of them has failed, as did H. R. 3835 in 1939. Bills of this character tend to erect State barriers which interfere with commerce between the States. The Federal Government should not be a party to the erecting of such barriers, nor should it act as the enforcement agent to keep those barriers intact. It is our contention that nothing in the Constitution was written or conceived in such a way as to place the Federal Government in the position of erecting trade barriers or collecting taxes for the several States.

Michael J. Horan, attorney, Office of the Assistant to the Attorney General, Department of Justice, testifying on H. R. 5645, said: "Such a measure may set a precedent for similar legislation with respect to other items upon which the States have imposed or may impose a sales or use tax. As to what proportions such Federal assistance may reach, or the extent of Federal expenditures which would be required in enforcing such laws and regulation, is, of course, speculative." Here we find an official of the Department of Justice calling to the attention of Congress—the Eightieth Congress—the fact that the principle set forth in this bill may be precedent for legislation which might affect all items of merchandise sold in any State that has a sales tax or use tax. Also, it is indicated that considerable expenditure may be encountered by the Federal Government in enforcing such laws and regulations.

Our association would respectfully request that the bill not be approved by your committee. We also respectfully request that this statement be incorporated into the report on the hearings on H. R. 195.

Sincerely yours,

D. D. RICHARDS,  
*Secretary-Treasurer.*

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[Telegram]

OLYMPIA, WASH., *June 10, 1949.*

Senator HARRY P. CAIN,  
*United States Senate, Washington, D. C.*

Senate Finance Committee having hearing on H. R. 195 (Jenkins bill) June 15. Would appreciate your contacting Senator George prior to hearing requesting favorable consideration of bill. This legislation is urgently needed by all tobacco-taxing States. Please refer to house joint memorial No. 31 passed by Washington State Legislature March 4, 1949, a copy of which you have.

CIGARETTE TAX DIVISION,  
TAX COMMISSION OF THE STATE OF WASHINGTON.  
By MARK ASPINWALL, *Supervisor.*

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JOPLIN, MO., *June 9, 1949.*

Hon. JAMES P. KEM,  
*Senate Office Building, Washington, D. C.*

DEAR SENATOR: The Jenkins bill is now before the Senate Finance Committee. This unprecedented type of legislation should have full hearing before being considered by the Senate. The hearing in the Ways and Means Committee was the reverse of the ordinary procedure; that is, the opposition was heard first. Thus, no chance to answer their arguments.

This type of legislation is bad, because we have dual system of government and we have 48 State governments. When tampering with the commerce clause of the Federal Constitution this Congress is usurping some of the powers that are

reserved in the people. Thus, the commerce clause and the privilege-immunity clause are entwined in many instances. States have under their own system of government the power to pass laws to cope with their own taxation problems. This Congress should not hamper the area of free trade protected under the commerce clause.

The Honorable Ellsworth has summed up the cause of the various States' inability to control their own citizens, which I am quoting from the Congressional Record, page 642 of May 17, as follows:

"Thirty-nine States have seen fit to impose a tax on this particular commodity. Now they are finding some difficulty in collecting the higher tax. If the States were more modest in their tax demands on this product, quite likely this situation would not have developed; but the fact is that the States are overtaxing this product, and the situation is that the Federal Government is now to be asked to police the shipment of cigarettes. I do not think the Federal Government should have any part in such an effort. I think that the States are suffering as the result of their own actions, and I do not think the Federal Government should be required, or that we here in Congress should be required, to help them out."

Why set a precedent for the above-described condition and trammel the right guaranteed and vested of the citizens of many States? And, furthermore, this type has no benefit to many States; thus, no national interest.

Your careful consideration of this matter will be of the utmost importance.

Sincerely,

JOE SMITH SALES Co.,  
S. J. SMITH.

The CHAIRMAN. The committee will recess until tomorrow at 10 o'clock;

(Whereupon, at 12 M. the committee recessed, to reconvene at 10 a. m. Thursday, June 16, 1949.)

# STATE TOBACCO-TAX COLLECTIONS

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THURSDAY, JUNE 16, 1949

UNITED STATES SENATE,  
COMMITTEE ON FINANCE,  
*Washington, D. C.*

The committee met at 10 a. m., pursuant to recess, in room 312, Senate Office Building, Senator Walter F. George, chairman, presiding.

Present: Senators George (chairman) Connally, Lucas, McGrath, Millikin, Martin, and Williams.

The CHAIRMAN. The committee will be in order.

As our first witness, this morning, we will hear from our colleague, Senator Thye, of Minnesota.

You may proceed, Senator.

## STATEMENT OF HON. EDWARD J. THYE, A UNITED STATES SENATOR FROM THE STATE OF MINNESOTA

Senator THYE. That there is need for legislation to regulate the shipment of cigarettes into States having cigarette taxes, so as to prevent evasion of the State taxes, has become increasingly apparent.

While I was Governor of Minnesota I know that the experience of the State with the problem presented by unregulated and untaxed shipments of cigarettes was such as to clearly emphasize the desirability of a Federal enactment such as H. R. 195 to assist States in collecting sales and use taxes on cigarettes. The bill under consideration by the committee, as adopted by the House of Representatives, would provide that when cigarettes are shipped into States having a tax on their sale or use, and shipment is to a person other than a licensed distributor, the shipper must supply monthly to the State tax commission or administrator a memorandum of all shipments, identifying them as to consignee, kind of cigarette, value and other pertinent points. It is my opinion that the measure is a practical and constructive one and would help to alleviate a serious problem, embracing a lost revenue, to the States.

In support of the interests of Minnesota, which I have already indicated on the basis of my experience as Governor, I wish to call to the committee's attention the fact that I have received communications not only from State officials, but also from many legitimate dealers throughout the State, who feel that the Federal enactment is necessary.

I wish to draw the committee's particular attention to the fact that the State Legislature of Minnesota adopted a resolution at its last session memorializing Congress "to enact a bill to aid the State

in the enforcement of the cigarette tax now evaded by use of the United States mails."

I wish to quote as follows from the resolution adopted by the State legislature:

It has been brought to the attention of the House of Representatives and the Senate of the State of Minnesota that a large and growing system of evasion of such tax law has developed; that the United States mails are flooded with advertisements and inducements to the citizens of this State to violate the law of this State; that in numerous instances such advertisers entice prospective customers with statements to the effect that the use of the United States mails is sufficient proof of the legitimacy of such business and such a system; that the mails of the United States are constantly flooded with cigarettes in the process of delivery within this State, and on which cigarettes the tax required by the laws of this State have not and will not be paid; that this State is seriously disadvantaged by such use of the postal offices and mails of the United States for the purpose of evading the laws of Minnesota; and that Minnesota faces and is now suffering serious losses of revenue as a result of such a system of evasion.

I earnestly urge favorable consideration of H. R. 195 by the Senate Committee on Finance, both from the standpoint of the needs of the various States in handling a difficult tax problem, and from the standpoint of appropriate cooperation in intergovernmental relations between the States and the Federal Government.

The CHAIRMAN. Mr. Leonard Biel, who was scheduled to appear yesterday, was unable to remain in Washington today and has asked that his statement be inserted in the record in lieu of his appearance. He speaks in behalf of the following mail-order houses selling denicotined cigars, cigarettes, and pipe tobacco directly to consumers: The Bonded Tobacco Co., Inc.; Guardian Tobacco Co., Inc.; Carl Henry, Inc.; Lincoln & Ulmer, Inc.

A copy of this statement has already been placed in the hands of each member of the committee.

(The statement referred to follows:)

**BRIEF OF THE BONDED TOBACCO CO., INC.; GUARDIAN TOBACCO CO., INC.; CARL HENRY, INC.; LINCOLN & ULMER, INC. FOUR MAIL-ORDER HOUSES SELLING De-NICOTINED CIGARS, CIGARETTES, AND PIPE TOBACCO DIRECTLY TO CONSUMERS, SUBMITTED BY LEONARD BIEL, NEW YORK, N. Y.**

This memorandum is submitted on behalf of four mail-order companies selling cigarettes, cigars, and pipe tobacco, all products which have been denicotined and which products have been and are sold directly to consumers throughout the country.

The history of the four companies is as follows:

Lincoln & Ulmer, Inc., a New York corporation, has been in business for more than 25 years, manufacturing denicotined cigarettes, cigars, and pipe tobacco. The bulk of the business of Lincoln & Ulmer is done directly with the three following companies: Lincoln & Ulmer, Inc., has no financial interest in these three companies. Lincoln & Ulmer, Inc., manufacture cigarettes, cigars, and pipe tobacco for the three companies named below but in each instance the specifications are submitted to them by the various companies and Lincoln & Ulmer, Inc., cannot sell any merchandise under the brand names owned by the three companies, except to these three companies.

The outstanding feature of the products sold by the four companies is that the bulk of the nicotine is removed by a nonchemical process so the finished product contains under 1 percent of nicotine, which compared to the so-called standard brands is considerably lower in nicotine content—nicotine, of course, adding only to the strength of tobacco not to its aroma or flavor. Along these lines, one company, the Bonded Tobacco Co., Inc., has spent a considerable sum in advertising their slogan *Smoke to Your Heart's Content and With Content to Your Heart.*

The Bonded Tobacco Co., a New York corporation, has been in business since July 1925. It sells denicotined cigarettes, cigars, and pipe tobacco under the

brand name of Sackett; 98 percent of its business is done directly with consumers in the various States with few shipments outside of this country.

Carl Henry, Inc., a New York corporation has been in business since January 1926. It sells denicotined cigarettes, cigars, and pipe tobacco under the brand name of Carl Henry. All of their business is done directly with consumers in the various States.

The Guardian Tobacco Co., Inc., has been in business since 1942. It sells denicotined cigarettes, cigars, and pipe tobacco under the brand name of Venieto. All of their business is done directly with consumers in the various States.

Lincoln & Ulmer's consumer business is nil as they do not wish to compete with the three companies for whom they manufacture various denicotined cigarettes, cigars, and pipe tobacco. Their brand name is O-Nic-O.

The three companies, The Bonded Tobacco Co., Inc., Guardian Tobacco Co., Inc., and Carl Henry, Inc., all operate in the same way. They send out, throughout the year, literature directly to consumers, offering denicotined cigarettes, cigars, and pipe tobacco. All merchandise is shipped by mail directly to the consumer. The amount purchased by dealers and jobbers of the three companies, The Bonded Tobacco Co., Inc., Carl Henry, Inc., and the Guardian Tobacco Co. is negligible. The gross business of the four companies in cigarettes in the year 1948 amounted to \$60,000. Assuming that the average carton sold for \$2.50 (allowance must be made that the Turkish blend cigarettes are only packed five packages to the carton) it would mean that 24,000 packs were sold throughout the year. At an average of 3 cents a pack for State stamps all the States in the Union would have received the grand sum of \$720 between them.

As can be seen from the above, these companies were not formed for the purpose of selling denicotined cigarettes to avoid any State taxes. As a matter of fact the cigarettes that they sell in the State of New York all bear New York State stamps. Lincoln & Ulmer, Inc., the manufacturer, assumes the New York State 2 cents tax on each pack. The 2 cents a pack tax on cigarettes, in New York State, which sales are small, is not charged to the customer by the Bonded Tobacco Co., Carl Henry, or Guardian Tobacco Co., in view of the fact that the manufacturer, Lincoln & Ulmer, Inc., absorbs that tax.

There would be no opposition by these four companies to the bill now pending in the Senate Finance Committee if their sales were not wholly made directly to consumers. A jobber naturally is in a position in the various States, to State stamp the cigarettes. However, the volume of the four companies, let alone any individual one of the companies, is so small that no jobber or dealer would handle the products. As a matter of fact, after being in business 25 years the volume is still very small and that is due entirely to the fact that this is a specialty not readily obtainable in ordinary channels. I dare say no member of this committee ever heard of or smoked the products of these four companies. When any dealer or jobber has made purchases of the various denicotined brands it has only been because some customer has requested it but they do not stock it, they do not attempt to push the products, the volume being so small the cost of distribution would be out of proportion to the volume.

It is noteworthy to know that the bulk of the sales are made in small towns and for that additional reason no jobber or distributor would be interested in stocking this merchandise—the turn-over would be so small that it wouldn't pay. As a matter of fact, Lincoln & Ulmer, who sell very little to consumers directly, sell very little directly to dealers and jobbers. Their sales are practically limited to these three companies.

Over the period of 25 years, the three companies, The Bonded Tobacco Co., Inc., Lincoln & Ulmer, Inc., and Carl Henry, Inc., have been in the hands of the same operators. The fourth company, the Guardian Tobacco Co. was formed in 1942 and is still in the same hands. The four companies have spent over several hundred thousands of dollars in advertising their denicotined tobacco products. The results of the loss of the cigarette business is too great to be absorbed by the other products. Not only would there be a financial loss to these four companies from the passing of this bill but assuming that these four companies desire to stay in business it would be far too costly for the amount involved for these companies to list the names and addresses of their customers in the various States, submitting the names and the addresses to the tax authorities in the several States and in the second place when these customers begin receiving bills for 20, 30, or 40 cents monthly for taxes for the cigarettes that they have purchased from these four companies, rather than be burdened with this nuisance they would promptly cancel their orders and forego smoking these brands.

It must be borne in mind that the customers of these four companies are people who are smoking a denicotined brand of cigarette because of either a doctor's

orders or because they are subject to nicotine poisoning. They do not appeal to the younger smoking public but mostly to people along in years who have been advised to cut out smoking or smoke cigarettes from which the bulk of nicotine has been removed. The customers of these companies come from people in every walk of life.

The cost to the States of checking this information and sending out bills or collectors to collect this small tax would be all out of proportion to the amount the States would receive. The Federal Government would have nothing to gain financially from the passage of this bill but on the contrary would lose that little revenue they now receive on the internal revenue tax paid on the cigarettes and from the income taxes and franchise taxes that the four companies now pay.

As a matter of fact, Lincoln & Ulmer, Inc., and the other companies have stated that so far as they are concerned they would be willing to give up their dealer and jobber business, if necessary, in order that the consumer business could continue.

The Federal Trade Commission and the Post Office have on one or two occasions looked into the business of these companies but no order has ever been issued by these Government agencies against these companies prohibiting the sale of their products. Needless to say, this is not regarded as an endorsement of the products of the various companies.

A package of the cigarettes of each of the four companies and a copy of their advertising matter is submitted with this memorandum to the members of this committee in the sincere belief that a visual exhibit will be far more effective and have greater weight than anything that can be written.

The mail-order houses that I represent and, of course, others as well, spend many thousands of dollars a year to obtain names of mail-order buyers. The average cost today, in my four companies, is about \$6 a name. You can readily appreciate that the list of these names falling into the hands of the wrong people would cause an irreparable financial loss to my clients.

The cost to our companies of preparing a list monthly of the names and addresses of cigarette buyers to send to the various State tax commissions is all out of proportion to the amount of money the States would receive and the profits we make. Many customers purchase as little as four packages of cigarettes. The tax on four packages, at 3 cents a package, would be 12 cents.

In view of the foregoing, it is respectfully submitted that this bill is undesirable and should not be passed.

The CHAIRMAN. Mr. Jenkins, is it agreeable for Mr. McNeer to come on at this time?

Representative JENKINS. Yes. He is a very distinguished lawyer who comes from my section, and I would be glad to accommodate him as far as we are concerned.

The CHAIRMAN. All right, Mr. McNeer. We will be able to hear you at this time.

Mr. Conlon had not quite completed his statement?

Representative JENKINS. No. He wants to appear again.

The CHAIRMAN. We will call upon him next.

#### **STATEMENT OF SELDEN S. McNEER, COUNSEL FOR AMERICAN SALES AGENCY, INC., HUNTINGTON, W. VA.**

Mr. McNEER. I am appearing here on behalf of the American Sales Agency, for whom I am counsel. That company is a West Virginia corporation and is engaged largely but not exclusively in the mail-order cigarette business. It does not sell to dealers, nor does it sell to anyone for resale, but solely to the ultimate consumer. It has accumulated a large list of names and addresses of prospective customers from various sources, and this list is of great value to it. It mails an advertisement to the prospective customer offering him cigarettes by the carton at so much per carton. If interested, the customer fills out the order blank, attaches his check or money order and mails it to

the office in Huntington. The cigarettes are then mailed, postage prepaid, to the customer. Most, but not all, of its customers are located in States imposing a sales or use tax on cigarettes. It sells a substantial amount of cigarettes in States that have no tax on cigarettes, either sales or use tax.

The company can sell cigarettes at a relatively low price for two reasons: first, because it handles a large volume of cigarettes and is, therefore, enabled to buy them directly from the manufacturer and obtain a better price than the retailer can obtain; and, second, because it pays no State sales or use tax on the cigarettes it sells.

Senator MILLIKIN. Mr. Chairman, may I ask a question at this point?

The CHAIRMAN. Certainly.

Senator MILLIKIN. Just for my own information, do many municipalities have their own cigarette tax? I know we have one in Denver, and I just wondered whether that was a widespread practice.

Mr. McNEER. I am informed, Senator, that many of them do. That is my information. I can't speak from my own knowledge very extensively.

Senator MILLIKIN. Thank you.

Mr. McNEER. A large number of other companies, located in different parts of the country, are engaged in the same business. This business has grown in recent years because of the exorbitant taxes that are being laid on cigarettes by many of the States and the high prices maintained by the cigarette wholesaler. This business is perfectly legal—in fact, it is substantially the same as the business conducted by Sears, Roebuck & Co., Montgomery Ward, and other large mail-order houses. They too buy most of their merchandise direct from the manufacturer and by eliminating the wholesaler and doing a large volume of business are able to sell at relatively low prices. They do not pay State sales or use taxes on interstate shipments except where they maintain a retail store within the State and the order is taken there.

I checked that statement with representatives of both Montgomery Ward and Sears, Roebuck & Co., and it is absolutely correct as to Montgomery Ward. They tell me that they do not pay any sales or use taxes, that is, State sales or use taxes, on orders that come in through the mail from other States. Sears, Roebuck & Co. told me that they do in some cases, and do not in other cases. They have attached to their order blank a statement informing the customers to the amount of the State sales or use tax, and some of them send it in and some of them do not send it in. They do not decline the order because the tax is not included; they mail it out just the same. That is the information I got from these people Monday.

I am informed that in the last few years pressure has been brought to bear on Congress to adopt legislation designed to put the cigarette mail-order house out of business. This pressure obviously has not come from the American public, the consumer of the cigarettes; he would oppose the legislation if given the opportunity. It has come from two other sources: First, the National Association of Tobacco Distributors who are anxious to eliminate competition from mail-order houses; and, second, taxing authorities from some of the States that have substantial sales or use taxes on cigarettes. The Jenkins bill is the result of this pressure. This bill would require any person

selling or disposing of cigarettes in interstate commerce, whereby such cigarettes are shipped to persons other than a licensed distributor located in a State taxing the sale or use of cigarettes, to forward to the tax administrator of the State into which the shipment is made, information with respect to each shipment, containing the name and address of the purchaser of the cigarettes and the quantity, brand, et cetera. It provides that anyone violating the act shall be fined not more than \$1,000, or imprisoned not more than 6 months, or both.

In the States that have a tax on the sale of cigarettes unaccompanied by a use tax, this act would accomplish nothing except to impose useless expense upon the mail-order house, since the sale, being made in interstate commerce, would not be subject to the State sales tax. The Supreme Court has held that in the case of *McLeod against Dilworth* mentioned by Judge Arnold on yesterday. It seems to be the idea of the proponents of this legislation, however, that in States that have a use tax on cigarettes as well as a sales tax, the taxing authorities, upon receiving information from the mail-order house that a resident of the State has bought a carton of cigarettes through the mail upon which the States tax has not been paid, would proceed against the cigarette purchaser for the collection of the use tax and perhaps also subject him to criminal prosecution, and this would put an end to the ordering of cigarettes through the mail in such States. The idea is that other States which have a sales tax only would probably add the use tax, and thus the sale and shipment of cigarettes through the mail would end.

I may add that I don't think anyone can say positively one way or the other whether the use of tax with respect to interstate shipments of this sort would be upheld by the Supreme Court of the United States. Judge Arnold covered that question yesterday, and I shall not go into it. But certainly the sales tax may not be imposed upon interstate shipments of this character.

The mail-order cigarette house has incurred the bitter enmity of the National Association of Tobacco Distributors, Inc., 200 Fifth Avenue, New York, because it enables the cigarette smoker who is willing to buy cigarettes by the carton and take the trouble to send an order by mail, to buy at a lower price than the local retailer offers, just as the West Virginia farmer can order a fishing rod or shotgun from Montgomery Ward and often get a better price than he can from his local hardware merchant. The farmer benefits from Montgomery Ward's volume of business and also saves the State sales tax.

Senator MILLIKIN. Mr. Chairman?

A very distinguished Senator yesterday—I do not subscribe entirely to the sentiment involved—said that Gene Talmadge, when he was Governor of Georgia, said that the poor man had three friends: “God, Montgomery Ward, and Gene Talmadge.”

The CHAIRMAN. To keep the record straight, I think it should be stated that that story was attributed to Judge Catts of Florida.

Mr. McNEER. The principal spokesman for the National Association of Tobacco Distributors, Inc., is Jerome Kaufman, who I see is on the agenda here for today, and no doubt is in the room, I am going to quote from him; although I have no quarrel with him whatever, and I know he is just trying to do the best he can for his association, just as I am trying to do for my client. I am informed that this association

is the real moving force behind the Jenkins bill, and that its representatives have made vicious attacks on the mail-order houses, referring to them as bootleggers, and as engaging in an illicit business. I am also informed that this association for a number of years has been engaged in a double-barreled legislative program, the objects being (1) to have Congress pass the Jenkins bill to eliminate competition from mail-order houses, and (2) to get as many States as possible to make it illegal for anyone to sell cigarettes at reduced prices under certain circumstances; the so-called fair-trade acts.

I have before me a copy of an address delivered by Mr. Kaufman at the annual convention of the National Association of Tobacco Distributors, Inc., April 26, 1949, held in New York City, in which he reviews this program and is somewhat boastful, and justly so, as to the success of his campaign. He said:

\* \* \* we have been eminently successful in having unfair cigarette sales acts enacted in several States this year \* \* \*.

He also said:

The remarkable accomplishments of the NATD in furthering unfair sales acts throughout the country is a matter of record and recognized by every tobacco distributor. During the past year, five unfair cigarette sales acts were enacted in Georgia, Tennessee, New Mexico, Indiana, and Iowa. Others are still pending in approximately 10 additional States. To those familiar with the difficulty of the task involved in getting a law passed by any legislature, it must seem miraculous that any one group should have been able to have this legislation placed on the statute books of five separate States during the same legislative session.

Three full-time field directors, in addition to NATD national office talent, were dispatched to States throughout the country to advise and assist in the drafting of the laws.

Later in his address he discusses the progress being made with respect to the Jenkins bill, the other part of the program. He explained that it was passed by the House of Representatives during the Eightieth Congress, but did not get by the Senate Finance Committee, and he tells of some of the activities of his association in behalf of this legislation.

As you gentlemen know, of course, the so-called unfair cigarette sales acts that have been adopted in many of the States, and similar laws, are designed to hold up the price of cigarettes, and they often apply as well to other articles. They make price reduction under certain circumstances a criminal offense. They are certainly in direct opposition to free trade.

The Jenkins bill is designed to destroy the mail-order cigarette business so that the citizen will have no choice but will be forced to buy cigarettes in his own State at whatever price the National Association of Tobacco Distributors may fix, plus whatever tax the State may levy. In other words, so far as cigarettes are concerned, we shall have a tariff wall around each State. We shall have taken a long step toward Balkanizing the United States of America.

If Congress adopts this policy with respect to cigarettes, if this precedent is set, where will it stop? Obviously cigars should logically be added to cigarettes, and if this law is passed, undoubtedly will be, since some States already have sales and use taxes on cigars. And why stop there? Why not apply it to all articles? Most of the States have general sales taxes and some of those sales taxes also have a use tax hooked onto them. Should cigarettes and cigars be discriminated

against in favor of other tobacco products, or articles of wearing apparel, jewelry, and so forth? Will each State undertake to establish its customs inspectors at every road leading into the State? This sounds absurd, but if the thing is done to cigarettes, where is it to stop?

Perhaps consideration should be given to the cost of this legislation to the Federal Government. Obviously, it will raise no revenue, nor will it otherwise benefit the Federal Government. On the contrary, it will cost a substantial sum for enforcement, and a loss of income to the Post Office Department will be suffered. It is possible that a loss of internal revenue from the Federal tax on cigarettes will result.

In the debate in the House of Representatives, the supporters of the bill argued that there would be no cost of enforcement, that the mere passage of the act would put the cigarette mail-order people out of business, and nothing further would be necessary. The fallacy of this argument is so apparent it needs no comment. It is impossible to make an intelligent estimate or guess as to what the cost will be, but certainly there will be some cost.

As to the loss of income by the Post Office Department, we can make some estimate. I take these figures from the debate in the House. In the House debate, it was stated that the Post Office Department's loss from the elimination of parcel-post shipments of cigarettes would amount to between 2 and 3 million dollars per year. To this, of course, must be added additional postage, because each order comes through the mail first class, and most orders are solicited through the mail. I am advised that the American Sales Agency, my client, spends approximately \$50,000 a year for postage.

Senator MILLIKIN. What does it cost an efficient organization to send out a first-class-mail letter?

Mr. McNEER. A first-class mail letter?

Senator MILLIKIN. I mean, all costs.

Mr. McNEER. It is my information, sir, that the original advertisement by the cigarette concern—and I have one here, and it has none of the vicious language that some of the people referred to yesterday—is sent by third-class mail. It is not in a sealed envelope.

Senator MILLIKIN. I am not talking about the advertisement. I will not press you unless you have some experience with it, but I am just trying to figure out what is the cost of addressing an envelope, buying the envelope, putting a stamp on it, putting it through all of the rigmarole necessary to drop it in the mail bag.

Mr. McNEER. I am sorry, sir, but I cannot answer that with any degree of accuracy. It would just be a guess. It would be worthless.

Senator MILLIKIN. Let us pass it.

Mr. McNEER. I have been told, though, by these people I represent, that the cost of the postage and the work of mailing out the advertisements, and so forth, approximately equals the wholesaler's profit, that the wholesaler is eliminated by these people, and that is the reason the National Association of Tobacco Distributors does not like them.

I am told also that the Congress is giving some consideration to increasing the parcel-post rates; and, of course, if that should be done, it would add to the Federal revenue.

I am also told that parcel post is now carried at a loss. Of course, no additional employees are required because of the mailing of ciga-

rettes, so whatever income is cut off from this source is necessarily a dead loss.

It seems to me that a very real danger to the Federal Government was pointed out by Mr. Sasser of Maryland in the debate in the House. I want to call your attention to this one other thing. He opposed the act because he thought it endangered the Federal revenue from the tax on cigarettes. He stated that the farmer now gets only 2 cents for his contribution to a package of cigarettes, the Federal Government 7 cents on each package, and now the States have come in with their sales and use taxes running all the way from 1 cent to 8 cents per package. The point Mr. Sasser made is that if this act should be passed, it would build a tariff wall around each State. It would eliminate competition from interstate sales, and each State could then from year to year raise its taxes without fear of competition, or without any danger of its citizens buying cigarettes elsewhere. The wholesome competition of the mail-order houses would be gone. Finally, the point will be reached where the volume of cigarettes sold throughout the country must be substantially reduced, thus causing loss of revenue to the Federal Government. Mr. Sasser feared that the passage of this bill would go a long way toward "killing the goose that laid the golden egg." He added:

Now, let us move cautiously in this productive field of revenue. Let us move cautiously, because if we do not, true to the chart sheet of every instance where any one source has been overtaxed, the source of revenue dries up. Let us move slowly, because the real purpose of this legislation is not to bring in the Government to help States collect this tax, as claimed, but it is to lock it so that they can pyramid more and more State taxes without any possible competition at all.

It is obviously true that the cigarette mail-order house is benefiting to some extent from the exceedingly heavy taxes some of the States are levying upon cigarettes; incidentally a field of taxation which for long years was regarded as belonging exclusively to the Federal Government. It is also obviously true that these people will be badly hurt if this act should pass. But no favors need be asked for them or by them. They may be forgotten entirely in considering the advisability of adopting legislation of this type. The bad precedent such a law would undoubtedly establish has already been pointed out, and if specific classes of people are to be considered, the two groups that certainly should not be overlooked are the cigarette-consuming public and the farmer who raises tobacco. With wholesome competition from the mail-order houses eliminated, the average cigarette smoker will, in many States be forced to pay exorbitant prices for cigarettes, he will smoke fewer cigarettes, and this will affect not only the Federal revenue, as stated above, but it is bound also to affect the farmer who grows the tobacco.

The consumption of cigarettes has been on the upgrade continuously for many years, but the trend may be reversed as a result of unfair prices and taxation, and this event the farmer who grows the cigarette tobacco will certainly be the ultimate and greatest loser.

Thank you very much, gentlemen.

The CHAIRMAN. Any questions, gentlemen?

Thank you very much, Mr. McNeer.

We will call on Mr. Conlon again, if he has not finished. We have a great number of witnesses, and would be very glad if you would not repeat any arguments, because we desire to close today, if we possibly can.

**STATEMENT OF CHARLES CONLON, EXECUTIVE SECRETARY,  
NATIONAL TOBACCO TAX ASSOCIATION, CHICAGO, ILL.—  
Resumed**

Mr. CONLON. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the committee: H. R. 195 involves one legal question. That is whether Congress has the power to enact this regulation of commerce. And some of the witnesses yesterday have testified of the numerous instances where Congress has so acted; that is, the Fair Standards Act, convict goods, the misbranded wool products, adulterated food products, commodities that have to be shipped in standard barrels, the Webb-Kenyon Act, the Connally "Hot Oil" Act, and several others of a like nature. And the power of Congress to regulate commerce in this manner has been upheld on a number of occasions, for, as legal commentators have said, Congress' power is plenary over interstate commerce.

I wish to say that it was in one of these cases upholding the power of Congress to regulate commerce, the Kentucky Whip and Collar case, that Chief Justice Hughes said:

Congress has formulated its own policy and adopted its own rule. The fact that it adopted this rule in order to aid the enforcement of valid State laws affords no ground whatsoever for constitutional objection.

Now, as to that one point, the power of Congress to regulate commerce, we submit that it has the full power.

There has been one other point brought in here in connection with H. R. 195, and that is the question of the State's jurisdiction to tax, and the possibility that the United States will be assisting in the enforcement of unconstitutional laws if H. R. 195 were enacted. I submit that H. R. 195 itself does not add one bit to or subtract one bit from State tax jurisdiction. That exists, as it is now defined by the United States Supreme Court, and it would be the same today as it would be at any time in the future, if H. R. 195 were passed.

Now, the basis of the States for taxing the receipt of cigarettes by consumers from sources outside the State, in direct mail-order shipments to the consumer, is the use tax. And we submit that the use tax has been unequivocally sustained by the United States Supreme Court as a proper exercise of the State taxing power. And we traced yesterday, if you will recall, the development of the use tax, as it applied, for example, to gasoline, which was taken from storage within a State, and put in the tank of an air line operating in interstate commerce. We mentioned the case in Washington where the basic validity of the use tax was lengthily examined by the United States Supreme Court, and it was upheld as to products and supplies that contractors brought into the State to use in the performance of contracts.

In the case of *Southern Pacific Railroad Company v. Gallagher*, shortly thereafter, the court upheld the use tax as it applied to articles which were brought into the State for use in an instrumentality of interstate commerce. And in the Pacific Telephone case, the very same ruling was upheld by the United States Supreme Court, that is, as to the tax on material which was used directly in telephone lines engaged in interstate commerce.

Then we had the illustration of the further extension of the power of the State to require the person who took the order and had it shipped

from outside the State to collect the tax from the consumer at the time that delivery was made. In other words, the consumer was under the basic legal liability to pay the tax, but the retailer had to collect it from him and turn the money over to the State. And that principle was extended to the mail-order cases.

The opponents of this bill haven't been able to cite any instance where a genuine use tax was thrown out in the United States Supreme Court. They mention the Dilworth case. That involved a sales tax. Under the construction of the Arkansas law, only a sales tax was in the litigation. The State does not have a use tax.

Now, we submit that the use tax is necessary. In the course of the hearings here, we repeat, there has not been brought out a case where a real use tax has been held invalid. On the very same day that the Dilworth case was decided, on a set of circumstances which involved the very same facts, by the same court, in an opinion written by the same justice, the State Tax Commission of Iowa was upheld in its request to require the user to pay the tax to the retailer who solicited the order through the means of his salesmen circulating about the State. That is in the case of *General Trading Company v. Iowa Tax Commission*.

I submit, Mr. Chairman, that on the very same day, in a case involving the very same factual situation, where a real use tax was involved, the court clearly upheld the power of the State to require that the tax be paid, to require that the person who took the order and shipped it from a point outside the State collect the tax and remit it to the State.

That is the type of case under which the States seek to tax these users of cigarettes who get them from sources outside the State. And we submit that it is very clear that there is no constitutional question whatsoever involved. The States have that power today, and they would have it if the Jenkins bill were passed, and they will still have it if the Jenkins bill does not pass. It is not a case of a property tax or one of those old taxes that discriminated against interstate commerce or the drummer; but this is a tax which applies on the consumer, and as far as it is practicable where business effects are concerned, it puts all competition inside and outside the State on the same basis.

We have submitted order blanks to show that mail-order business in general, not cigarette mail-order business, but mail-order business in general collects and pays over these taxes. And they have been doing it for some years. And they have prospered because they have competitive advantages that small business does not have. But that advantage does not lie in the tax. And you have a demonstration of it here, Mr. Chairman. If the mail-order cigarette business has any competitive basis, has any competitive advantage over the ordinary small store distribution of cigarettes, it too will prosper if it is on the same basis with the local merchant or the local distributor, as far as the payment of taxes is concerned.

However, if the only advantage that that business enjoys is this tax advantage, which is a legal liability of the purchaser now, in 30 of the States with the use tax, then it will not prosper.

The gentleman this morning raised this question of enforceability, of how many people are needed.

Well, according to the statements made by the mail-order people themselves, there is not going to be any question of enforcement, if

H. R. 195 is passed. In this advertisement that was circulated generally to the States that had tobacco taxes, one of the mail-order sellers said, "If by some remote chance such a law were passed, we would discontinue this business before we would comply."

That is the sum and substance of the whole matter. If there is a competitive advantage, the mail-order business can prosper. But if it is only the tax—and from all we can see it is only the tax—then it will not prosper, it will dry up, and no enforcement problem will remain.

Senator WILLIAMS. In the event that it did not dry up, has there been an estimate by the Treasury Department or the Justice Department as to the cost of administering the program?

Mr. CONLON. No, sir. But let me say this: The various State tax departments now have men in the field. They have investigators checking up all the time. It is a very simple thing to determine that A Company is sending cigarettes into a State, and if it is not reporting them, it would be a simple matter to inform the United States district attorney that that is the situation. And this is an open and shut statute. There is no room for argument about it. Either you are doing it or you are not doing it. If the man is violating the law, I don't see the possibility that he will continue with impunity to disregard the warning of the United States district attorney's office.

I think that is all.

The CHAIRMAN. Thank you very much, sir.

(The supplementary brief of Mr. Conlon is as follows:)

SUPPLEMENTARY BRIEF SUBMITTED BY CHARLES F. CONLON, EXECUTIVE SECRETARY, NATIONAL TOBACCO TAX ASSOCIATION, CHICAGO, ILL.

This brief touches on several points which opponents of H. R. 195 have raised in objecting to the bill:

(1) It is objected that the simple language of H. R. 195 conceals the fact that in this instance the exercise by Congress of its power to regulate commerce would be revolutionary in its effects on intergovernmental relations.

There is nothing revolutionary in H. R. 195. Congress has exercised its power to regulate commerce in numerous instances where State laws were unavailing, it has used its powers over interstate commerce specifically to enable the enforcement of State laws and it has several times enacted legislation specifically to assist the States in enforcing their tax laws.

GENERAL REGULATION OF COMMERCE

Congress has exercised its power to regulate commerce, even to the extent of total prohibition on transportation in interstate commerce, e. g. lottery lists (15 U. S. C. 387) and certain drugs (18 U. S. C. 396). The various fair standard statutes, e. g. relating to the shipment of convict-made goods (18 U. S. C. 396a); forbidding transportation of mis-branded wool products in commerce (15 U. S. C. 68a); forbidding the introduction into commerce of adulterated or mis-branded food products (21 U. S. C. 38); and forbidding the shipment of dry commodities in other than standard barrels (15 U. S. C. 235) are essentially legislative methods to prevent a few unethical or sub-standard manufacturers or trader from undermining the minimum but higher standards maintained in most States.

The Federal statute prohibiting, with certain exceptions, the mailing of firearms (18 U. S. C. 361) was enacted after the city of Detroit which had adopted an ordinance banning traffic in firearms, appealed to the United States Post Office Department to prevent evasion of this ordinance through the medium of shipments by mail.

## TO ASSIST THE ENFORCEMENT OF STATE LAWS

Acts of Congress adopted for the specific purpose of assisting in or enabling the enforcement of State laws other than tax laws are:

(a) The Webb-Kenyon Act of March 1, 1913 (27 U. S. C. 122) prohibiting the shipment of intoxicating liquor into a dry State in violation of State law.

(b) The Plant Inspection Act of March 4, 1915 (7 U. S. C. 166) providing that parcels containing plants or plant products addressed to a State having terminal inspection facilities must be delivered to these inspection depots by the Post Office Department for approval before final delivery is made to the addressee.

(c) The Post Service Act of March 3, 1917 prohibiting the use of the mails for liquor advertising or solicitation of orders for delivery at any place in any State where local law forbade the advertisement, sale or solicitation of orders for liquor.

(d) The Liquor Enforcement Act of 1936 (9 U. S. C. 223) prohibiting the transportation of liquor into a dry State.

(e) The Connally "Hot Oil" Act (15 U. S. C. 715) prohibiting the transportation in commerce of oil produced in excess of the allowables under State law.

## TO ASSIST THE ENFORCEMENT OF STATE TAX LAWS

Acts of Congress adopted for the specific purpose of assisting in or enabling the enforcement of State tax laws are:

(a) The Costigan amendment to the Revenue Act of 1936 (Internal Revenue Code, sec. 55b) wherein it is provided that all Federal income returns shall be open to inspection by any official body or commission charged with the administration of any State tax law.

(b) The Hayden-Cartwright Act (Act of June 16, 1936, as amended, 4 U. S. C. 12) wherein the officer in charge of a post exchange or similar agency on Federal territory is directed to submit a written statement as to taxable gasoline sold and to remit the tax on same to the State tax administrator.

(c) The Buck Act (Act of Oct. 9, 1940, 4 U. S. C. 13) wherein it is provided that no person shall be permitted to deny liability for the payment of a State sales or use tax, or income tax on the ground that the transaction took place or the income was earned on a Federal area.

It is also pertinent that the Federal estate tax levied under the Revenue Act of 1926 was for all practical purposes in assistance of State inheritance and estate taxes. Eighty percent of the tax was in effect paid to the State where the decedent lived through the medium of a crediting device. The reason for this action was Congress' desire to prevent the establishment of tax havens and consequent competition among the States for well-to-do residents.

(2) It is argued that H. R. 195 sets a disastrous precedent for our competitive economy in that it will indirectly subject interstate sales to taxation contrary to the Federal Constitution and the decisions of the United States Supreme Court.

The fact is that the precedents for the taxation of transactions in interstate commerce date back several years. General sales and use taxes are collected on these transactions every day without any indication yet of approaching disaster.

## THE USE TAX

The use tax as applied to general commodities sold in interstate commerce or brought into a State for subsequent use by an instrumentality of interstate commerce has been unequivocally sustained by the United States Supreme Court.

*Henniford v. Silas Mason Co.* (300 U. S. 577 (1937)).

*Southern Pac. Co., v. Gallagher* (306 U. S. 167 (1939)).

*Pacific Tel. & Tel. Co. v. Gallagher* (306 U. S. 182 (1939)).

If the seller has an office in the taxing State, or if he even has salesmen soliciting orders which are sent to his place of business outside the State for acceptance he, the seller, is obligated to collect the use tax on goods shipped to consumers within the taxing State, if the State statute so provides.

*Felt and Tarrant Mfg. Co. v. Gallagher* (306 U. S. 62 (1939)).

*General Trading Co. v. Tax Commission of Iowa* (322 U. S. 335 (1944)).

If the seller is a mail order firm and has some type of sales place in the State he is obligated to collect the use tax on sales made to consumers in the taxing

State even though the mails were used exclusively as the medium of the transactions, and orders were mailed directly by the customer to a point outside the State and the order was filled from that point.

*Tax Commission of Iowa v. Sears, Roebuck & Co.* (312 U. S. 359 (1941)).

Compliance with this requirement is now a matter of course. For example, Sears, Roebuck & Co.'s mail order blank contains special instructions for including the tax which is collected from the customer along with the purchase price.

Since H. R. 195 is concerned only with traffic in cigarettes it should be noted here that the validity of a specific cigarette use tax has been upheld as a matter of State law in several cases.

*Ex parte Kimberlin* (86 S. W. (2) 717 (1935) Texas).

*Sheppard v. Musser* (92 S. W. (2) 219, appeal dismissed, 299 U. S. 513 (1935) Texas).

*Head v. Cigarette Sales Co.* (4. S. E. (2) 203 (1939) Georgia).

*Mealey v. Hamm* (decided Dec. 15, 1948 by the Circuit Court of Montgomery, Ala.).

#### THE GENERAL SALES TAX

The use tax became widely used as a complement to the sales tax in order to prevent widespread evasion of general sales taxes by various devices, for example, by having an order formally accepted outside the taxing State thus to convert the local transaction into an interstate transaction protected by the cover of the immunity presumed to be granted to interstate commerce.

Ironically enough, it subsequently developed that sellers in many of the specific types of transactions covered by the use tax could be required to collect the sales tax even though orders were accepted and shipments made from points outside the State. In short the application of a nondiscriminatory sales tax was upheld as to transactions in interstate commerce in a series of opinions handed down by the United States Supreme Court on January 29, 1940. These cases were:

*McGoldrick v. Berwind-White Coal Mining Co.* (309 U. S. 33).

*McGoldrick v. A. H. DuGremier, Inc., and McGoldrick v. Tarrant Mfg. Co.* (309 U. S. 70).

*Jagels, A. Fuel Corp. v. Taylor* (309 U. S. 695 (per curiam)).

#### NATURE OF CONSUMERS' SALES TAXES

The generalizations in some of the older cases on the immunity of interstate commerce from taxation must be limited to the taxes then before the court. There are fundamental differences between the taxes invalidated in the older cases and the State sales and use taxes which were widely adopted after the depression. The older cases, on the whole, involved attempts by the States or localities to impose taxes, the real incidence of which was on persons outside their jurisdiction, and to impose discriminatory burdens on outside traders who sought to sell or solicit locally. On the other hand, the general sales and use taxes, the cigarette and liquor taxes, and similar excises imposed by the States today are levied in economic fact on the consumption of these commodities or services within the jurisdiction. The seller is under a duty to collect the tax and pay it over to the State but it is the purchaser or consumer who actually bears the tax. The tax is in fact added to the price he pays.

#### TAX AFFECTS ALL MERCHANTS EQUALLY

The only way in which this type of tax affects competition is in the case where one merchant can sell to the consumer without collecting the tax from him, whereas his rival has to collect the tax. H. R. 195 corrects that situation. All other competitive factors remain unaffected. Each merchant may calculate his best competitive price and it is to this price that the tax is added.

The precedents, such as they are, which it is claimed H. R. 195 will create, are with us and have been with us for some time in the much more important field of general merchandising. Inspection of one of the mail order forms used by Sears, Roebuck & Co., a leading mail-order firm, will dispel any ideas to the contrary. H. R. 195 would apply the same principle to a special segment of merchandising not otherwise covered

#### STATE LAWS MUST BE APPLICABLE TO INTERSTATE SALES

Two cases mentioned by the opponents of H. R. 195, *McLeod v. J. E. Dilworth Co.* (322 U. S. 327 (1944)), and *Babcock v. Barrett* decided by the Circuit Court of

Cook County, Ill., on October 1, 1948, do not involve the basic constitutional points just discussed. Both turn on the interpretation by the State court of the State statute on which the actions were based.

In the Dilworth case the Arkansas Supreme Court interpreted the sales-tax law to levy only a sales tax and not a use tax. The court held, moreover, that the sales tax law was applicable only to sales made within the State. Since the statute had been authoritatively interpreted by the State court the United States Supreme Court refused to disregard this interpretation and treat it as a use tax. (The Arkansas Legislature had on several occasions defeated a proposed use tax.)

In the Babcock case the provision of the statute involved was a section added by the legislature after the original passage of the Cigarette Tax Act. The amendment was intended to serve as a use tax by indirection. Instead of adopting an outright use tax the legislature provided that anyone who bought more than 10 cartons of cigarettes for consumption should be deemed to be in the business of selling cigarettes. This presumption was adjudged arbitrary and unreasonable by the court.

(3) H. R. 195 would enable the States by indirection to collect an unconstitutional tax.

The opponents make the argument that the Dilworth and Babcock cases show that these use-tax laws are unconstitutional as applied to this type of transaction and if information on sales is supplied it means that the persons involved will be subjected to the harassment of going to court to have the tax claim dismissed.

The analysis just made shows the unquestioned power of the State to require compliance with sales and use taxes on transactions involving interstate commerce if the State law so provides. Dilworth and Babcock indicate only that a State cannot enforce a use tax until it enacts one.

(4) The requirement that a list of shipments be forwarded to the tax administrator violates the search and seizure provisions of the Federal Constitution; the list of shipments during a given month being tantamount to the list of customers which is a valuable property.

The mail-order shipper may do one of two things; he may register and pay the tax as do many out-of-State dealers who operate through established trade channels or he may send information on his shipments each month.

As a matter of fact, in the administration of gasoline, liquor and tobacco taxes, information on out-of-State sales is required to support the exemption commonly given to export sales under State excise laws. It is provided regularly and exchanged among the State tax administrators for the express purpose of preventing tax evasions.

State tax statutes commonly require that this type of information be furnished and authorize its disclosure to tax administrators of other jurisdictions. The practice has been upheld against the objections made by the opponents of H. R. 195.

*Dixie Wholesale Grocery, Inc. v. Martin* (278 Ky. 705, 129 S. W. (2) 237 (1939), cert. den. 308 U. S. 609).

*Roberts Tobacco Co. v. Department of Revenue* (decided by the Supreme Court of Michigan on October 4, 1948, — Mich. —).

Mail-order sellers of cigarettes in Indiana were denied relief by the United States District Court, N. D. Indiana, in an action to enjoin the Indiana cigarette tax administrator from sending information on their shipments to other State tax administrators.

*Edwards Sales Co. v. Indiana Alcoholic Beverage Commission, and Rolin Sales Co. v. Indiana Alcoholic Beverage Commission*, (decided January 27, 1948).

(5) If the mail fraud indictments in the New Orleans case reported in the press recently are sustained the State tax administrators do not require H. R. 195 to enforce their taxes.

The indictments against Anguzza and others involve facts which are not found in the ordinary cases of mail-order purchases. It is alleged by local officials (1) that the recipient in Louisiana was reselling the cigarettes; (2) that there was a conspiracy to violate the Louisiana law; (3) that instruments for counterfeiting the Louisiana revenue stamp imprint were seized along with the contraband cigarettes; and (4) that special steps were taken to conceal the fact that the shipping cartons contained cigarettes.

On the other hand, the ordinary case confronting the tax administrator involves a purchaser who simply orders by mail for his own consumption.

(6) There is no reason to limit H. R. 195 to cigarettes. It should be extended to all taxable commodities.

The proponents of H. R. 195 request the assistance of Congress in meeting the cigarette problem because it is a comparatively highly taxed commodity, widely used and easily purchased by mail in quantities sufficient to last a week or several weeks with a consequent heavy loss in tax revenue. The same conditions do not exist in connection with other taxes where adequate enforcement is attained by various means.

(7) The enactment of H. R. 195 abridges the citizen's right to trade where he pleases and will eventually mean the abolition of the whole mail-order industry.

H. R. 195 does not interfere with the citizen's privilege of trading in any market. He can trade wherever he likes although he will no longer be able to evade his tax responsibility by trading with mail-order cigarette firms which assure him in their advertising that their records are immune from inspection by State tax officials. As to the mail-order trade in general commodities it has been pointed out that consumers are already paying taxes on their purchases; the mail-order firms are collecting and remitting the tax to the taxing State.

(8) Other miscellaneous points have been urged against H. R. 195; that State laws are indefinite; that it would be impossible to know who is a licensed dealer, etc.

These objections have no substance. State cigarette laws are being enforced every day as a run of the mill proposition. Registered dealers located outside the State comply with the provisions and do so without difficulty. In many fields of taxation, e. g., tobacco, gasoline, beer, distilled spirits, a wholesaler must sell tax paid commodities unless he is selling them to a dealer licensed to assume liability to the State for the tax. They do business on that basis without difficulty.

(9) Many irrelevant points are urged against H. R. 195, for example, that the cigarette tax laws violate the uniformity clauses of State constitutions, that cigarettes are taxed at too high rates, that they are taxed much more, proportionately, than other commodities, that allowances granted distributors to compensate them for the cost of affixing stamps are too high, that penalties for violating State laws are too severe.

All of these points involve questions of State legislative policy and objections to them should be addressed to the State legislatures. It is the responsibility of the State legislature to determine the level of taxation in each State, as well as the general administrative provisions in each State's tax laws.

The CHAIRMAN. Mr. Jenkins, did you want to make a statement now?

Representative JENKINS. Senator, some of these men will have to go. I do want to make a statement, and I want to know if the committee is going to quit today at noon.

The CHAIRMAN. Yes, sir, we will have to quit at noon, or shortly thereafter.

Representative JENKINS. I shall take my time a little later, but I do not want to crowd anybody out.

The CHAIRMAN. We have a number of witnesses, and wish to make as much progress as possible.

Representative JENKINS. I would like to suggest to our witnesses, those who support this measure, that they be as brief as they can, consistent with their duties.

The CHAIRMAN. We will now hear from Mr. Joe M. Whitaker.

Mr. Whitaker, you are vice chairman of the Oklahoma Tax Commission?

**STATEMENT OF JOE M. WHITAKER, VICE CHAIRMAN, OKLAHOMA TAX COMMISSION, AND MEMBER OF THE EXECUTIVE BOARD OF THE NATIONAL TOBACCO TAX ASSOCIATION**

Mr. WHITAKER. Yes, Mr. Chairman.

The CHAIRMAN. You are here in favor of this bill?

Mr. WHITAKER. I am, Mr. Chairman.

Gentlemen of the committee, besides being vice chairman of the Oklahoma Tax Commission, I am also a member of the executive board of the National Tobacco Tax Association, which association is composed of the administrators of all the States taxing tobacco products, and I am chairman of that association's committee on cigarette tax enforcement. So that while I am more familiar with the problem as it applies to Oklahoma, I am also speaking for all of the 39 States that have been taxing cigarettes.

I can best illustrate the problem that these administrators have been facing by talking about the tax in Oklahoma. As I stated, 39 States have been taxing cigarettes. Delaware has just passed a tax, making it the fortieth State, but that does not apply until the 1st of July of this year.

Some \$375,000,000 was produced in these taxing States this last year from this source of tax. It has steadily grown from the inception, when it was first passed, in Iowa, and generally the States are going to it as a needed source of revenue. The raise of the revenue from cigarettes and tobacco taxes parallels the decline of the ad valorem source of revenue for local and State purposes.

The problem of the cigarette tax evasion developed along with the increase in the cigarette and tobacco taxes. That is, as more and more States came to that type of tax, and as the rates were increased, this system of evading the tax by mail order likewise grew with it.

This system is built on two propositions. One is the differential that they enjoy because of the tax, and the other is on the theory of the privacy and sanctity of the United States mail.

Incidentally, in passing I want to say that Oklahoma does have a use tax, so that any citizen in Oklahoma smoking cigarettes is liable to the paying of the tax.

Those in the business of mailing cigarettes to consumers encourage the violation of our laws. Now, as an illustration of these two principles, I cite the ad of the Joe Smith Beverage Co. That company was represented before the Ways and Means Committee, and I imagine will be represented here. There are two things that this illustrates. One is that they advertise that they are selling their cigarettes at wholesale prices. The other is the statement that—

our best reference is the fact that we are conducting our business through the United States mails, therefore it is strictly legal, and you are assured the privacy of the United States mails.

Thus inviting the citizens of Oklahoma to violate the Oklahoma law, and at the same time leaving with them the impression that they are not law violators. And the postal agency of the Federal Government is used, and advertised, as the means of breaking down the laws of Oklahoma.

The States have made every effort they could to enforce these laws, but they are helpless because of this protection that is given this arm of the Federal Government. And with every addition to the number of taxing States, the business has an increase of potential customers, so that if the entire 48 States enacted the tax, and there remained one island, such as the District of Columbia, the business would just simply reach its maximum potential.

With every increase in the number of taxing States, there is an increase in the potential customers.

The District of Columbia has a tax?

Mr. WHITAKER. They have adopted just recently a 1-cent tax; yes, sir.

It is generally estimated that the loss to these States by this means runs from 10 to 20 percent of the collected taxes. I think many States have greatly underestimated their loss.

In Oklahoma—and I am ashamed of these figures—we estimate a \$3,000,000 loss. We collect \$8,000,000, a little over \$8,000,000 a year.

Statistics are frequently misleading, but these are of some interest. The national per capita consumption of cigarettes in 1948 was 2,500 cigarettes per person.

In Texas, the per capita consumption of State tax-paid cigarettes was about 2,300.

Senator CONNALLY. What is that?

Mr. WHITAKER. Twenty-three hundred.

Senator CONNALLY. Twenty-three hundred in what?

Mr. WHITAKER. Twenty-three hundred in Texas per capita consumption of tax-paid cigarettes.

Senator CONNALLY. Twenty-three cigarettes?

Mr. WHITAKER. Twenty-three hundred.

The CHAIRMAN. Per year, I assume.

Mr. WHITAKER. That is right. In Oklahoma, the consumption of tax-paid cigarettes was 1,500; in Arkansas, slightly over a thousand. It is obvious that local conditions affect cigarette consumption, but it is felt that the people of Texas and the people of Oklahoma are comparable and that it would average about the same. Assuming that the per capita consumption of cigarettes from all sources was as high in Oklahoma as in Texas, and that our tax could have been collected on that total, over \$4,000,000 additional tax money would have been paid into the treasury of Oklahoma.

Two facts exist in favor of Texas. One is the fact that they have a 3-cent-tax rate as against our 5.

Senator CONNALLY. You are speaking only of cigarettes now?

Mr. WHITAKER. Yes, sir, cigarettes only. One is the fact that they have a 3-cent-tax rate as against our 5-cent tax, and the other is the fact that there is a buffer State between them and Missouri, which is a nontaxing State, and the source of most of our mail-order business.

Without meaning anything by it, let me say that the second ranking State competing for Oklahoma business is Colorado.

Senator MILLIKIN. Do you mean that we have a nice thriving business in this matter in Colorado?

Mr. WHITAKER. You have a few that are very good advertisers, sir.

Senator MILLIKIN. I have not been sent down here to liquidate Colorado business.

Mr. WHITAKER. About two-thirds of the Oklahoma revenue from the general revenue fund, to which this cigarette tax is devoted, goes to education. This Congress is now asked to aid Oklahoma and other States for this very purpose. States generally use this tax for education, for welfare, for veterans, or for general government; matters in which this Congress has a direct interest.

I don't believe that there is any effort to maintain that there is any wholesomeness to the mail-order business in cigarettes. The argu-

ment, as I understand the opposition, is based on two propositions: first, that the act is unconstitutional, and, second, that the act would set a bad precedent.

With reference to the unwholesomeness of the business, let me point out that it is an abnormal business. It is natural for a consumer of cigarettes to buy cigarettes from his corner grocery store or corner drug store and to buy it a package at a time, or two packages at a time. It is not natural for a consumer to buy five cartons at a time from a stranger. And, as I said before, the only reason that it is done is because of the price differential that these taxes permit them to make.

As an illustration, here is an advertisement from Missouri listing Camels at \$1.56 a carton. The tax in Oklahoma is 50 cents, which, if that tax were paid, would make the price to the consumer in Oklahoma \$2.06. Well, actually, cigarettes can be bought in Oklahoma City at \$1.95 a carton, which I think illustrates that that is the basis of their business—the tax differential.

This is from the Sedalia Sales Agency, of Sedalia, Mo., and also contains the language I quoted a while ago, or similar language, and I will quote from this:

Our best reference is the fact that we are conducting our business through the United States mails; therefore it is strictly legal.

Senator McGRATH. What does it cost to send five cartons of cigarettes from Sedalia by parcel post?

Mr. WHITAKER. I don't know. They pay the postage, I think, in almost every case. This one is advertised "postage prepaid." There is an additional 7 cents, according to this 1-cent per carton, if the package comes c. o. d.

Senator WILLIAMS. Do any of the cities of Oklahoma or municipalities there have a tax?

Mr. WHITAKER. No municipalities, no, sir. It is entirely State tax.

Senator MILLIKIN. Are they entitled to collect a tax under your constitution?

Mr. WHITAKER. They are not prohibited under our constitution, but they are not authorized under our statutes.

Senator MILLIKIN. You have the home rule system in Oklahoma?

Mr. WHITAKER. If I understand what you mean, sir, we do not. The municipalities are all creatures of statute, and some of them have charters that give them special privileges, but the legislature can give to them or withdraw from them certain authorities.

Senator MILLIKIN. And does the legislature prescribe the kind of taxes which they can assess?

Mr. WHITAKER. Yes.

I think there can be no doubt of the constitutionality of the proposed act. The Constitution simply says that the Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes. That has been upheld and could not be disputed. This act is to regulate and to control certain transactions in interstate commerce.

I think Congress without question could prohibit the shipment of these cigarettes into any of the States absolutely, or provide that they may be shipped only when in compliance with the laws of the State

into which shipped, or that only the cigarettes on which the taxes of the recipient State have been paid could be shipped

And certainly it is within the power of Congress to take this small step that we ask in this act of requiring the shippers to furnish to the taxing authorities a copy of the invoice

Senator WILLIAMS. If this was passed by Congress, would you recommend including cigars in it?

Mr. WHITAKER. Sir, I would be delighted, but there are only eight States in the Union that tax cigars and cigars do not afford the same problem that cigarettes do, for the reason that they are a bulkier shipment, and the tax is proportionate to the cost, and the sales price even in those States that do tax cigars is not as high.

The fact that a package of cigarettes or a carton of cigarettes has such a high value on it and such a high tax on it, and that it is so small and easily shipped, affords a problem to these States that is not comparable to a general sales tax problem, or even the problem as to a cigar tax.

Senator WILLIAMS. But if Congress were going to establish a precedent, we could break it up before it got to any size.

Mr. WHITAKER. Sir, I would have no objection to it. Oklahoma is one of the few States that do tax cigars.

The CHAIRMAN. Anything further?

Mr. WHITAKER. Yes, sir; if I may proceed without overburdening the patience of the committee. I would like to discuss the law, but I believe possibly you have heard enough of the law.

Senator CONNALLY. We are like a court. We hear two laws, one for and one against.

Mr. WHITAKER. I first understood Judge Arnold in his appearance before the House committee, to try to cast a doubt upon the constitutionality of this act from the standpoint of the Congress's ability to legislate in this way; but yesterday, if my ear caught it rightly, he was rather questioning the constitutionality of the acts of the several States; in other words, suggesting that you might be lending assistance to a State that was trying to do something that was without their power to do, and particularly saying that we could not enforce a use tax.

I don't think that any presumption should be permitted to stand that tax-gathering bodies of the several States would act contrary to the Federal Constitution and try to enforce an unconstitutional tax. But, as stated by Mr. Conlon, I think there could be no question about the constitutionality of our use taxes. The Supreme Court of the United States more and more has gone to the substance, and particularly in these cases where people were trying to avoid a natural responsibility for paying their own State taxes. It used to be that any tax on interstate commerce was objectionable, and now they are getting more and more toward the position that it is the discriminating tax that is objectionable.

In this case we are not asking for any discrimination against a nonresident.

Senator CONNALLY. Is there not a point there that they make, though, that if it is domestically produced, the taxing power is unquestioned, while the question here is as to whether or not a product made in another State and shipped in interstate commerce is subject to State taxation. That is the point.

Mr. WHITAKER. Thank you, Senator. The fact remains that the tax is imposed here on the individual citizen of Oklahoma on the use.

Senator CONNALLY. Yes; I know. On the use.

Mr. WHITAKER. This regulation that Congress is asked to provide—

Senator CONNALLY. Of course, that was before us by reason of the other rules and regulations, and the decision of the Supreme Court. They had to go to the use tax; not the production tax, of course.

Mr. WHITAKER. Quite true, sir.

Senator MILLIKIN. Mr. Chairman, is this the gist of it: That if in Oklahoma the citizen does not pay his use tax, he is violating the law?

Mr. WHITAKER. Yes. With respect to cigarettes that is true, sir.

Senator MILLIKIN. This is an effort to get the Federal Government (1) to stimulate the conscience of the Oklahoma citizen who is buying these cigarettes through interstate commerce, and (2) to aid the State of Oklahoma to enforce its own law, over its own citizens.

Mr. WHITAKER. Yes, Senator; that is true. Now, this cigarette tax is a very productive tax, and in practically all the States it is enforced by licensing the dealers, requiring stamps to be affixed to the package, and by auditing the records of these dealers. From that level, it is a very productive tax, and a very easily enforced tax.

Now, what the Tax Commission of Oklahoma and the administrators of these other States need is information. They cannot get that information without the assistance of Congress, because we have no right to examine your post office. And if we have that information, we can collect the tax.

In that connection, and in view of some of the questions yesterday, we have some concrete illustrations. Two years ago the State of Indiana had operating in it some mail-order concerns. They audited those and furnished to other States a list of shipments of cigarettes out of Indiana by those concerns. They sent them to Oklahoma. We sent registered letters to those people who had received cigarettes, and asked them not only to remit the 5 cents per package but an additional 5 cents penalty, a 10-cent-per-package tax. Two-thirds of those people responded with a check or money order on that first letter. To the rest of them we sent out an additional notice. We collected a little over 90 percent by the means of those letters.

Senator WILLIAMS. What did you do with the other 10 percent?

Mr. WHITAKER. We issued tax warrants on them. Under our procedure, we give them notice and an opportunity to dispute the facts.

The CHAIRMAN. Do you tax smoking tobacco?

Mr. WHITAKER. Yes, sir.

The CHAIRMAN. You do tax that?

Mr. WHITAKER. Yes, sir, in Oklahoma.

The CHAIRMAN. How much per package, on the ordinary brands, for Prince Albert or Tuxedo?

Mr. WHITAKER. I think the price on a can of tobacco is 2½ percent.

The CHAIRMAN. Let us ask you: Do you permit the sale of cigarette papers?

Mr. WHITAKER. Yes, sir.

The CHAIRMAN. And you have a 5-cent tax on cigarettes?

Mr. WHITAKER. Per package; yes, sir.

The CHAIRMAN. And the Government collects about 7 cents?

Mr. WHITAKER. Yes, sir.

The CHAIRMAN. So that is 12 cents. Do you suppose if we have something like a recession there will be a lot of people rolling their own, so that you would then lose a good deal of tax?

Mr. WHITAKER. Quite true, sir; but they do that now.

The CHAIRMAN. I know, but they will do it much more if times really get hard.

Mr. WHITAKER. That is true, sir. But we expect that to happen, and it is the privilege of an Oklahoman to do that.

The CHAIRMAN. You do not grow tobacco in Oklahoma, do you?

Mr. WHITAKER. Only small patches for the old-style twist.

The CHAIRMAN. That is chewing tobacco. Do you think you might get this thing up so high that you would hurt the people who do grow tobacco for cigarettes?

Mr. WHITAKER. Sir, I think not.

The CHAIRMAN. You do not think so?

Mr. WHITAKER. No, sir. Of course, that is a problem that we face on all taxes.

The CHAIRMAN. I know, but it looks to me like the situation is this. Yesterday the testimony was that Indiana had 8 cents a package, plus 7, and then if a city in the State were taxing, that would add some more to it. It looks to me as though the producers ought to have some consideration in these matters.

Mr. WHITAKER. Tobacco has increased constantly in use, even in view of this very thing that you are talking about.

The CHAIRMAN. I know that, but we have been living in a period when people had a lot of money. There was a time when cigarettes were not so salable. Mr. Duke, I believe, down in North Carolina, gave them away on the streets of China and other places for advertising purposes. Then the World War came on. We have had a lot of money. But it could be the case that you would see them rolling their own in increasingly large numbers, if these taxes keep going up.

Mr. WHITAKER. If I may suggest it, though, sir, the fact that two-thirds of the Oklahoma smokers pay the tax and one-third do not, creates a condition that is unfair to those who do pay the tax, and who do want to buy from the local merchants, and who do want to carry their responsibilities.

The CHAIRMAN. That is true. Of course, nobody would have any sympathy with anyone who is simply trying to evade the tax.

Mr. WHITAKER. The rate of the tax may be too high, and I would be pleased if our legislature would reduce our local rate. I am sure the Congress of the United States could reduce or increase the Federal rate.

The CHAIRMAN. The United States Congress might, but it has not; and the tobacco tax is a well-fixed thing in our excise scheme, and it is a great source of revenue.

But the point I am asking you to consider is that you are a representative of a State that does not produce tobacco, and I want to ask you whether or not the easier you make a tax like this collectible, and the more it becomes a great source of revenue, the greater the temptation which is held out to the States and to the municipalities to constantly run this tax up to a point where, it seems to me, the producers themselves would have some interest in saying to us here that we should not take any step that would directly hurt them.

Mr. WHITAKER. There is so much merit in what you say, Mr. Chairman, that I would not want to speak in contravention of any of it.

The only thing that I would like to suggest is that it is an unhealthy condition when an agency of the Federal Government is utilized to thwart the laws of these States.

The CHAIRMAN. That is true, but you do not put any burden on the Post Office Department, do you? This bill does not.

Mr. WHITAKER. Oh, no.

The CHAIRMAN. Not at all.

Senator WILLIAMS. Does Oklahoma have an income tax?

Mr. WHITAKER. Yes, we do. We have no ad valorem tax for State purposes, and it is very low for other purposes, but we do have several other taxes.

Senator McGRATH. The Post Office is looking for a great deal more money. Would it answer your problem if Congress put a special high rate on cigarettes sent through the mail?

Mr. WHITAKER. Yes, definitely. Because if they put any rate of tax or charge on the cigarettes sent through the mail that approximated any of these taxes, the business would stop. As I said a while ago, the business is built on this tax differential.

There is another thing I would like to mention. It was stated before the House Ways and Means Committee that in 1 month, in one post office, in Oklahoma, 12,000 cartons were delivered c. o. d., alone. That does not include those for which the payment had been sent in. That made that post office alone the biggest distributor in that city, and the only one that was not licensed by the State, and the only one distributing tax-free cigarettes.

There are 20,000 licensed retailers in Oklahoma that more or less depend on this for their livelihood. At least, it is a part of their trade. And as to those 20,000, I would like to say just a kind word, too, because they are facing awfully stiff competition when somebody else can sell their neighbors cigarettes purely because of a tax differential.

There is one more thing I would like to say about the enforcement of this, because it was mentioned yesterday. And the possible cost of enforcement was mentioned. That is with reference to the Connally "Hot Oil" Act, which also was mentioned yesterday. It was passed in the thirties, to cure a situation which the States themselves could not cure. Our Oklahoma Corporation Commission estimated that over a hundred million barrels of "hot oil" escaped from the Oklahoma City field alone, and at that time the Federal Government had no expressed interest in conservation; but the State had the problem of obtaining its gross production tax on this oil, and enforcing the State conservation laws then enacted, protecting the royalty owners as to their fair share of the oil produced from their lands.

The simple effectiveness of this type of legislation is shown by the fact that while they had lost some 100,000,000 barrels of oil prior to its enactment, the practice stopped immediately upon the passage of the act.

Senator MILLIKIN. The distinction, I suggest, is that the hot oil was criminal at the place of its origin. The cigarettes that are shipped in interstate commerce, here, are not criminal at the place of their origin. There is that difference. It is the same as the case of the

stolen car, which starts with a criminal act, and becomes a Federal offense at the moment it is transported in interstate commerce.

Mr. WHITAKER. There is a price distinction there, but there is also a parallel. In the case of the oil, the only reason a criminal act was involved, was because of the laws of Oklahoma. It was not criminal in any other State to use the gasoline from that oil. The State of Oklahoma could not enforce its own laws, because of boundary lines, and under the interstate commerce clause, the Congress aided the State of Oklahoma in the enforcement of its laws by the passage of that Act.

Senator MILLIKIN. I repeat that there the commodity had a criminal aspect at the moment of its production, because it was produced contrary to local regulations. There is nothing criminal in the case of these cigarettes, at the point of origin.

Mr. WHITAKER. No; it is the point of reception here.

Senator MILLIKIN. The point of reception.

The CHAIRMAN. Is there anything further, Mr. Whitaker?

Senator MILLIKIN. And let me say that there is nothing criminal about the cigarette at the point of reception. The criminality is on the part of the individual in not paying his tax.

Mr. WHITAKER. Of course, it was the act of the individual in producing the oil that made it criminal. And there was not one single prosecution under the Connally "Hot Oil" Act on facts that arose in Oklahoma, and yet the thing was definitely stopped.

If this act is passed by the Congress, I have no doubt about its easy enforcement. In the first place, this business can't operate in secret, and if it is operating without these reports being given, the tax commissioners, the tax administrators in these States will know about it, and they can furnish the facts to the Federal attorney for prosecution.

Senator MILLIKIN. Mr. Chairman, the situation is not exactly analogous, but we are always talking about State's rights, and I am somewhat of a "State's-righter" myself. But then we always proceed, after doing a lot of talking about it, to commingle the functions of the Federal and State governments, so that there is no such thing.

Now, it is a principle of international law that one sovereignty does not help another collect taxes. In the absence of treaties, for example, you cannot extradite a man for tax evasion—on the principle that one sovereignty will not help another collect taxes. I say it is not completely analogous, because we are dealing with nations as distinguished from separate sovereignties within a nation. But there is the principle there, and there is a reason for it.

Mr. WHITAKER. Quite true, sir. That principle is very good. However, the application of it we have modified slightly by these commodity agreements between the States. An illustration, the courts upheld the right of Oklahoma to enforce an income-tax liability that was due from a person who had removed from Oklahoma to Missouri. And the action was brought in Missouri. In the old law that would not have been permitted.

Senator MILLIKIN. I would hate to try to support this law, and a lot of the atrocities that have been committed in other directions, so far as interstate commerce is concerned.

Mr. WHITAKER. This is all we ask; and if the Congress feels that this is not the right way to do it, and the Congress would do as they have done in other cases, and simply require these people to comply

with the laws of the States to which shipped, it would bring the same answer. But I think the opponents of the measure would object to that even more than they would to this.

Senator MILLIKIN. Is it not a basic proposition that Oklahoma should get her own people to comply with her own laws?

Mr. WHITAKER. Sir, that is an impossible thing to do. I think, in any State. There is no conscientious scruple on the part of any ordinary citizen to avoiding a tax.

Senator MILLIKIN. That is one of the most wholesome things that we have in our whole system of government. I love to see the citizen's resistance to tax. We had a revolution that was related to that one time.

Mr. WHITAKER. There is no scruple on their part to evade a tax if they think they can get by with it, in most cases.

Senator MILLIKIN. Is it the business of the Federal Government to act as moral preceptor to the people of the States?

Senator McGRATH. Mr. Chairman, it seems to me that we do that.

Senator MILLIKIN. Yes, we do; and I wonder how often we made a mistake in doing it, Senator.

Senator McGRATH. The Senator has stated it is not the function of one sovereign to guide another in the collection of its taxes. Yet all over the United States we make income-tax information available to the municipalities in order that the municipality may determine the income of the citizen.

Senator MILLIKIN. But we have there, I suggest to the Senator, a mutuality of interests, because there are deductions and one thing and another that flow back and forth between the Federal Government and the municipality, as far as the income tax is concerned.

Senator McGRATH. We have a mutuality of interest in this situation, too, in that the instrumentality of the United States Government, namely, the mails, is operating at a terrific loss. It probably ships every one of these packages at a loss; and that, it seems to me, suggests some mutuality.

Senator MILLIKIN. The principle would be the same, I suggest, if they were carried across the line on horseback, or on foot, or shipped by truck.

Senator McGRATH. There is no question on that, but the fact is that most of them are shipped by mail.

Senator MARTIN. Mr. Chairman, this witness is an expert on the collecting of taxes, and I would like to ask his opinion whether the suggestion of Senator McGrath, to increase the amount of postage, is practical. The Post Office Department needs more money, and I would like to ask his opinion whether the suggestion of Senator McGrath, to increase the amount of postage, is practical. The Post Office Department needs more money, and I should like to ask him whether or not this might solve the problem. I am in sympathy with the States on this, because I have collected taxes for States, and I know your difficulty. But on the other hand, I am just a little fearful about the Federal Government getting into this new field of work.

Do you think what Senator McGrath suggested would be practical?

Mr. WHITAKER. Sir, I thought I answered that in this way: That the business is based entirely on the tax differential, and if the postage rates equal such an amount, it would stop it.

Senator MARTIN. It seemed that way to me, and I thought that Senator McGRATH's suggestion might be a way to solve this problem.

Senator CONNALLY. One difficulty there would be, though, that the taxes are not uniform in the States.

The CHAIRMAN. No; they range from 1 cent to 8 cents a package.

Senator CONNALLY. They have different taxes.

The CHAIRMAN. But I suppose that any special tax, any special stamp, would necessarily decrease the business, even if it did not fully cover it.

Senator MILLIKIN. You would also have the problem, I suggest, Senator Martin, of whether you want to do the same thing as to all other goods shipped in interstate commerce which are subject to local taxes.

Senator MARTIN. I know. And Senator George brought up a thing that is worrying me. You know, Pennsylvania is a great producer of tobacco. And during the depression, a great number of our very fine tobacco producers went out of business, and the tax had a lot to do with it. So what Senator George was suggesting there is a thing that has to have consideration in this.

Senator MILLIKIN. It would obviously put a ceiling on the amount of money that you can pay the tobacco grower.

The CHAIRMAN. Thank you, Mr. Whitaker.

Mr. WHITAKER. Thank you, gentlemen.

(The prepared statement of Mr. Whitaker is as follows:)

STATEMENT BY JOE M. WHITAKER, VICE CHAIRMAN OF THE OKLAHOMA TAX COMMISSION

I am Joe M. Whitaker, vice president of the Oklahoma Tax Commission. I am also a member of the executive board of the National Tobacco Tax Association, which association is composed of the administrators of all the States taxing tobacco products, and am chairman of that Association's committee on cigarette tax enforcement.

While I can better demonstrate the problem created by mail-order evasion of the cigarette tax laws from the standpoint of my own State, I am here representing all of the taxing States.

The problem: Thirty-nine of the States now tax cigarettes at rates ranging from 1 to 8 cents per package of 20. In 1948 these taxes netted those States approximately 375 millions of dollars. I understand that Delaware has become the fortieth State utilizing this source of revenue.

As a general rule the State enforces the tax through a system of licensed dealers and requirements for the stamping of packages to evidence the tax payment. This tax is productive and easily enforced as long as normal trade channels are followed, for the State can easily check on quantities of cigarettes that dealers handle. This tax has developed into one of the substantial foundations of the budget of the States. It should be noted that increase in importance of this tax parallels the decline of the property tax for State purposes.

The mail-order system of evasion was born almost with the birth of the State cigarette tax, and it steadily grew as State after State adopted this source of revenue and as rates were raised in the various States.

This system of evasion is built on the price differential between tax-paid and nontax-paid cigarettes, and on the theory of the privacy and sanctity of the United States mail. Oklahoma, as does most of the States, imposes a tax on the use of cigarettes so that a citizen in Oklahoma smoking nontax-paid cigarettes is liable for the tax thereon.

Those in the business of mailing untaxed cigarettes encourage the violation of our laws.

As an illustration, I cite the ad of a concern who was represented before the House Ways and Means Committee, the Joe Smith Beverage Co., of Joplin, Mo., which ad contains the words:

"Cigarettes at wholesale prices" and "Our best reference is the fact that we are conducting our business through the United States mails, therefore it is strictly

legal, and you are assured the privacy of the United States mails." Thus inviting citizens of Oklahoma to violate the law, and at the same time leaving with him the impression that he is not a law violator. And the Postal Agency of the Federal Government is used, and advertised, as the means of breaking down the laws of the State.

Although the States have made every effort, they are helpless to stop this system. With every addition to the number of taxing States this business has an increase of potential customers, so that if the 48 States enacted the tax and there remained one island, such as the District of Columbia, the situation would only reach its maximum abuse.

It is generally estimated that the loss to the States by this means runs from 10 to 20 percent of the collected taxes. I think many of the States have greatly underestimated their loss. In Oklahoma—and I am ashamed of these figures—we estimate a \$3,000,000 loss. Statistics are frequently misleading, but the following are of interest: The national per capita consumption of cigarettes in 1948 was 2,500; in Texas the per capita consumption of State tax paid about 2,300; in Oklahoma consumption on State tax paid about 1,500; in Arkansas, slightly over 1,000. It is obvious that local conditions affect cigarette consumption, but it is felt that the people of Texas and of Oklahoma would average quite the same; assuming that the per capita consumption of cigarettes from all sources was as high in Oklahoma as in Texas, and that our tax could have been collected on such total, over \$4,000,000 additional money would have been in our Treasury. Two facts exist in favor of Texas—one, their 3-cent tax rate as against our 5; and the fact that there is a buffer State between them and Missouri, a nontaxing State.

More than half of the general revenue fund of Oklahoma to which our cigarette tax is committed goes to education; this Congress is now asked to aid Oklahoma and other States for this very purpose. States generally use this tax for education, for welfare, for veterans, or for general government. Much of the money collected by this tax in the several States goes for education, for welfare, and for veterans—matters in which this Congress has an interest.

Opposition: I believe there has been practically no effort to maintain that there is any wholesomeness to the mail-order system of tax evasion, or any part of it. The argument, as I understand the opposition, being based on the following two propositions:

- (1) That the act is unconstitutional; and
- (2) That the act would set a bad precedent.

I think there can be no doubt of the constitutionality of the proposed act. The Constitution provides: "the Congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes" (sec 8, act 1)—

Of this, it has been said:

"To regulate, in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large (*Mondou v. New York, N. H. & H. R. Co.* 230 U. S. 1, 47 and others). It includes the power to prohibit in cases where such prohibition is in aid of the lawful protection of the public (*Champion v. Ames* (Lottery case), 188 U. S. 321; *Hoke v. U. S.*, 227 U. S. 308; *Rhode v. Iowa*, 170 U. S. 412).

This act is to regulate and control certain transactions in interstate commerce: it is without question within the power of the Congress to prohibit the shipment of these cigarettes into any of the States, or to provide that they may be shipped only when in compliance with the law of the State into which shipped, or that only the cigarettes on which the taxes of the recipient State have been paid may be shipped; it certainly is within the power of Congress to take the small step, provided in this act, of requiring such shippers to furnish to the taxing authorities a copy of invoice.

There has been considerable said about invasion of privacy, and the taking of property without due recourse. Such a matter is not new. The Bureau of Internal Revenue can and does furnish to State authorities information as to the "private" facts of taxpayers; almost universally the taxing authorities, both Federal and State, have access to the private files of the taxpayer or those who do business with him in order to determine tax liability.

In the operation of this law, the tax does not fall on the shipper, but on the individual citizen of the State, and it is up to the administrator under the laws of such State to collect the tax. The information is all that is needed.

Something has been said about a "burden" on interstate commerce. I do not think interstate commerce ever has an objectionable burden when it is required to pay a nondiscriminatory tax and believe the courts are coming to that theory.

Under the operation of the proposed law, however, the tax does not fall on the shipper or on the interstate commerce; it simply, as a regulation of that commerce, requires information to the State authorities; it is then up to the State administrator to collect from the citizens of such State in accordance with the valid laws of such State. In passing, let me say that the so-called use-tax laws have been regularly upheld by the courts.

As to precedent, this act follows previous precedents rather than setting a new one. Congress has in the past, to aid the States in the enforcement of their own laws, legislated on the following matters:

- Transportation of convict-made goods (15 U. S. C. 396 (a)).
- Transportation of lottery tickets, lists, etc. (15 U. S. C. 387).
- Transportation of contraceptive drugs (18 U. S. C. 396).
- Advertising securities without disclosing consideration (15 U. S. C. 77q (b)).
- Transportation or distribution in commerce of a misbranded wool product (15 U. S. C. 68 (a)).
- Shipments of dry commodities in barrels of less capacity than standard barrels as defined (15 U. S. C. 235).
- Shipment of falsely marked gold or silver ware manufactured after June 13, 1907 (15 U. S. C. 294).
- Firearms nonmailable generally (18 U. S. C. 361).
- Introduction into interstate commerce of adulterated or misbranded food products (21 U. S. C. 331).
- Shipment of intoxicating liquor into dry State, Webb-Kenyon Act, March 1, 1913 (27 U. S. C. 122).
- Shipment of petroleum (hot-oil law) (15 A U. S. C. 715).

The Mann Act; the Dyer Act; the act with reference to criminals or escapees fleeing across State lines; the act as to kidnaping—all were enacted to assist the States in the enforcement of laws where the States were hindered by the interstate commerce clause and by State boundary lines.

The Connally "Hot Oil" Act referred to above was to cure a situation existing in the Thirties which the States themselves could not cure. It is estimated by the Corporation Commission of Oklahoma that over 100,000,000 barrels of hot oil escaped from the Oklahoma City field alone. At that time the Federal Government had no expressed interest in conservation, but the State had the problem of obtaining its gross production tax on this oil, and enforcing the State conservation laws then enacted, and protecting the royalty owners in their fair share of the oil produced from their lands. The purpose of this act is expressed in the first section, as follows:

"It is declared to be the policy of Congress to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil as herein defined, and to encourage the conservation of deposits of crude oil situated within the United States" (February 22, 1935, ch. 18, No. 1, 49 Stat. 30).

The simple effectiveness of this type of legislation is shown by the fact that while shipment of this illicit oil stopped immediately, not one Federal prosecution was required on facts arising in Oklahoma. I understand that there was at least one prosecution in Texas.

Even if this act constituted a new precedent, I have confidence in the judgment of the Congress of the United States and assume such precedent would only be followed in the future when facts clearly justified it.

I believe the Government has a responsibility to avoid if possible the use of its agencies to the detriment of the States, and that such responsibility applies as definitely here as in the circumstances that resulted in the passage of the Hayden-Cartwright Act (act of June 16, 1936, as amended, 4 U. S. C. 12) and the Buck Act (act of Oct. 9, 1940, 4 U. S. C. 13); here the arm of the Government being used to the detriment of the States in their essential functions of government is the United States Postal Service; the mails are not only used to solicit trade and to make deliveries, the sanctity of the mails is flaunted as featured advertising and as a convincing argument to customers that they, the customers, are not violating the laws of their own State as long as the mails are used; the effectiveness is illustrated by the authoritative statement made before the House Ways and Means Committee, that in 1 month in one city in Oklahoma the post office delivered 12,000 cartons of c. o. d. cigarettes alone; those c. o. d. shipments alone made that post office the largest distributor of cigarettes in that city, and the only one not licensed, controlled, and on whose cigarettes the tax (\$6,000 for those deliveries) was not paid. Surely the Congress will grant to the States some relief.

In addition I would like to speak for the 20,000 licensed dealers of Oklahoma who cannot buck the competition of out-of-State dealers who have a 50-cent-per-

carton differential to play on. These licensed dealers are citizens, taxpayers, small-business men; they are neighbors of those who consume mail-order cigarettes; they are the ones from whom such consumers would prefer to buy, and from whom they would buy, if it were not for the price differential accomplished by an evasion of the laws of our State.

I can assure you that the administrations of the 39 States which have been taxing cigarettes realize the urgent need of this legislation and are for it; and believe we can assume that Delaware, having just passed a tax on cigarettes, and having so long housed numerous concerns engaged in the business of soliciting the evasion of similar laws in other States, will realize with the other 39 States the urgent need of this legislation.

The CHAIRMAN. Congressman Rogers, did you wish to be heard now on this matter?

### STATEMENT OF HON. DWIGHT L. ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Representative ROGERS. If you will permit me to say a few words, I should be grateful, because the House is supposed to meet in about 10 or 15 minutes.

The CHAIRMAN. We will hear from you right now, sir.

Representative ROGERS. Mr. Chairman and members of the committee, I shall be very brief. I am glad to have the privilege of appearing here, and especially before Senator George, because I used to appear before him when he was my judge down in Georgia. Of course, he did not always rule with me, but when he did I appreciated it.

This is a bill, gentlemen, that merely protects the States that have a cigarette tax against those States that do not have a cigarette tax.

Now, this bill has been before the House a second time, and we passed it by a very large majority each time it has come before the House. In looking into a measure like this, I think the things we should consider are two: the evil, and the remedy that we propose for that evil.

Now, here is the evil. Here are 39 States of this Union that single out cigarettes for taxing purposes. The tax ranges anywhere from 2 cents, I think it is, to 5 cents.

The CHAIRMAN. Eight cents in the case of Louisiana.

Representative ROGERS. Is it 8 cents?

The CHAIRMAN. Yes. I was surprised to learn that it was that high.

Representative ROGERS. But anyway, here are 39 States of your Union, which we all represent, or which a great many of us represent, and 9 States that do not seem to be too much interested in this bill. But not a single one of those States are here opposing the matter that I know of. Yet here are 39 States coming before you. And we say to you that these nontaxing States are sending cigarettes into our States through the instrumentalities of interstate commerce, and we want you to provide for us.

As I understand it, this is not a matter of aiding in the collection of taxes, but it is merely furnishing to the tax commissioners or the tax offices of the various States information so that the States can go after the law evaders and collect this tax. That is everything it is, as I see it. We just say to the shippers in these nontaxing States, "If you ship into our State any cigarettes to other than licensed distributors in those States, we only want you to send us a memorandum or an invoice of the bill, giving us the name of the party to whom shipped,

and giving us the amount of cigarettes." That enables the tax commissioner of the State where these cigarettes are shipped, to have some idea as to how they can collect these taxes. And I do not believe it is the intention of Congress to permit the instrumentalities of interstate commerce, consisting of your post office mostly, parcel post—and the post offices are losing money on shipping parcel post as you will note if you look into the record—to use the express facilities to help these fellows evade the tax. And that is what they are doing under the present situation.

Now, it is unfair to our local merchants to permit that. Take the local merchants in your State, or in the cities where they have this tax. They pay a license to do business. They deal in cigarettes. And the men that buy the cigarettes from them have to pay the tax. There is no question about that.

But here is an evader over here who buys from a dealer in Missouri. That is one of the States that ship a great deal of cigarettes. And North Carolina ships a great deal of cigarettes to the various States of the Union. And you permit them to ship to this man here, and he goes out and sells these cigarettes, or disposes of them without a tax. Now, it is a difficult proposition for the State authorities, unless they have some avenue of information, to collect that tax.

That is all, Senator, that we are asking this committee to do.

The CHAIRMAN. Do any of the cities or municipalities in Florida have a special cigarette tax? Or is it purely a State tax?

Representative ROGERS. I think, Senator, it is purely a State tax. If there is any city in Florida that has a special tax in addition to the State tax, I do not know of it.

Senator MILLIKIN. Do you have the home rule system there in Florida? Can the city levy any taxes it wants to?

Representative ROGERS. Yes, sir; we can levy an additional gasoline tax or a cigarette tax or any special tax that a municipality wants to levy. And I think the States are losing millions of dollars. I know my State of Florida loses anywhere from \$250,000 to half a million dollars a year by reason of the evasion brought about by the using of the instrumentalities of interstate commerce in this way. And the State of Georgia loses some \$500,000. I was advised of that by the tax commissioner of that State.

The CHAIRMAN. Yes; the tax commissioner thinks the loss is from half a million dollars up.

Representative ROGERS. I think this bill is constitutional. Of course, I recognize the fact that the members composing this committee are well versed in constitutional law. I think Justice Hughes laid down a principle which would justify this proposal when, I think in the case of the Kentucky Whip & Collar Co., Justice Hughes used this language:

to prevent the use of interstate transportation to hamper the execution of State policy.

And that opinion concluded with these words:

The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid State laws affords no ground for constitutional objection.

We hope that this committee will recommend this and get this passed, and save these States a lot of money that is being lost.

The CHAIRMAN. Thank you, Congressman.

Representative ROGERS. Thank you.

Representative JENKINS. In the interest of expedition and the saving of time, the next three witnesses, who are administrators, I think would agree to limit their testimony to 5 minutes each. Then, if it would be all right with the committee, I would like to have a few minutes, and then we will be through.

I think Miss Krone, the next witness, and the two who will follow, will consent to be limited to 5 minutes each.

The CHAIRMAN. Will you please come around, Miss Krone?

Representative JENKINS. I might say for Miss Krone that she has a very important position in the tobacco world, and is a very competent individual.

The CHAIRMAN. We will be very glad to hear you on this bill.

**STATEMENT OF MARY GOODE KRONE, DIRECTOR, MISCELLANEOUS TAX BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND PRESIDENT, NATIONAL TOBACCO TAX ASSOCIATION**

Miss KRONE. I am Mary Krone, director of the miscellaneous tax bureau, New York State Department of Taxation and Finance. In addition to that, I am also appearing before you today as president of the National Tobacco Tax Association. You have heard Mr. Conlon and Mr. Whitaker speak of that group, which is composed of all the tobacco tax administrators. In order to conserve your time, I am speaking the thoughts and the opinions of the remaining administrators, who are not present here today.

You have heard the legal aspects of this legislation, and I feel it would be repetitious for me to dwell on that any longer, but there are a few points from the administrator's point of view that I want to reiterate. One is that the cigarette tax is becoming more and more important as a revenue producer to every one of the States; and in some States it is earmarked for particular purposes, such as education, or veterans' bonuses, assistance to the blind, and that sort of thing.

As a matter of fact, in New York State, one-third of our 3-cent tax is allocated to the payment of the veterans' bonus.

We feel that for some time the United States mails have been used to accomplish the avoidance of the cigarette taxes, and it appears to me that under the cloak of this constitutional protection certain individuals and organizations are circumventing State laws.

You may have seen in the press recently one instance where certain citizens had sent checks expecting their cigarettes to be shipped, and then the mail-order concern went out of business, and the last I heard they hadn't even gotten their checks back.

The CHAIRMAN. They could be reached for mail fraud; could they not?

Miss KRONE. I suspect that is probably what will develop. I haven't seen the follow-up.

The interstate movement of cigarettes among the taxing States is handled very satisfactorily and completely by the exchange of information, the same way as we handle the exchange of information on administering the liquor tax and the motor-fuel taxes in the respective

States. However, I think you will agree that it is quite obvious that no such system can be extended to the remaining nontaxing States.

If the proposed legislation is enacted it will be my job—and I know the other administrators feel very strongly it will be their responsibility—to carry out its provisions after the information is furnished to each one of the States.

We are not asking the Federal Government to administer our own State laws. For example, in New York State when information is received, even today, letters are written to the taxpayers requesting payment of the tax due; and in the majority of cases no further action is required. The check is sent in and that is the end of it.

We have examiners and investigators located in various parts of the State so that sometimes we also use that method of collecting the tax.

In a great many cases I think it is because the citizen doesn't realize that he is evading or avoiding the payment of the State tax. When it is explained, the tax is paid.

Of course, as you know, the Federal Government will not be required, under this legislation to render reports itself, since the information will be furnished by the persons selling or disposing of the cigarettes, and no department of the Federal Government is charged with the administrative duty as such.

I think it is only fair that the company that engages in the sale of cigarettes in a taxing State should be on a competitive basis equal with those companies making mail-order shipments. A price differential predicated only on tax evasion is, in my opinion, unfair competition.

On the basis of national estimates which you have heard recited, New York State obviously is losing a tremendous amount of revenue each year. In our last fiscal year, we collected approximately \$50,000,000. Conservatively, the State is losing between 5 and 10 percent of the cigarette tax revenue each year. In the other States, though the revenue loss may not be as great as in New York State, it is to that particular State of comparable importance.

I would like to add that many State legislatures, including the New York State Legislature, have memorialized Congress to enact this legislation.

In conclusion, both on behalf of New York State and the National Tobacco Tax Association and the administrators whom I represent, I do urge your favorable consideration of this proposed legislation.

Senator McGRATH. Do all States that have a tobacco tax law also have a use tax?

Miss KRONE. No, sir; only 30, I think, have a use tax.

Senator McGRATH. So that the only States that would profit by this law would be those that have a use-tax law.

Miss KRONE. Yes.

Senator McGRATH. You spoke about 39 States.

Miss KRONE. Thirty-nine tobacco-taxing States. As a matter of fact, I should have said 40 States, Senator, because Delaware has just enacted such a law.

Senator McGRATH. How many have a use tax?

Miss KRONE. Thirty have a complete use tax, and I believe there are four others that have what might be called a partial use tax.

Senator McGRATH. How many have a use tax with respect to cigarettes?

Miss KRONE. That is what I was referring to. I was limiting my remarks to a cigarette use tax. I am sure there are just two or three that have no use tax whatsoever.

Senator McGRATH. So that the number of States that would benefit by this would be what? It would not be 39 or 40?

Miss KRONE. It would be between 30 and 35, a great majority of the cigarette taxing States.

Representative JENKINS. The next witness is Mr. Kaufman.

Senator McGRATH (presiding). Mr. Kaufman represents the National Association of Tobacco Distributors.

### STATEMENT OF JEROME KAUFMAN, DIRECTOR OF INDUSTRY AND PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS

Mr. KAUFMAN. My name is Jerome Kaufman, and I am director of industry and public affairs of the National Association of Tobacco Distributors. My association represents the wholesale tobacco distributors of the Nation, who serve approximately a million and a quarter retail outlets which sell cigarettes, confectionery, and allied products.

Since the condition which the proposed legislation is designed to correct, not only seriously affects the cigarette tax States and their citizens, but also the welfare of more than a million local merchants in those States, we are vitally interested in its passage.

We consider it our duty to emphasize the dire need of a law which will afford relief and equity to the merchants so affected. These local merchants in every city, town, and hamlet of our Nation depend, in small or large measure, for their livelihood upon the sale of cigarettes in their communities; and it is they who give employment to local residents and, in the aggregate, pay a substantial portion of the taxes used to support their local, State, and Federal Governments.

The local merchant, in the American scheme of things, necessarily depends entirely upon sales to consumers in his own community. The practice of mailing, or otherwise shipping cigarettes direct to consumers in tax States destroys this historical and traditional local business and creates a condition that clearly jeopardizes the existence of these small deserving merchants.

There is still another group of persons who suffer the consequences of cigarette bootlegging. These are the law-abiding citizens in the tax States who must bear an additional tax burden to compensate for the lost cigarette taxes which are needed to meet the State's budgetary requirements. It is well known that in formulating its budget, a State anticipates the amount of revenue that will be required. When a substantial portion of expected income is not forthcoming, the State must then seek other sources of revenue.

Senator MILLIKIN. Would the State not make allowances for the uncollectible part of its ambition in drawing up a sensible budget?

Mr. KAUFMAN. I dare say that that has not been taken into consideration to this point.

Senator MILLIKIN. I suggest it should be. I mean, if you were projecting your income and have a certain method for getting it, you

certainly would make allowance for what you consider to be the uncollectible part of it.

Mr. KAUFMAN. I speak only from observation. The affected tax States have apparently not anticipated this possibility in the past, because they now report these losses of revenue, which seemingly have impaired their administration.

I say that the result is that all of the citizens of that State invariably must contribute, in the form of additional or new taxes, to any resulting deficit. To permit out-of-State sellers to ship cigarettes into a State to avoid that State's tax constitutes a rank injustice to those citizens.

We know that 39 cigarette-tax States, representing approximately 75 percent of the total population of the country, collected approximately \$375,000,000 in tobacco taxes in 1948. Since the tax administrators of those States have already supplied this committee accurate estimates of the amounts of revenue lost by each State, we deem it proper only to refer at this time to the validity of their just claim that only legislative relief of the type proposed will serve to stop the draining off of huge amounts of revenue so necessary to support their public institutions, to pay State employees and veterans' bonuses, and to withstand the other numerous costs of administration. We have estimated the tax loss to the States to be between 15 and 20 percent of the total amounts collected.

The wholesale tobacco distributors whom we represent are very much concerned with this loss of revenue to the States, since they have served these States faithfully for many years, as tax-collection agents, and have considered the States' interests their own.

I have thus far omitted reference to the 1½ billion dollars annually collected by the Federal Government in taxes on cigarettes and other tobacco products. This is a prodigious amount of revenue to our Government. We are firmly convinced that by permitting parcel-post shipments of cigarettes to evade State cigarette taxes, we place in disrepute this product that contributes so substantially to the support of our Government.

The commerce clause in our Constitution provides a certain safeguard to commercial transactions in interstate commerce. The wisdom of this provision in the operation of our form of Government has been proven beyond question to be sound and in the best interests of all the people of this Nation. However, it is our firm conviction that it was never the intention of the framers of the Constitution to guarantee this protection to the type of transaction here under consideration.

The practice of mail-ordering cigarettes across State lines with the intention of evading State tax laws is an abuse of interstate commerce, and violates and destroys the freedom of a State in exercising its legitimate taxing power. It is an obstruction and impingement on the States' rights that cannot be tolerated or condoned if we are to preserve our form of government.

We witnessed during the prohibition era a widespread loss of respect for the laws enacted by the Federal and State legislatures, as a result of the flagrant violations of the Prohibition Act. By permitting cigarette bootlegging, we are again making a mockery of all the laws enacted by our elected representatives.

It is significant, we believe, that the House of Representatives of the Eighty-first Congress, after a fair and open hearing before the Ways and Means Committee, passed this legislation. The fact that five separate bills identical to H. R. 195 were introduced in the House and two similar bills in the Senate clearly demonstrates the urgent need for this law. That so many Representatives and Senators are sponsoring these bills, conclusively shows that their constituents have a deserving cause for which they properly seek a fair and equitable solution.

We commend all of these gentlemen for their understanding of the critical situation involved and for their sincere desire to sponsor equitable legislation in the public interest.

We know that you are as desirous as we to see conditions equalized between the local merchants in each of the tax States, and the out-of-State sellers who are jeopardizing the existence and livelihood of these local merchants. What we are seeking for the local merchants is not special treatment, but only that they be placed on the same competitive level with no advantage, gained through tax evasion, being given to the out-of-State sellers.

We believe, moreover, that you will further agree that the cigarette tax States should be afforded the opportunity of meeting their budgetary needs by preventing illicit shipments of cigarettes to consumers in those States. In addition, we are sure that you subscribe to the fact that it is not unreasonable to require every consumer to comply with his own State's cigarette tax law and to bear his proportionate share of the tax.

The proposed legislation, we are confident, will accomplish every one of these worth while and deserved purposes. When we consider that this legislation, if enacted, would place no additional burden or responsibility on any Federal agency and would impose absolutely no additional cost upon the taxpayers, the desirability of such a law becomes crystal clear and self-evident.

For all of these reasons and on behalf of all those whose interests and welfare are at stake in this matter, we respectfully and earnestly request your favorable consideration and support of this legislation.

Senator McGRATH. Thank you, Mr. Kaufman.

Senator WILLIAMS. Mr. Kaufman, is this bulletin that has just been handed to us the one that you distributed to the committee?

Mr. KAUFMAN. Yes, sir.

Senator WILLIAMS. How did they arrive at the estimate of the loss in revenue in these States?

Mr. KAUFMAN. It is based on an estimate of about 15 percent of the total revenue.

Senator WILLIAMS. Is it your opinion that these cigarettes are bought primarily to evade the taxes, in these interstate shipment?

Mr. KAUFMAN. I don't think there can be any question about it.

Senator WILLIAMS. Then, if that is true, and I am inclined to agree with you, would you not expect a greater loss in revenue in those States which have a higher tax than you would in those States which have a lower tax?

Mr. KAUFMAN. I think that is probably true.

Senator WILLIAMS. I was just noticing this table. For instance, in Louisiana, they have an 8-cent tax, and you have an estimate here of a 15-percent loss in revenue. Yet in the State of West Virginia,

which has a 1-cent tax, you estimate the same percent loss. I am wondering if this is not just a wild guess, this loss estimate; or whether you sat down and figured it out.

Mr. KAUFMAN. It is an estimate, I must agree, and it was made on an over-all basis. It would be impossible to project every State's actual loss. The States themselves have made certain estimates, and on the basis of those and the information that our members have given us as to the estimated loss of business in their communities, we have represented it as a 15 percent loss, approximately.

We have not attempted to analyze the situation in each individual State, but rather on an over-all basis.

Senator WILLIAMS. And these figures as I understand them, are not supposed to be taken as having any high degree of accuracy as pertaining to any particular State.

Mr. KAUFMAN. That is correct, sir. It reflects the general over-all condition affecting the States as a whole.

(The figures referred to follow:)

*Cigarette taxes in 39 States and many municipalities pay growing costs of State and local governments and veterans' bonuses—amount of required revenue lost to States*

State	Tax per pack	1948 yield <sup>1</sup>	Tax loss <sup>2</sup>	State	Tax per pack	1948 yield <sup>1</sup>	Tax loss <sup>2</sup>
	Cents	Thous. of dol.	Thous. of dol.		Cents	Thous. of dol.	Thous. of dol.
Alabama	3	7,681	1,152	Nevada	2	490	73
Arizona	2	2,232	334	New Hampshire	2½	2,076	311
Arkansas	6	6,161	924	New Jersey	3	9,902	1,485
Connecticut	3	7,231	1,084	New Mexico	3	1,766	264
Florida	4	12,584	1,887	New York	3	50,872	7,630
Georgia	3	8,331	1,249	North Dakota	3	1,715	257
Idaho	3	1,583	237	Ohio	2	17,551	2,632
Illinois	3	28,168	4,225	Oklahoma	5	9,323	1,398
Indiana	3	12,386	1,857	Pennsylvania	4	40,435	6,065
Iowa	2	4,858	728	Rhode Island	3	2,941	441
Kansas	3	4,499	674	South Carolina	3	5,630	844
Kentucky	2	4,968	745	South Dakota	3	1,785	267
Louisiana	8	13,399	2,009	Tennessee	3	8,184	1,227
Maine	4	5,114	767	Texas	3	23,148	3,472
Massachusetts	4	21,622	3,243	Utah	2	881	132
Michigan	3	22,386	3,357	Vermont	2	1,033	154
Minnesota	3	8,260	1,243	Washington	2	5,150	772
Mississippi	4	6,565	984	West Virginia	1	2,130	319
Montana	2	1,265	189	Wisconsin	2	6,717	1,007
Nebraska	3	3,881	582				

<sup>1</sup> Preliminary.

<sup>2</sup> Based on best available estimates of cigarette tax States.

Senator WILLIAMS. Would it not have been better, in preparing this table, not to break that down? Because it seems a little misleading that you figure a 15-percent loss in a State that only has a 1-cent tax, when the State that has an 8-cent tax does not have any greater loss. It contradicts the whole purpose of the bill, and its basis, that there is this loss of revenue in taxes.

Mr. KAUFMAN. I think there would be some variance in a higher tax State; that is, some additional amount of loss. However, the average is about 15 percent.

Senator MARTIN. Mr. Kaufman, do you have any information as to the number of municipalities in the United States that collect a cigarette tax?

Mr. KAUFMAN. There are approximately, to the best of my knowledge, between 20 and 25 cities in the various States.

Senator MARTIN. Are they increasing from year to year very rapidly?

Mr. KAUFMAN. Yes, municipal tobacco taxes are somewhat of an innovation, so most of them have just gotten started in the last few years. We ourselves have opposed tobacco taxes in all of the cities, States, and counties, so that we would not for a moment condone the imposition of additional taxes. The cities, as I say, have been comparative newcomers to the tax field. In some cases they have started at a low rate, and in very few cases have they increased it.

Senator WILLIAMS. Do any of the cities which tax cigarettes supply information to the State?

Mr. KAUFMAN. I don't have that information.

The CHAIRMAN. Any further questions?

Senator LUCAS. Let me ask you one question.

Why is it that the States cannot take care of this?

Mr. KAUFMAN. Why is it that the States can't take care of it?

Senator LUCAS. Why is it that the States cannot take care of this problem, rather than the Federal Government?

Mr. KAUFMAN. They have attempted to, but they lack the necessary information. It is a rather nebulous situation. The cigarettes are shipped into the State to consumers, and there is no way of tracing them. It is just that type of information that is sought by the States, under the proposed law, to enable them to enforce their own tax laws.

Senator LUCAS. I presume each State has a law making it an offense, has it not?

Mr. KAUFMAN. That is true. But its powers of enforcement in this type of situation are weak. It does not have the facilities or the necessary instrumentality to do it. It is now impossible to locate receivers of cigarettes through the mails.

Senator LUCAS. What this bill would do is to simply make the Federal Government an agency for the collection of taxes in these States?

Mr. KAUFMAN. Well, it would not do that specifically. It would merely help the States in pointing out to them the recipients of tax-free cigarettes in those States.

Senator LUCAS. I notice the report filed by Congressman Jenkins before the Committee on Ways and Means says that the bill—

would place no additional burden whatever upon anyone shipping cigarettes to a distributor, licensed by, or located in the State into which the shipment is made.

Do you agree with that?

Mr. KAUFMAN. Yes, sir, I do.

Senator LUCAS. That is all, Mr. Chairman.

Mr. KAUFMAN. Thank you very much.

The CHAIRMAN. Mr. Calamia?

#### STATEMENT OF ERIC CALAMIA, MANAGING DIRECTOR, RETAIL TOBACCO DEALERS OF AMERICA, INC.

Mr. CALAMIA. Mr. Chairman, and gentlemen: My name is Eric Calamia, and I am managing director of the Retail Tobacco Dealers of America, which is the national association representing the retail tobacco dealers of the country.

Gentlemen, our membership is made up of really small-business men. The retail dealer feels he has a very definite interest in the passage of H. R. 195. He believes also that the members of this committee and of the Senate will agree with him that fundamentally a retailer must expect to put himself in a competitive situation if he is going to survive in business. And he can be competitive with the retailer within his own State, but he cannot be competitive with that cigarette business which is solicited by mail from a nontax State.

We heard a witness yesterday morning say that H. R. 195 was hocus-pocus. But the same gentlemen would have great difficulty in trying to tell a retail dealer operating in Maine, Vermont, Massachusetts, Pennsylvania, where there is a 40-cent differential per carton, that he had any chance of being competitive with a shipment made from a nontax State. There isn't 40 cents difference between the manufacturer's cost price and the consumer's price, for him to get down to. There isn't that much of a spread between them.

The retailer asks you, gentlemen, to fairly consider 195, and he feels he is being just in asking it. In spite of the fact that we decry the increased growth of taxes on cigarettes, we feel that H. R. 195 only puts the 800,000 retail dealers who are trying to conduct their business in the 40 tax States, on a competitive level with the approximately 180 retail dealers who are in nontax States.

I also have a statement that I would like to leave with the clerk for the members of this committee, but as I know your time is very limited, and I have been asked to confine my remarks, I will do so.

The CHAIRMAN. We will be very glad to receive your statement for the record.

(The statement referred to is as follows:)

STATEMENT OF ERIC CALAMIA, MANAGING DIRECTOR OF RETAIL TOBACCO DEALERS OF AMERICA, INC., NEW YORK, N. Y.

This association represents thousands of independent retail tobacco dealers throughout the country. As a result of a careful survey of the reactions and opinions of our membership, we urge the passage of H. R. 195, which would regulate cigarette shipments from nontax into tax States.

Thirty-nine States impose a tax on the sale of cigarettes. Mail order cigarette firms, who establish offices in States having no tax and solicit business direct from the consumer through the mail and over the radio cause a serious drop in the anticipated cigarette tax revenue to these States.

Moreover, the situation is distinctly unjust to the more than 800,000 retailers who do business in States having cigarette taxes. Since 50 to 60 percent of the total volume of their business lies in the sale of cigarettes, they are completely at the mercy of these mail order firms. In many instances the retailer loses, not only his cigarette customers, but the potential customer for other products that he vends, inasmuch as it is a well-known fact that the customer for a package of cigarettes is oftentimes the purchaser of additional merchandise.

The entire business structure of mail order cigarette firms seems to us one that commends itself to you for scrutiny. Unlike large general mail order houses, whose legitimate business practices always include the collection of States' sales taxes, their business is based on the sole premise of evading taxes. They mulct the States of income running into millions of dollars.

H. R. 195 would be of invaluable help to our thousands of members. Its passage would:

1. Remove the penalty that now exists for those doing business in the 39 States imposing cigarette taxes.
2. Assist the States themselves to collect their taxes.
3. Return the cigarette business to its legitimate channels—the local retail dealer.

Representative JENKINS. Mr. Chairman, I hope I can conclude in 5 minutes. I want these other gentlemen who have not been heard to have a chance.

The CHAIRMAN. You may proceed, Mr. Jenkins.

**STATEMENT OF HON. THOMAS A. JENKINS, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF OHIO—Resumed**

Representative JENKINS. I should like to state first, with reference to my good friend, Mr. McNeer, who testified, from West Virginia, that West Virginia runs about 100 miles along the Ohio River directly across the river from my district, and Mr. McNeer lives almost across the river from where I live. I want to say for his State that West Virginia is one of the States that has a cigarette tax, and that the Governor of West Virginia and the taxing authority of West Virginia both endorsed this bill, last year and this year also. In our hearings before the Ways and Means Committee it was brought out that practically all of the Governors and tax authorities of 39 of the States endorse this legislation most enthusiastically.

I want also to say that the client that Mr. McNeer represents here today testified before our committee this year, in this session of Congress, and he said that as far as he knows he is the only individual in the whole State of West Virginia who deals in this business of shipping cigarettes into tax States without stamping them. I just mention that to bring up this fact—I do not want this great committee to be deceived by a claim that the enforcement of this law will be a difficult task.

As to this matter of enforcement, I daresay there are not 200 of these so-called bootleggers in the whole United States. And my judgment in this respect is verified by the opinion of several of these State administrators who are here today and in fact, most of these administrators think that the number will not exceed 100. Personally, I think that the number is not more than 50 and that 25 of these do 95 percent of the business.

It is not a legitimate business. It is that sort of business in which every man engaged in it knows that when he sends these cigarettes into these tax States, he is undermining and taking the business away from a man in that State who pays taxes in that State on all the cigarettes he sells and who lives there and who operates there. He knows that he is engaged in a disreputable business because his advertisements are all apologetic. Several of them seek to get some justification for their dishonest activity by claiming that the business is given gentility by the fact that the Government permits the cigarettes to pass through the mails.

Mr. McNeer indicated that it might be that some of these big tobacco organizations were responsible for this legislation. This supposition is not true. I introduced my bill after one or two other bills had been introduced. I introduced my bill because I could not in good conscience stand by and see my State robbed out of \$750,000 per year by a bunch of bootleggers. All of these bills were referred to the Ways and Means Committee of the House, of which I have been a member for 16 years and, naturally, when the committee took up these bills, they reported out my bill. Another reason is that I

represent a great State and we have a wonderful tax administrator who has been administering taxes there for years. He has served under Democratic Governors and the Republican Governors and he is a great tax lawyer. As a diligent State administrator he could not in good conscience stand back and permit his State to be robbed so he asked me to press my bill. He cannot be here today and I am asking unanimous consent that I may insert his statement in the record. He deals largely with the constitutionality of this bill.

The CHAIRMAN. Who is he?

Representative JENKINS. His name is Mr. Emory Glander, of Columbus, Ohio.

The CHAIRMAN. Yes, you may do so.

(The statement will be found on p. 43 of the record.)

Representative JENKINS. In addition to what I have said, I want to further state that as to the business done in my State, we lose about \$750,000 a year. We lose this to just a few of these bootleg outfits. We have the most wonderful cooperation from Sears, Roebuck and all of the other big wholesalers. You would be surprised. I cannot give you the figures, but I daresay that Sears, Roebuck will send in \$100,000 in taxes to our administrator every year. And we have an arrangement made with about 300 other big wholesalers, who do the same as Sears, Roebuck. Their books are open and any State tax authority can check on them. There are a thousand other agents outside of the State of Ohio, who represent wholesalers who operate legitimately. Many shippers from outside have agents in Ohio to whom the reports of shipments into the State are made. These agents all pay the tax without any trouble.

The cigarette business in Ohio is a great, gigantic business. It runs into millions of dollars. Ohio does not manufacture nearly as many cigarettes as it consumes. A 2-cent tax on all the cigarettes used in Ohio produces millions of dollars.

This \$750,000 which Ohio loses in taxes at the rate of 2 cents per pack, would mean that our merchants lose the sale of about \$7,500,000 worth of cigarette business during the year. These bootleggers take about \$40,000,000 a year that the States should get; and we lose our part of it. New York loses approximately \$3,000,000. It is intimated that Oklahoma loses about \$3,000,000 per year. Pennsylvania loses probably 1½ million. All the States lose proportionately.

As to the constitutionality of this legislation, I am not going to take much of your time. Most of you are lawyers, I think, and some of you I know are very eminent lawyers, and all I would want you to do with reference to the constitutionality of this legislation is to read Thurman Arnold's brief and you will find that in 9 out of 10 cases that he cites, he deals with State laws. The cases he cites raise the question of the constitutionality of State laws. I have gone over his brief carefully and made comparisons and find that he has gone far afield in his efforts to find authorities. The constitutional question involved here is a very simple one. It is this: Can Congress regulate interstate commerce? The answer is easy. It is "Yes." Of course Congress must have some reason for its regulation. In this case the reason is to prevent bootleggers of cigarettes from using interstate commerce to violate State laws. This bill seeks to prevent that and

nothing else. I need cite only one case—it is the Collar case in which Chief Justice Hughes says:

Congress has formulated its own policy and established its own rule. The fact that it has adopted this rule in order to aid the enforcement of valid State laws affords no ground for constitutional objection.

You talk about the morals and ethics of this bootlegging business. I say to the esteemed and distinguished members of this committee that this is a tremendously important matter of common honesty. These parasites ought not to be permitted to continue to operate.

In a small village directly across the river from where the clients of Mr. McNeer live, are at least a half a dozen persons engaged in the grocery business and in selling cigarettes. They pay the State cigarette tax and all other taxes. And as to these cigarettes sent in by these fellows from West Virginia, with only one group in West Virginia selling them, according to their own testimony, you can see what our law-abiding merchants have got to compete with. It is not right. The morals are all one side.

You may say, "Well, why do not the States levy smaller taxes?" It is the constitutional right of the States to do whatever they have a right to do. Congress cannot complain if a State wishes to levy an 8-cent tax on cigarettes. I would not levy an 8-cent tax nor a 5-cent tax but it is none of my business what and State levies. Our State only has a 2-cent tax. But if the State of Louisiana wants to do it, who is there, even in the great Senate of the United States, that can question that State's right to do it. Most of the States levy an average of about 2 cents.

New Jersey was one of these so-called tax-free States until about 2 years ago. Located as it is right up against New York, they sent millions and millions of dollars worth of cigarettes into Pennsylvania and New York upon which they paid no tax. But New Jersey saw the light, and has gone out of this unethical business; and the same is true with the State of Delaware. There are only a few States left. The pride of those State will I am sure soon assert itself and they will free themselves of this unwholesome business. They will awake to the fact that it is to their financial benefit. The State will then get the tax money that the bootleggers now get.

You talk about enforcement. Gentlemen, it is not a difficult problem: it will not be a problem. One of these so-called bootleggers States in his advertisement that if this bill is passed, he will go out of business. It is just simply a problem as to whether we are going to lose in the State of Ohio 7½ million dollars worth of business to people who do not pay any tax, and who encourage others to violate the law. Persons who have the effrontery to send people into our shops and induce our citizens to buy cigarettes upon which the tax has not been paid are directly contributing to a violation of the law of Ohio. With reference to a man who has a pack of unstamped cigarettes in his pocket, you say, "Prosecute him?" No, this will not be necessary. The Federal Government does not prosecute persons with packs of cigarettes which do not have a Federal stamp on them. It is a violation of the law for a man to have a package of cigarettes in his pocket that does not have the Government revenue stamp on it if he knowingly is seeking to avoid paying a tax and it is a violation of law in Ohio for a man to have a package of ciga-

rettes in his pocket that does not have the State tax paid on it. But we are not going to run after all those people. It is not necessary. It is best to go after the man who initiates the sale and encourages the violation and who is responsible for it.

I shall not say any more about the constitutionality of this bill, except, as I said before, I wish you would read Thurman Arnold's brief. And those of you who are lawyers will find that that brief is no credit to a man who is dealing with what he says is a great constitutional question. When you read it, you will find it is a brief of apology, and it does not go to the point. The issue is not a constitutional issue. There is no question about the constitutionality.

The Congress of the United States has the right to control interstate commerce. You can regulate it almost to the point of regulating it out of business. And this is simply a regulation.

Somebody says the Post Office Department will lose money. Well, if the Post Office Department could get rid of all of its parcel post today, it would be ahead financially, would it not? That is where it loses most money now. And one of the witnesses before the House committee, one of our Congressmen from Oklahoma, testified that his post office in his town did a bigger cigarette business than any cigarette dealer in that city.

I dare say that many post offices in the United States, in towns of a thousand or more will do a bigger cigarette business than any cigarette man in those towns, and do it free, and pay no taxes at all.

Gentlemen, to me it is a serious problem.

Senator WILLIAMS. Congressman, how would you say the loss in Ohio would compare with that of the other 39 States? Would it be on the same level?

Representative JENKINS. I do not have all the figures here, Senator.

Senator WILLIAMS. I mean, roughly, what would your figure be?

Representative JENKINS. I think Ohio would be typical of the large States. Of course, Oklahoma is, I think, the biggest loser, because it is a larger State than Louisiana, and then maybe Louisiana would come next, because it has a high tax; and then New York comes next with \$3,000,000 and then Pennsylvania, with \$1,500,000, and Illinois, with \$1,000,000; and Ohio estimates \$750,000. The last estimate our man gave me as to Ohio was \$1,000,000, but I prefer to stick to \$750,000.

Senator WILLIAMS. What I was getting at was the question of whether your State would be a typical State.

Representative JENKINS. Yes, I think it would be typical as one of the large States.

Senator WILLIAMS. I notice in the briefs filed by the National Association of Tobacco Distributors, they estimated the loss of Ohio at \$2,736,000, and you estimate it at \$750,000.

Representative JENKINS. I am giving Mr. Glander's figures. He is our State man and I think the best authority in Ohio.

Senator WILLIAMS. You will agree that there is not much accuracy to these figures.

Representative JENKINS. You mean the figures from the bulletin you have in your hand? I do not know anything about that bulletin. In fact I do not know what it is nor who put it out. I have never seen it.

Senator WILLIAMS. I was wondering where they got those figures.

Representative JENKINS. I am giving you Emory Glander's figures, and, as I said before, he is a high-class man in every respect.

Mr. Chairman and members of the committee. I thank you very much for your uniform courtesy.

The CHAIRMAN. Thank you very much.

Is there any question?

Senator MILLIKIN. I was going to say that as far as these figures are concerned, they are obviously artificial, because they apply the same loss regardless of the rate of tax.

Representative JENKINS. I do not know anything about them, and I do not think these two men that I have been working with know anything about them.

Senator LUCAS. Mr. Chairman, our State is vitally interested in this bill. I have a telegram here from Richard J. Daley, who is director of the Department of Revenue, of the State of Illinois, which I desire to incorporate in the record.

The CHAIRMAN. Yes, you may place that in the record.

(The telegram referred to is as follows:)

SPRINGFIELD, ILL., June 14, 1949.

Hon. SCOTT LUCAS,

*United States Senator, Washington, D. C.:*

Hearings on States' cigarette tax bill, which passed the House on May 18 as Jenkins bill H. R. 195, will be held before the United States Senate Finance Committee on Wednesday morning, June 15. Will you please use your good influence to secure favorable action on the bill.

RICHARD J. DALEY,

*Director, Department of Revenue, Springfield, Ill.*

The CHAIRMAN. Now, Senator Lucas, will you be good enough to ask that this committee may sit until 1 o'clock today? I think possibly we may be able to finish. It is not likely that there will be any vote on any controversial question before one, is there?

Senator LUCAS. No, sir.

The CHAIRMAN. Mr. Harvey Wilson?

Mr. Wilson, we are going to undertake to complete the hearing today if we can do so by 1 o'clock. We have several witnesses here. We will ask your cooperation.

#### STATEMENT OF J. HARVEY WILSON, CIGARETTE SALES CO., MURPHY, N. C.

Mr. WILSON. I will cooperate as best I can, Mr. Chairman. There have been more than 4 hours consumed so far by the proponents of the bill, and we really do want some time to present our side.

The CHAIRMAN. We are prepared to sit until one. I do not think we can go beyond one today.

Mr. WILSON. As I say, our time is so limited that it is going to be awfully hard for us.

The CHAIRMAN. Now, Mr. Wilson, where is your home in North Carolina?

Mr. WILSON. Murphy, N. C. I am representing the Cigarette Sales Co., a family organization.

The CHAIRMAN. You may be seated.

Mr. WILSON. Thank you, sir.

I might say that what I am going to give you here is a brief of a brief. I worked for 4 weeks to try to boil down all the arguments. There are so many problems presented here.

In the limited time that I have had, I have boiled this down as well as I can, but I have asked that a copy of the main statement I have prepared be laid before you, because this is just catching the high lights and making continuous reference to the main paper.

The CHAIRMAN. Yes, sir. We have the main brief.

Mr. WILSON. And do you have copies of the House hearings?

The CHAIRMAN. Yes, sir; they are available to the committee.

Mr. WILSON. Then I will proceed, sir. I would like a copy of this statement to go to my friend, Mr. Jenkins, the author of this bill.

Representative SIMPSON. He will return shortly.

Mr. WILSON. I hope someone will lay a copy on his desk, and I would be glad to have any other of the opposition have a copy, particularly Mr. Kaufman and Miss Krone, if she is here.

In the reading of this brief, I will pause at the end of each paragraph to answer as best I can any questions that might occur to any of you in connection with that particular charge or argument, and trust that you will not hesitate to question me, since I have made a deep study of this subject, and all the points which I am bringing out here, in my opinion, were logically arrived at, or fully backed by reference to data submitted in previous hearings by the proponents of the bill.

My main statement, the principal statement, I have before me here, and will refer to. My main statement is prepared for the use of your committee. It opens with the following preliminary remarks:

This bill is remarkable in that it is one of the shortest pieces of proposed legislation on record, as innocent in appearance and first reading as milk toast, but loaded with as much devastating explosive to the economic life of the Nation as is the atomic bomb for the destruction of life and property.

How pertinent at this juncture the casual observation of the Honorable Robert L. Doughton, chairman of the House Ways and Means Committee, namely: "I am wondering what we are opening the door to."

I am going to leave out the references I have cited here, because a copy of the paper will be filed with the secretary.

"I am wondering what we are opening the door to."

Words as full of momentous portent as the famous inscription said to have been found on the ancient sundial in England, namely: "It is later than you think."

I am thoroughly convinced that in this proposed legislation, we have one of the most horrendous proposals ever put before the United States Congress, and that to enact this bill into law will be tantamount to turning the pages of United States history back 164 years, or to the time of the first Constitutional Convention in 1787.

Since the legal phases of this proposed law have been so ably presented by our eminent counsel, Judge Thurman Arnold, I will make no reference thereto other than to suggest that the only constitutional warrant for assisting the States in the enforcement of their laws is to be found in article IV, section 4, which when read in connection with the tenth amendment, would seem to limit the Federal Government in the matter of assistance to the States to the one contingency and that being in case of domestic violence.

On page 4 of the manuscript that you have there, is a copy of the article I referred to, and also the tenth amendment.

I have repeatedly charged that this legislation is being fostered through the joint efforts of one organization known as the National Association of Tobacco Distributors, an organization composed of some five to six thousand wholesale tobacco dealers throughout the country, and another organization known as the National Tobacco Tax Association, an organization composed of various tax-enforcement officials in the 39 States who are imposing taxes on cigarettes. In the interest of brevity, I will hereinafter refer to the first-mentioned organization as the NATD and the last-mentioned as NTTA.

I have repeatedly charged that there is a definite liaison between the two afore-mentioned organizations (see Kaufman, ms. pp. 2 and 3; Krome, ms. p. 6; HCR, p. 113) and that through whose joint efforts NATD is profiting to an extent exceeding \$30,000,000 (see various State tobacco laws; ms. p. 10; HCR, p. 72). And further that certain minimum-price-tobacco laws have been enacted in some 20 States and enactment of similar laws is being pressed for in the remaining States of the Union and that through these laws the members will ultimately profit in a sum upward of 150 to 175 million dollars—all at the expense of the consumer and the tobacco grower (ref: ms. p. 2, Kaufman statement). In support of these charges I would here like to submit for the record two articles which appeared in a publication, Tobacco Leaf, issue of November 27, 1948.

The CHAIRMAN. Yes, sir. You may do so.  
(The articles referred to are as follows:)

#### UNFAIR SALES ACT UP BEFORE 16 STATES

Jerome Kaufman, director of public affairs and industrial relations for the NATD, says that more than 16 States, not now having an unfair sales act, have either definitely decided to sponsor such legislation or will consider it when the various State legislatures convene in January. Among those States considering some form of action in this matter are: Michigan, Pennsylvania, New York, Nebraska, Kansas, Alabama, Arkansas, California, Illinois, Indiana, Iowa, Kentucky, Louisiana, Missouri, Texas, and Tennessee. Most of these States will seek unfair sales laws pertaining specifically to cigarettes, according to Mr. Kaufman. They will be patterned after those acts already in force in such States as Rhode Island, Maine, Massachusetts, Connecticut, Ohio, and Colorado.

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#### IMPROVED STATE CIGARETTE TAX TECHNIQUE—AN ADDRESS BEFORE THE NATIONAL TOBACCO TAX ASSOCIATION IN SAN ANTONIO

(By Jerome Kaufman, of the NATD)

Collections of State tobacco taxes, which have shown marked increases from year to year, will approximate \$375,000,000 to \$400,000,000 in 1948. That is a prodigious sum. Compared with State tobacco tax collections of approximately \$300,000,000 in 1947, this is an increase of about 36½ percent. Whenever any enterprise advances at such a tremendous rate, its operations become more complex and require increased efficiency and better planning. This meeting will, I am certain, do much to prepare all of you to cope with the problems presented as the result of this growth and expansion.

Most of the tobacco tax States have already attained a measure of increased efficiency in the vast majority of those States, considerable progress has been made toward improving the tax-collection machinery and technique. This is true both in States where cigarette taxes have been in effect, and where new taxes have been recently imposed. An outstanding example of efficiency has been demonstrated by the State of New Jersey which, in the first 4 months of a new cigarette tax law, has collected approximately \$7,000,000, whereas the estimated income for the entire year was only \$14,000,000.

The successful administration of this law is due to several factors. First, the New Jersey Legislature had the foresight to incorporate in the cigarette tax law, a licensing provision that provides the State with sufficient funds to enforce the unfair cigarette sales act, the companion measure to the cigarette tax law. Another factor is the action by the State tax department in placing the administration and enforcement of both these laws in the extremely capable hands of Commissioners Homer C. Zink, Aaron K. Neeld, and Amos Tilton. These men have set an outstanding example of efficiency and of effective and cordial relations with the industry.

In this formula, New Jersey, Massachusetts, Ohio, Connecticut, Maine and New Hampshire have discovered a means for solving many of the problems which arise in the administration of the tobacco tax laws. If this pattern is followed by the other tobacco-tax States, the task of every State tax administrator will be eased and facilitated.

The NATD takes just pride in the part that we and our member tobacco distributors throughout the country have played in the development of this excellent legislative formula. We believe that the success that has been attained by the tax States in the administration of their tobacco-tax laws is attributable in great part to the desire of the State tax administrators and ourselves to cooperate and to work together toward a common goal, the effectuation of more efficient tax systems with the greatest possible benefit and least discomfort to everyone concerned.

This commendable cooperation is also revealed in our joint efforts to promote the enactment of the Jenkins-Rogers bill which, unfortunately, because of the lack of time during the last congressional session, was not acted upon by the Senate. When the new Congress meets in January, you may be assured that we shall be with you in championing this bill to obtain its passage.

I am hopeful that we will continue to work together in complete harmony in many other constructive ways. The prospect of more and more Federal, State, and municipal tobacco taxes, for instance, offers a threat to you and to us and to the entire tobacco industry and to the consumer. Whatever action is needed to combat this danger which, if not checked, will inevitably result in fewer sales and diminished tax returns, I am sure that we will all agree, should be undertaken. While I recognize that you as tax administrators cannot act directly on such matters we, as distributors, can take a vigorous part in combating the seemingly unquenchable desire for more and more, higher and higher tobacco taxes. Our influence, individually and collectively, together with your encouragement and counsel, can carry a great deal of weight in retarding excessive and destructive taxation.

In April of next year the NATD will hold its greatest annual convention in New York City. It is my personal pleasure, on behalf of our association, and Joseph Kolodny, its managing director, to extend to each of you a cordial invitation to participate in our deliberations and convention functions. We shall welcome the opportunity and will extend to you and your womenfolk the same courtesies and accommodations as at the last convention.

Mr. WILSON. And, digressing for a moment, you heard Mr. Kaufman a while ago, and you heard some gentlemen representing the tax-enforcement division of New Jersey yesterday, on the amount of the tax. I will just casually mention that where they had expected during the first 4 months to collect \$7,000,000, they collected \$14,000,000.

I have charged that there is neither any State nor Federal law that attempts to make the shipment of cigarettes through the United States mail in interstate commerce illegal (ms. p. 5) and this statement has gone unchallenged throughout all of the House committee hearings. On the other hand, it has been freely admitted by the proponents of the bill that there is no illegality attached to such transactions. (See Jenkins testimony, ms. p. 5; HCR p. 28; Rogers, Glanders et al., ms. pp. 16-20), and the chief logic which they have advanced in requesting Federal assistance is based on the fact that cigarettes have been singled out for taxation far in excess of taxes of any other nature imposed by these States on other common necessities. I further charge that cigarettes are being taxed by certain

States and the Federal Government to an extent ranging for 165 percent of the first sales value up to 251 percent (ref.: p. 3 HCR statement) and that the tobaccos in these cigarettes are being taxed from 366 percent to 566 percent of the price received by the tobacco-grower for the tobacco (ref. HCR statement, p. 4). I further charge that in many cases cigarettes and cigarette tobaccos are being taxed far in excess of intoxicating liquors, all of which charges have gone unchallenged by this bill's proponents.

I have also averred that cigarettes are now considered a common necessity and in confirmation have recited that the United States Government in both world wars were most diligent in seeing that our soldiers were amply provided with this necessity and the further fact that millions of dollars worth of cigarettes were shipped under lend-lease to sustain the morale of Allied civilian population, and further, if I am correctly informed, are being supplied to such populations under the European recovery program. The proponents of this measure in the House hearing have freely admitted that cigarettes are just as much a necessity as any other common commodity (ref. ms. pp. 16-20).

In the main body of my present statement I have charged that these so-called State tobacco laws are in violation of the rights of the citizens under the Constitution of the United States in that they impose a direct burden on interstate commerce by requiring a purchaser in interstate commerce to buy and pay for a license before making such purchase; that the goods of any suspected person and the persons themselves may be seized without a warrant by State enforcement officials, and that any suspected automobile or other conveyance may be seized and confiscated and that all transportation companies or common carriers shall furnish enforcement officials with complete information on all cigarettes and other tobaccos handled by them, and that all common carriers shall give and permit such officials free access to their books and records and furnish such other information and reports as such officials may require (ms. pp. 14-15).

I am sure that the foregoing just must sound unbelievable and in order that you may be enlightened, I am submitting herewith 35 of these State laws and ask that they be made a part of this record. Laws submitted: Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. And these are the laws, gentlemen, on which you are being asked to virtually place the stamp of United States Government approval and which in effect will indirectly give them the full force and authority of any Federal law. It is to be noted that there is a variation in the tax on cigarettes of as much as 800 percent, that is, West Virginia tax, 10 cents per carton; Louisiana tax, 80 cents per carton. In addition, to these State taxes, it is becoming quite common for various counties and municipalities to place additional taxes. I submit in evidence copy of a Birmingham, Ala. ordinance providing for such taxes. That will be along with the State taxes.

And may I say, there, that some gentleman a while ago, in answer to a question, stated that he thought there were about 25 cities.

Well, I can name half a dozen cities in Alabama alone that have such taxes, on top of the Federal and State taxes.

In my main statement I commented on the fact that these State laws are continually being changed and amended, which changes usually mean higher taxes, and that the passage of the bill in question into law will apply to such changes and new laws as the States from time to time see fit to enact.

It is my observation that the chief law violators in connection with these State tobacco laws are the State enforcement officials themselves who are constantly and flagrantly making unconstitutional arrests, assessing fines and other penalties in contravention of all our concepts of law and justice. Here I would like to place in the record a photograph of a letter received by the writer from one Frank W. Manning, who identifies himself as chief investigator, New Orleans Division, Department of Revenue, State of Louisiana, and in submitting this letter I would like for you to particularly note what he says about the sanctity of the mails and the question as to whether such sanctity exists.

I am going to file the whole letter for your inspection. I have several copies if you would like to see them. I would just like to read one paragraph, where he talks about the sanctity of the mails:

Revenue officials over the entire Nation are well aware of the fact that companies like yours rely solely upon getting cigarettes through to a customer without possible detection, or upon the so-called sanctity of the mails. In view of what is going on throughout the Nation, whether or not this sanctity exists is problematical. Competent law-enforcement officials have been and will continue to find ways and means to enforce its laws with or without help from the post office.

This is a threatening letter that is intended to frighten me from doing business in Louisiana. I didn't read the whole contents, but it will be found in the discussion at the end of my testimony. (P. 119).

The CHAIRMAN. You may put it in the record.

Mr. WILSON. Also in connection with this letter I quote a telegram from this same person as follows:

HON. T. HALE BOGGS,  
*House Ways and Means Committee,*  
*Washington, D. C.:*

Have over a period of time confiscated some 500,000 cartons of cigarettes shipped into Louisiana by mail in contravention of Louisiana tax laws. Hundreds of thousands of additional cartons received without possible chance of detection. Jenkins bill indispensable to State taxing authorities, who are now subject to worst form of interstate racketeering. Your support will be deeply appreciated here. Frank W. Manning, Chief Enforcement Officer, Louisiana State Department of Revenue. (ref: HCR., p. 107).

I would like for you to compare that with the testimony yesterday by one of the Louisiana Representatives as to how many people they had prosecuted. Now here is a man who says that they have confiscated 500,000 cartons of cigarettes. Well, the average shipment is about six or seven cartons in this mail-order business. What do they do with the prosecutions? He said there were 15 or 20. There must have been thousands of them if this is correct.

Never in my own experience have I ever encountered as much wild and exaggerated testimony as to the amount of taxes which it is claimed the States are losing by reason of the cigarette mail-order business. These estimates vary from \$40,000,000 at the minimum up to billions of dollars as a maximum, all made by proponents of the

bill without submission of one iota of substantiating data. On page 9 of the main body of my statement is to be found what I believe to be the only logical approach to this question from which it is to be noted that the maximum amount being lost to the 39 tax States is less than \$3,000,000. Since this hearing was called it occurred to me that there is quite a simple method by which this sum could be closely approximated of which I have made a memorandum which I will read:

Reference is made to the statistical data appearing on page 9 of this testimony. The essential thing, in your deponent's opinion, is to get some unprejudiced and factual data on this situation.

After the preparation of the main part of this document and, as a matter of fact, while I was on the train coming up here, it just occurred to me that this could be done with very close approximation through the Post Office Department and without violating in any way the sanctity of the mails. Practically every mail-order concern of any consequence uses a postage meter, and each post office from where their goods are shipped keeps a complete record of the amount of postage used on that meter. The volume of business done by the smaller operators who purchase ordinary postage is exceedingly small, but, even at this, the local postmasters could tell with reasonably close accuracy the amount of postage purchased by those people.

In other words, the postmaster gets his revenue from the sale of stamps, and he knows pretty well how much postage everyone buys.

My own concern sells in 10 different States, and our records show that the average cost of postage is  $3\frac{1}{2}$  cents per carton, of 10 packages each, and we believe that this  $3\frac{1}{2}$  cents per carton would be very close to the average of that paid by all of the mail-order shippers. So, after having obtained through the Postal Department the total amount of annual postage, the total numbers of cartons shipped could be closely ascertained by dividing the total postage in dollars and cents by the  $3\frac{1}{2}$ -cent constant.

The association of which I am a member, viz, the Consumer Mail Order Association of America, can and will give fairly accurate data as to the various shippers throughout the country, which could easily be supplemented and checked by the records of the various State tax enforcement officials.

I know of no more reasonable approach to this matter than this, and believe confidently that, when the results are ascertained, they will be within 1 percent of the figures that I have given you, or a total of 9,477,000 cartons.

If this committee desires accurate information before coming to a decision on this measure, let me say there that I was under the impression that the Hendrickson bill was the one that was before us, and I prepared this paper with that in mind. So S. 879 in the statement as it stands now should refer to H. R. 195, which I understand is the way the bill is designated at present—

it does seem reasonable for us to request that this procedure be taken prior to any decision or recommendation by the committee, because, if my estimate is correct that the taxes being lost to the States is less than \$3,000,000, it would certainly hardly warrant or justify the passage of a Federal law to correct it, the expense of which the Federal Government in its administration would run many times the foregoing figure, to say nothing of establishing a precedent which would lead to all manner of complications, as I have set out in the main body of my testimony.

I made the assertion at the outset that this was one of the most portentous laws ever presented to Congress. It is not so much a question of what is involved in the shipment of cigarettes but once such precedent is established it is bound to lead to multiplicity of similar laws applying to other taxes which in the long run will most surely bring about a complete paralysis of all free commerce between

the States, and on pages 16-20 of my main statement you will find where proponents' chief witnesses throughout their testimony have admitted that the principle involved in cigarettes was identical with that of other common commodities and that in all likelihood other laws would be proposed to regulate all shipments into the many States that now have general sales tax laws on practically every type of commodity.

And with your permission, I will refer to this: because one of your witnesses here was a man who identified himself as Charles Conlon. And while some of the witnesses tried to dodge it, and said it would not apply to general sales taxes, and so forth, here is what is said by the executive secretary of the National Tobacco Tax Association, in his words, which are to be found on page 123 of the House committee report. Briefly he was referring to a much heralded case in Louisiana that somebody had been proceeding on under the Federal laws.

On the other hand, the ordinary case confronting the tax administrator involves a purchaser who simply orders by mail for his own consumption.

There is no reason to limit H. R. 195 to cigarettes. It should be extended to all taxable commodities.

In other words, he is giving warning that once this bill is established, the same thing is going to be asked for on laws to follow.

And with your permission I will here read my summing up which is to be found on pages 21 and 20 of the main statement:

My abject apologies for the length of this discourse but, as a matter of fact, to adequately cover the many facets which the subject presents would require several hundred times the number of pages this paper contains. To make it anywhere near complete a thorough analysis of the 39 State laws should be included. But even that would have no great meaning because the States are continually changing and amending their laws on tobacco products. Yet, as S. 879 is worded, it will not only apply to the State laws as of the present, but as well to any future laws their legislative bodies choose to enact. And without any deterrent there is no limit to which they might not do. You will note a variation in these cigarette taxes as they now stand of 800 percent (e. g. West Virginia tax rate 10 cents per carton—Louisiana tax 80 cents).

I have shown by the testimony of proponent witnesses a definite liaison existing between State tax officials and their chosen wholesale dealers, or NATD, and that they, at the expense of cigarette smokers, are profiting to an extent upward of \$30,000,000.

Thirty million dollars, gentlemen, is the rake-off that Mr. Kaufman's members are getting in the way of discount on tax stamps. You will find in my main statement where I proposed to do that job for \$3,000,000 for all the States if they would give me the contract for it.

I have also shown by these same witnesses that, with the assistance of NTTA, NATD is actively engaged in fostering so-called unfair sales acts throughout the States, many of which have already been passed. These "unfair" sales laws fix a minimum price at which cigarette dealers can sell and are so designed that the wholesalers' profits will be enhanced by at least 400 percent and that is true, gentlemen, or to a figure well in the excess of \$100,000,000.

And let me, Senator, digress for a moment. You are from Georgia. It is just a short while ago that you got the Atlanta papers with A&P ads, and others that advertised cigarettes in Georgia at \$1.69 a carton. Now, all of them are now \$1.88 a carton. There is 20 cents a carton difference, a carton being 10 packages. And according to the Government records last year, 1,715,000,000 cartons went into domestic consumption which, if he gets these laws through that he is so proud of will mean fully \$3,500,000,000 to his organization. I hope Mr. Kaufman is present to hear what I am saying.

It is self-evident that these cigarette tax laws in conjunction with the minimum-price laws will create what might properly be called State-created monopolies by which the consumer-taxpayer will be robbed of untold millions of dollars. And, because of decreased demand occasioned by increased prices, the returns to the tobacco grower will be greatly diminished.

I have definitely shown by proponent witnesses that cigarettes have been "singled out" for taxation at a rate out of all proportions to other common products; that they contemplate "singling out" other common commodities should this bill become a law and prove effective. One of the witnesses goes so far as to say "It should apply to all States that have a general sales tax."

And I have already quoted Mr. Conlon, saying that H. R. 195 should apply to all commodities.

I have shown, by what I believe to be reliable computations that the outside amount being lost to the tobacco States by reason of mail-order business is less than \$3,000,000. Less than \$3,000,000, mind you.

Now the man from Oklahoma said that they were losing \$3,000,000.

New York was \$3,000,000 or more, and what not. At any rate, the table that is recorded here claims the loss of \$56,000,000.

And I challenge proponents to disprove that figure. \$3,000,000, mind you, a sum equal less than one-tenth of the amount these States are gratuitously handing out to wholesalers under the guise of "discounts on tax stamps." In other words, I am using the figure that NTTA brought up, and which I submitted myself to the House committee—they didn't—claiming that there was \$56,000,000 being lost in this way. And Mr. Rogers, one of the coauthors of the bill, Congressman Rogers, said, "billions of dollars."

I have also shown by proponent witnesses, including the Honorable Thomas A. Jenkins, author of H. R. 195—Are you present, Mr. Jenkins?

Representative JENKINS. Here. Present.

Mr. WILSON. That they recognize that there is neither State nor Federal law that remotely suggests that the business of selling cigarettes through the United States mail in interstate commerce is in any way illegal. Therefore, being legal, it should not be interfered with, and I might say that it should be encouraged because, as matters stand now, it is the only deterring factor in slowing the heavy hands of these States lawmakers in the imposition of discriminatory, inequitable and unjust taxes—under laws so drawn as not only to burden interstate commerce, but as well to destroy it insofar as cigarettes are concerned.

That is the whole idea of this law, to destroy our business. They admitted that here this morning.

Therefore, we hold that enactment of this bill into law would establish a precedent which when extended to other commodities would completely eliminate all free commerce between the States and lead us back to the same conditions that existed when the first constitutional convention was called to meet in the year 1787.

Proponent witnesses blandly and naively state that the administration of this proposed law will not cost the Federal Government anything—that State officials will assemble all evidence and bring the charges before United States District attorneys for handling, et cetera. Apparently they labor under the delusion that United States courts and United States attorneys' offices are operated at no cost to the Government.

And now, back to our main theme. By enacting this bill into law: "What are we opening the door to?"

(a) Setting a precedent by putting a blanket stamp of Government approval on a mass of laws (many of which are widely divergent), by 39 States, as they stand today or as they may be changed in the future, or others that may in the future be adopted by other States. Laws that may or may not square with the Constitution of the United States. Laws which, in fact, in many respects contravene the fundamental law of the Constitution.

I am almost through. I hate to burden you with this long discourse.

(b) Setting a precedent for a multiplicity of other laws to follow as the States from time to time "single out" other common commodities for discriminatory taxation such as State taxes now imposed on cigarettes.

(c) Setting a precedent, ultimately, for a law to protect all States in the operation of their general sales tax laws all of which are designed and intended to control and virtually throttle the free flow of interstate commerce, the effect of which would, in the end, be to:

1. Create monopolies.
2. Place control of all business in the hands of State administrators.
3. Clutter up the Federal courts and reduce them to police court status.
4. Impose on the Federal Government incalculable expense in supervision.
5. Make a mockery of Federal law, as happened under the Volstead Act.
6. Impose on the citizens of this Nation these and other burdens and restrictions inconsistent and incompatible with a free democracy and all of our prior concepts of law and justice regulating the behavior of the inhabitants of a free State.

And you gentlemen are being asked to set off this explosive chain of economic reactions for what? Nothing more than to save certain States the paltry sum of \$3,000,000.

Gentlemen, I didn't know I had imposed on your time to such an extent. With my physical handicap I am not as fast as I used to be.

The CHAIRMAN. That is quite all right, Mr. Wilson. We have your brief here, and we can refer to it.

Mr. WILSON. I certainly appreciate your patience.

The CHAIRMAN. We were glad to have you here.

(The extension of remarks, statement, and discussion of Mr. Wilson follow:)

#### EXTENSION OF REMARKS BY J. HARVEY WILSON

Taking advantage of the permission so kindly given me to extend my remarks I beg to make the following additions thereto:

Mr. Charles F. Conlon, after I had testified at the above hearing, came to me with the complaint that I had misquoted him when referring to paragraph 6, page 123, covering his statement to the House Ways and Means Committee. He further stated that my misunderstanding was due to the fact that the printers of the House committee report had garbled his statement. Since that time I have read and reread the entire statement by him at the House committee hearing and am unable to reason out any other construction that could be placed on it than was set out by me during my testimony. Under the circumstances I feel that it is up to Mr. Conlon to file with you a photostatic copy of the statement given to the House Ways and Means Committee and which was turned over to the printers by them. I certainly have no desire to do Mr. Conlon an injustice in any way.

Since I testified, certain issues of the publication the Tobacco Leaf have come into my hands, and I wish to submit for the record a number of articles appearing

therein, namely, issue of May 7, an article headed "Florida Cigar Tax Beaten by Sterling Logic" which appears on page 1 and concluded on page 14:

**"FLORIDA CIGAR TAX BEATEN BY STERLING LOGIC—TRADE FIGURES, WITH M'ELVY AND LOVE AS SPOKESMEN, PROVE LEVY BAD MEDICINE**

**"By Neva Grace Murray**

"TAMPA, May 2.—This comes to you by way of Tallahassee. Our boys have done it again. They have fought the proposed tax on cigars once more, and won. Therefore, everybody interested in that little item in Governor Warren's tax bill can breathe easily once more—probably for the next 2 years.

"A delegation representing Tampa cigar manufacturers told the lawmakers at a hearing that any tax which adds to what smokers must pay for cigars would certainly curtail sales which, in turn, would mean decrease in production and decrease in employment in the cigar industry. Governor Warren had estimated that the tax he proposed on tobacco, 'other than cigarettes,' would bring Florida \$1,400,000 annually and might even be good for nearer \$2,000,000.

"The Tampa delegation which appeared in Tallahassee before the joint Senate and House tax and finance committee, had as spokesman, T. W. McElvy, vice president and assistant treasurer of the Hav-A-Tampa Cigar Co. Associated with him were Francisco (Pancho) Gonzalez, of the Garcia & Vega cigar factory, who is president of the Tampa Cigar Manufacturers' Association; Louis Lopez, of the Perfecto Garcia & Bros.' factory, and Eugene Simon, of Cuesta, Rey & Co.

"The Tampa manufacturers had deeply interested helpers from another part of the State. James Love, mayor of Quincy, representing the Florida-Georgia Cigar Leaf Growers Association, was on hand. He declared that the proposed Florida tax was the highest he ever heard of on cigars, saying that the 1 cent tax for each 5 cents or fraction thereof, would mean that a 6 cent cigar would be taxed 2 cents and that would be  $33\frac{1}{3}$  percent tax. His point was good when he said: 'We are not worried about the consumer's ability to pay, but we are worried about his willingness to pay.'

"Mr. McElvy told the committee about taxes in other States. Of the 48 States, the only ones which tax cigars are Arizona, Georgia, Louisiana, Mississippi, New Hampshire, New Mexico, Oklahoma, South Carolina, and Tennessee. None of the other States which are important in the manufacture of cigars, New York, Pennsylvania, New Jersey, or Michigan, have a tax on cigars, nor do any of the States which are tobacco-producing States.

"The industry's representatives presented their side of the matter so convincingly that the committee also downed the tobacco tax along with several others in the Governor's 15-point program; so that's that for now, at least."

I believe that in view of certain testimony by Hon. Dwight L. Rogers and other witnesses appearing from Florida that your committee will find this article most enlightening and on page 2 of the same publication, same date, an editorial headed "Sharp-Shooters on the March," which definitely bears out the contentions I have made that NATD is principally interested in every means in getting the prices on cigarettes raised to the consumer's great disadvantage:

**"SHARP-SHOOTERS ON THE MARCH—THEY ARE MAKING A DETERMINED AND METHODICAL FIGHT AGAINST EVERY FORM OF LAW THAT MAKES PRICE-CUTTING DIFFICULT**

"From numerous sources come evidence of a determined, methodical attack upon legal restrictions against price cutting. Several unfair-trade-practice acts have been defeated in State legislatures; a bill has been introduced in Congress to repeal the Miller-Tydings law, which is the basic Federal measure upon which fair-trade laws of the various States are founded; numerous suits have been brought to test the constitutionality of the fair-trade laws in various States (in the State of Florida a misguided supreme court has declared that State's fair-trade law unconstitutional), and the fury and viciousness of the attack upon the Jenkins bill, which, if enacted, will put an end to the practice of shipping unstamped cigarettes from non-tax States into States which impose taxes on the sale of cigarettes, is characteristic of the attitude that certain elements of the industry take on the subject of price cutting.

"Now the Miller-Tydings law, the fair-trade-practice laws, the unfair-trade-practice laws, and the Jenkins bill have but one thing in common; all of them are intended to make price cutting more difficult. The fair-trade laws simply provide that a manufacturer may contract with a distributor (jobber or retailer) in each State having such a law, to maintain a resale price upon the manufacturer's

product, set by the manufacturer. The law is permissive only; there is no requirement that a manufacturer shall fair trade his product, but when one has done so, the theory of the law is that this contract is valuable property both for him and the distributor with whom he has contracted, and that anyone who destroys the value of that property (contract) by price cutting is answerable in damages. The Miller-Tydings law, the Federal act upon which this law is based, simply takes care of the interstate aspects of the matter. Unfair trade practice acts generally provide that it is illegal to sell merchandise, usually cigarettes, at less than specified mark-ups above inventory by both the jobber and the retailer. They are criminal statutes and where they prevail are enforced by the courts without any reference to whether the article has been fair traded or not, and they are not based on the Miller-Tydings Act. The Jenkins bill, as before stated, is intended to prevent shipment of unstamped cigarettes from non-tax States into States that have cigarette taxes.

"All these laws are of comparatively recent origin in American jurisprudence and the fact of their rapid acceptance is clear proof that there was a need for them. The legislators of the various States having such laws didn't just think them up to keep their hand in practice or for amusement. They were enacted because certain products, generally cigarettes, were being used in a way that was injurious to the welfare of the industry, and especially to the detriment of the small merchant, and that this injury had reached proportions that threatened the livelihood of thousands of small merchants. Cigarettes, a commodity in wide demand by both men and women and having a small per-package cost, were (and are) sold by many large retail concerns (whose purchasing power gives them larger discounts than their smaller competitors enjoy) at prices sometimes less than their smaller competitors actually pay for them, simply for the purpose of getting people into their stores in the hope they will buy something on which the price has not been cut. Cigarettes are merely a side line with these people. But they constitute 60 to 70 percent of the average small tobacco store's turn-over. To merely state the facts of the case is the best justification of these laws; argument or elaboration is unnecessary.

"These facts are not only easily arrived at by anyone desiring to learn the truth but they are actually notorious. And yet one of the judges of the learned Supreme Court of Florida delivered himself of the following opinion:

"It permits price fixing of the worst character \* \* \* the fixing of a minimum price floor as distinguished from a maximum price ceiling \* \* \*. It is not only not a fair trade act as far as its effect upon the consuming public is concerned, but actually it is unfair and unconstitutional. It stifles individual initiative and allows no premium upon the personal ingenuity and efforts of the successful merchant—as distinguished from the lethargy of the mediocre \* \* \*. The owner of a trade-name, trade-mark, or brand does not need such protection—because he has it within his power to protect himself. He need not furnish his product to the retailer who refuses to agree to his minimum resale price.'

"The late United States Supreme Court Justice Brandeis, one of the greatest liberals who ever held high judicial position in this country but who had a practical knowledge of how business is done, had this to say upon essentially the same subject:

"Americans should be under no illusions as to the value or effect of price-cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the cooperation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly.'

"On this matter the Tobacco Leaf will trail along with Justice Brandeis rather than with Justice Jobson, of the Florida court. As a matter of fact, our feeling is that some kind-hearted person ought to take the Florida jurist by the hand, gently lead him into a corner and quietly, but nevertheless firmly, whisper into his ears that wonderful story about the birds and the bees. For if his knowledge of biology is on a par with his knowledge of economics, he still believes that the doctors find babies in cabbages.

I also submit herewith for the record, page 49 of the above-mentioned publication the first paragraph of an article bearing the heading "Missouri NATD Seeks 3-cent Tax on Cigarettes," and giving an account of the activities of the Missouri Association of Tobacco Distributors, a State organization allied with NATD wherein they are attempting to influence the State of Missouri in putting a 3-cent per package or 30 cents per carton tax on cigarettes.

**"MISSOURI NATD SEEKS 3-CENT TAX ON CIGARETTES—STATE GROUP ADMITS SUB-JOBBER TO ASSOCIATE MEMBERSHIP AND FIXES RATE OF DUES .**

"St. Louis, April 18.—The Missouri Association of Tobacco Distributors has memorialized the Missouri Legislature to impose a 3 cents per package tax on cigarettes, 1 cent of which is to go to schools, 1 cent to the State, and 1 cent to the counties by per capita allocation. They ask that evasion of this tax be made a felony. It is anticipated that such a tax would produce \$18,000,000 revenue annually. Carroll Moore brought the matter to the attention of the association, which agreed."

My comment on this is that they are endeavoring to foster this tax in order to profit by reason of the usual discount allowed to wholesalers in these States.

I also submit for the record page 7 of the June 4 issue of the same publication an article entitled "Highest New York Court Upholds Fair Trading," and giving an account of the upholding by the New York court of the minimum-price law.

**"HIGHEST N. Y. COURT UPHOLDS FAIR TRADING—GOLDSMITH BROS. DEPARTMENT STORE ENJOINED FROM SELLING CIGARS BELOW MINIMUM PRICE**

"As reported in last week's Tobacco Leaf, the Court of Appeals of the State of New York, has unanimously affirmed the judgment of the Appellate Division of the New York State Supreme Court, permanently enjoining Goldsmith Bros., Inc., large New York department store from selling cigars below the minimum retail prices stipulated in the various fair-trade contracts. This action affirmed in all respects the opinion of Justice Koch, of the supreme court, New York County, who originally heard the case.

"The suit instituted by Eric Calamia, managing director of Retail Tobacco Dealers of America, Inc., individually and trading under the firm name and style of Reinhard Bros. Malcolm L. Fleischer, general counsel of the RTDA, represented Mr. Calamia throughout all stages of the action. Associated with Mr. Fleischer was Herbert M. Markham, counsel of the Tobacco Retailers Circle, Inc.

"The decision, which will have a far-reaching effect, will discourage other price-cutters from attempting to violate fair trade contracts in force in the tobacco industry. This decision, a notice to the trade that serious and zealous enforcement of fair-trade contracts are respected by our courts, will be a constant reminder to any recalcitrant that despite the many obstacles thrown in the path of fair trade by one of the largest and most powerful price-cutters in the country the champions of fair trade were victorious.

Since the fall of last year, some 60 cigar manufacturers have fair traded their brands under various State fair-trade laws."

My reason for submitting this is the fact that Mr. Jerome Kaufman has stated that the RTDA, or Retail Tobacco Dealers Association, is indirectly a part of the NATD, and I also submit it for the reason that one Eric Calamia who has previously testified and identified himself at this hearing and who it seems was responsible for instituting this suit.

I also submit for the record the editorial page of May 28 issue, 1949, of the Tobacco Leaf, all of which bears on these minimum-price laws and the attitude of the NATD toward them. I ask that you take particular note of the editor's uncomplimentary remarks regarding a decision by one of the Florida lower courts holding the Florida minimum-price law unconstitutional.

**"THANKS, MR. VIPOND—YOUR ANSWER TO THE WALL STREET JOURNAL EDITORIAL DISCLOSED A FINE KNOWLEDGE OF TOBACCO TRADE ECONOMICS AND GOOD STRAIGHTFORWARD ENGLISH**

"Next to a prize fight a public debate is about the most interesting public performance that this writer knows of, and we take pleasure in presenting a case in which a young tobacco executive breaks lances over an important tobacco trade matter with one of the country's ablest editorial writers, and, in our opinion, comes off with the honors of war.

"A recent issue of the Wall Street Journal carried an editorial about price fixing, which was an attack upon the Miller-Tydings bill and the State fair-trade laws based thereon. which, the usually well-posted editor declared, are contrary to the principles of the Federal antitrust laws and he urged Congress to take another look at the Miller-Tydings Act.

"David Vipond, of the Scranton Tobacco Co., in a well-written letter pointed out the editor's misunderstanding of one aspect of the fair-trade laws and pre-

sented an argument that seems to us to comprehend the genuine substance of the matter.

"The Journal's editorial was in part as follows:

" 'Price-fixing is a nasty word. Most people are instinctively suspicious—and rightly so—that when competitors agree among themselves to fix prices for their goods and services, the consumer is going to get rooked one way or another. \* \* \*

" 'Now legal price-fixing is being questioned. It all began, of course, under the guise of avoiding cut-throat competition, on the plea of stabilizing prices. But like every other such stabilization program—from the cartels of Europe to our own farm price supports—it results in the consumer paying more than he would otherwise have to pay. For it is either that or the price-fixing has no point whatsoever.

" 'Florida's price-fixing law has been declared unconstitutional by a lower court; so has part of the Louisiana law. Illinois' mandatory fair-trade law is being challenged. And this week a New York intermediate court upset that State's mandatory price-fixing as it applies to liquor sales.

" 'It is time Congress took a look at the Federal law which supports all this local pricefixing. Congress has said in the antitrust laws that combinations interfering with free competition are not in the public interest. Saying this, it is absurd to give the stamp of approval to the very practices it has outlawed.'

" 'Now that is undoubtedly one honest man's view of the matter, cogently put, and doubtlessly represents the editor's genuine convictions. However, the editor is manifestly unfamiliar with the circumstances that make fair trade laws and the like necessary, and we believe that Mr. Vipond's reply, which appeared in the Wall Street Journal of May 19, states the case for the legitimate merchant admirably. His letter follows:

" 'EDITOR, THE WALL STREET JOURNAL: It is true that "price fixing" is a nasty word; at least, if not intrinsically nasty, it is nasty in the mind of the public. We do not believe, however, that the price fixing if it may be called that, contemplated by the various fair trade acts is the price fixing that is usually thought of.

" 'The fair-trade acts in the 45 States which have them are permissive, not mandatory, and they allow single manufacturers, not combinations of manufacturers, nor competing manufacturers, to establish a retail price on one or more articles of their manufacture. We might go as far as to say (contrary to your statement that such a plan results in the consumer paying more than he would otherwise have to pay), it is quite likely that the over-all result is that the consumer pays less, if not for a specific article, at least for his total purchases. \* \* \*

" 'When a retail chain store, or any retailer for that matter, offers at a cut price an article that is widely consumed and of which the value is generally known, it is usually done because that store hopes to attract customers who can be sold something else, and not because the store is charitable, or feels a strong social purpose in selling merchandise without a profit.

" 'The very term "cut price" implies that that price is something less than the "regular" price which is established by custom, advertising, or otherwise. The tendency toward monopoly, or cartelization which you decry, as do we, is hastened very markedly by use of cut prices and underselling, and such a device is widely used to freeze out competition. If small, independent businesses are to be preserved, such devices as fair-trade laws are essential. They are automatic, if employed, and no bureaucracy is involved in their use and enforcement.

" 'You are no doubt also aware that these fair-trade laws protect a manufacturer, if he desires to avail himself of such protection, from having a very valuable trade-mark jeopardized by a few who might care to use it for their own interests, and thus depreciate its value to consumers. What is basically wrong with a manufacturer, who makes an article which he believes to be a good value at a given retail price, insisting that the article be sold at that price? There is no collusion involved. If the price he sets is so high as not to represent a good value to the consumer, some competitor will surely make a similar article and sell it at a lower price, so the consumer does not suffer.

" 'The fair-trade acts, in our opinion, far from being part of an insidious stabilization program, or part of a program of planned economy, are quite the reverse. They are merely laws which allow competition to be carried on fairly.

" 'DAVID VIPOND, Scranton Tobacco Co.

"And while we are content to permit the case for fair trading to stand upon Mr. Vipond's letter, we cannot forbear to close with the quotation from Justice Brandeis, which recently appeared in this paper:

“‘Americans should be under no illusions as to the value or effect of price-cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the cooperation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of a trifling immediate gain, and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly.’

“In our opinion Mr. Vipond and Justice Brandeis are an unbeatable team.”

I also submit for the record page 12, issue of May 28, 1949, of this same publication, an article entitled “Florida May Increase Tax On Cigarettes”:

“FLORIDA MAY INCREASE TAX ON CIGARETTES—HOUSE COMMITTEE APPROVES AN ADDED TAX OF 1 CENT; WOULD UP TAX TO 5 CENTS

“By Neva Grace Murray

“TAMPA, FLA., MAY 16.—Another penny tax on cigarettes to raise money for construction and operation of Florida State tuberculosis sanatoria was approved yesterday by the house committee on finance by a vote of 23 to 8. The yield is estimated at about \$3,300,000 a year, which would go to build three more new sanatoria, the proceeds later to be earmarked for operation of those institutions. The bill was introduced by Representative Tupper, of Gulf County, and would make the tax on cigarettes in this State 5 cents. Florida has taxed cigarettes 4 cents since the last legislative session.

“The only opposition to the new tax was reported as coming from J. M. Butler, representing the Eli Witt Tobacco Co., distributors. He said it would be an excessive and harmful tax, and pointed out that the tax on cigarettes now—State, Federal, and local—amounts to 13 cents a package in many cities.

“In the Senate, Senator Sanchez introduced a bill Monday to require anyone purchasing cigarettes on which no Florida State tax has been paid to buy and affix the State stamp on such cigarettes within 3 days after receipt. This requirement would strike a blow at the mail-order business from out of the State.

“Several more bills of interest and concern to the cigar industry were thrown into the legislative hopper at Tallahassee yesterday. Unemployment compensation would be raised by a bill introduced by Representative Tupper, of Gulf, in the house, and workers would themselves be required to contribute as much from their pay as their employers put into the fund. Benefits would be raised to \$30 a week for 30 weeks, according to this proposal. Now only the employer contributes and the maximum benefits are \$15 a week for 16 weeks.

“The House last week passed a bill to raise unemployment payments to \$20 a week for 20 weeks, and that drew fire from legislators who declared it was simply a dole and would encourage those who would rather draw \$15 a week and do nothing rather than work for \$30 a week. Supporters of the increase pointed to the \$74,000,000, of which \$24,000,000 is declared surplus, which has accumulated in the State’s unemployment fund, and told the House that Florida’s unemployment payments are lower than any other State in the Union.

“The Tupper bill would have the heaviest impact on the Tampa cigar and the west coast citrus industries, requiring employers to withhold from their workers’ wages an amount equal to the employer’s payment into the fund. Tupper said he introduced the measure at the request of workers in the Port St. Joe paper mills.

“The House committee on constitutional amendments has announced a public hearing Thursday on a proposal to eliminate Florida’s anticlosed shop constitutional amendment. Sponsored by former Attorney General Tom Watson, this amendment provides that no person shall be denied the right to work because of membership or lack of membership in any union or organization. Court actions have sought to enforce it—and to break it—in several hotly contested actions.”

This article deals with the attempt that is being made to increase the Florida tax on cigarettes from 4 cents as at present to 5 cents per package.

It is well worth while comparing this proposal with the action that has just been taken as reported above, in connection with a proposed tax on cigars. The Florida lawmakers seem readily disposed to increase the tax on cigarettes which are manufactured in sister States but promptly turn down a proposal by the Governor of Florida to impose a tax on cigars.

Also submitted for the record from this same publication, issue of May 21, 1949, an article entitled “\$374,000,000 to States in Tobacco Taxes,” and which gives an account of the vast increase in taxes collected by the States during the

year 1948 which they attribute largely to "new and increased taxes on these items":

**"\$374,000,000 TO STATES IN TOBACCO TAXES—1948 FIGURE A RECORD—NEW YORK STATE'S \$50,900,000 TOPS LIST—PENNSYLVANIA NEXT**

"WASHINGTON, May 15.—State tobacco taxes yielded a record \$374,000,000 in revenues in 1948. The gain was attributed to increased consumption of cigarettes, cigars and other tobacco products, and new and increased taxes on these items.

"The country's smokers bought 348,000,000,000 cigarettes in 1948, or 13,000,000,000 more than in 1947, and 5,800,000,000 cigars or 3 percent more than in the preceding year.

"The largest yield, or \$50,900,000, was collected in New York, where the tax was 3 cents a package on cigarettes, up 1 cent from 1947. Pennsylvania, with a levy of 4 cents a package, ranked second, collecting \$30,300,000. Illinois, which was third, took in \$28,400,000 from a tax of 3 cents a pack.

"Other high yields were: Texas, \$23,100,000 from a 3-cent tax; Michigan, \$22,400,000 from a 3-cent tax; Massachusetts, \$21,600,000 from a 4-cent tax, and Ohio, \$17,600,000 from a 2-cent tax. Altogether, 39 States have tobacco taxes and all State cigarette taxes are in addition to the Federal levy of 7 cents a pack.

"Although Nevada ranks among the tail-enders in producing revenue, consumption in the State last year averaged more than 3,460 cigarettes for every member of the permanent population."

Also is submitted for the record page 8 of this asme publication, issue of May 21, 1949, an article entitled "1-Cent Sales Tax on Cigarettes Looms in Ohio":

**"1-CENT SALES TAX ON CIGARETTES LOOMS IN OHIO—STATE NOW LEVIES 2 CENTS PER PACK—OATD'S OLLENDORFF MAY KILL MEASURE IN COMMITTEE**

**"By Bob McCusker**

"Cleveland, May 14.—Members of the tobacco industry in Ohio are up in arms over the introduction in the State Senate of bill 295, which would impose a State sales tax of 1 cent per package on cigarettes. As it is now, there is a 2-cent-per-pack tax, with cigarettes exempt from the Ohio 3-percent sales tax. The passage of this bill would work a hardship on the cigarette-vending-machine operators. It would mean the operator would have to absorb the 1-cent sales tax, or place a 1-cent tax slip in each pack of cigarettes. The OATD is definitely opposed to this bill, and Executive Secretary J. J. Ollendorff is spending considerable time in the State senate, trying to get this bill killed in committee. It would be a very good idea for all interested to contact their State senator at once, and let him know that they are opposed to S. B. 295.

"President Albert A. Guarnieri, Jr., of the OATD, will soon call a special meeting at the Neil House, Columbus, at which time the provisions of the recently enacted H. B. 101 will be explained by William D. Bailey, supervisor of the excise section, Ohio Department of Taxation. Mr. Bailey will also announce at that time the rules and regulations concerning H. B. 102, which regulates the setting of the cigarette-tax meters.

"Tony Rappish, who has been associated with the late Izzy Roth in the High-Long Cigar Co., Columbus, has taken over the management of the concern. He will be assisted by L. C. Brown, formerly of the cigar department at the Fair store, Chicago."

It is not clear from the foregoing article whether it is the intention of the State of Ohio to reduce its present tax of 2 cents per package to 1 cent per package, or whether the intention is to add another 1 cent to the present 2 cents, but in view of the fact that the OATD, an allied organization with NATD is resisting the proposed law we take it that it means a reduction in tax.

All the articles above submitted bear out the charges that I have repeatedly made that NATD is the active force and influence in fostering both the tax laws and the minimum price laws of 39 States by which the price on cigarettes to the consumer is raised to outrageous proportions and through which the members of NATD are profiting to an unconscionable extent, and also bear out my contention that NATD members are the prime movers in attempting to get H. R. 195 enacted into law.

## STATEMENT OF J. HARVEY WILSON CIGARETTE SALES CO., MURPHY, N. C.

Let us state frankly at the outset that our opposition to the above-mentioned bill is, in part, prompted by a selfish interest and well it might be. We have invested 11 years of hard work in establishing our business and in addition many thousands of dollars in advertising, buildings, real estate, good will, et cetera. However, since your deponent is near the end of his useful life he can state with all sincerity that he is more concerned with the welfare of his country than with his own, and for the past several years has viewed with alarm the tendency on the part of many States to pass laws restrictive of free commerce between the States. This tendency if not curbed will soon bring us to a state of chaos comparable with that which existed toward the end of the Federation of States and which was responsible for the formation of our present Government. Therefore, we feel that the bill in question is a particularly vicious one for the following reasons:

## I CONSTITUTIONALITY

(a) It lacks constitutionality because it attempts to establish a precedent or type of legislation not heretofore presented in the entire history of Congress and apparently without any constitutional authority. Argument: It is reasonable to suppose that there is not a member of this committee nor probably not a Member of the Senate as a whole who would not be opposed if the terms of the bill went so far as to transgress the sovereignty of the States by so authorizing an official of one State to go into another State and examine the business records of any individual, group of individuals, or corporation. Nevertheless the bill under consideration attempts to do this very thing by indirection in that it would require the shippers in one State to file their records with State authorities of an adjoining State.

(b) It attempts to place an undue burden on interstate commerce by impeding the free movement thereof and placing on the purchaser conditions with which said purchaser could not possibly comply. To elucidate, all of the State laws with which we are familiar allow a period of only 1 hour after cigarettes are received in the State in which to affix the so-called tobacco stamps thereon. The only place for the purchase of such stamps is at the several State capitols, and even though the purchaser were located in the city of the State capitol it would be wholly impossible to obtain the stamps and affix them within the time provided. Yet his failure to do so would adjudge him a criminal. Hence, the strict enforcement of the law would result in a complete stifling of any interstate commerce business on this particular commodity and deprive the consumer of the right to buy this essential merchandise when and from whom he may.

(c) It attempts the deprivation of property without due process of law. Argument: It has been recognized from time immemorial that the good will of any business firm is one of its chief and most valuable assets, and that an established list of customers is one of the essential components of good will. This is particularly true of any person or firm transacting business through the mails. If the above-titled measure is enacted into law, such list of customers would have to be furnished by such firms to the administration officials indiscriminately and without any guaranty that misuse could or would not be made of them. The whole import of this measure is intended to destroy such businesses, and we believe that if any proponent or advocate or even the author of the bill were put under oath he would admit that such is the purpose of the legislation. Yet, there is no evidence or even intimation that such businesses are not entirely legal under our Constitution and laws as now construed.

(d) The tobacco laws of the several States do not conform or square with the tax-uniformity provisions of the constitutions of the several States. Argument: Since the beginning of World War I our Government has recognized cigarettes as being a necessity and was just as diligent in seeing that our soldiers were provided with them as it was in providing bread and meat. In World War II, further recognizing that cigarettes were an essential, or, may we say, a dire necessity, our Government went so far as to not only provide ample quantities of cigarettes to our soldiers, but as well distributed millions of dollars' worth of them under lend-lease. Therefore, it can no longer be argued that cigarettes are luxuries, or that they come under the head of so-called police provisions relating to public safety,

public morals, and public peace. That cigarettes are not so considered in the several States' tobacco laws is well evidenced by the fact that they are taxed by the several States, counties, and municipalities, varying with different sections, from 40 to 90 percent of their first sales value. Chewing tobaccos mostly are not taxed at all; smoking tobaccos only slightly, and even the most expensive cigar is taxed only 1 percent of its sale price. In many States if one person were to purchase \$500 worth of 50-cent cigars the total State tax would amount to \$6.75, whereas, if another citizen of the same State purchased \$500 worth of 10-cent packages of cigarettes he would pay a tax of \$166.66. Certain it is that there is no logical reason for classifying the several forms of tobacco before-mentioned in separate categories. A large proportion of the States have in recent years provided for a general sales tax on all commodities ranging from 1 to 3 percent of the sales value but making at the same time an exception in the matter of cigarettes and taxing them in percentages as above outlined. The only justification that the proponents of this bill can put forth in support of this outrageous discrimination is that "the States need the money and this is an easy tax to collect." Any rational person who takes the trouble to analyze the proposition must admit that this is gross discrimination against a person who chooses to use his tobacco in the form of cigarettes. The advocates of the measure during the House debate saw fit to cite certain Supreme Court rulings in justification of the constitutionality of this bill, but they failed to mention, either intentionally or from lack of information, that these were whisky cases about which there is a special constitutional amendment that does not apply to tobacco.

## II. PRECEDENT

Once the precedent has been established as called for in this bill, Congress would undoubtedly soon be called upon to pass similar laws that would apply to all interstate commerce, the free operation of which would be virtually paralyzed. To substantiate the foregoing statement we respectfully refer to the House debate on the Jenkins bill (H. R. 5645) as set out in the Congressional Record of May 28, 1948, volume 94, No. 97, wherein certain Members openly suggested that such was their intention. All of the State tobacco laws which we have seen are patently designed to channel all business through certain wholesalers within the State, deny the consumer the right to purchase his needs except through such sources. It is easy to imagine the abuses and damage to the general welfare of the people such a system could and would bring about. To illustrate: the State of Georgia tobacco law provides that wholesalers will be allowed a discount of 10 percent on their purchases of stamps, ostensibly to reimburse them for the expense of affixing or printing the stamp on cigarettes, which is done with automatic machinery and at small cost, but the Georgia consumers at the present time are being penalized through this discount of upward of \$750,000. This is a generous reward for the small task of affixing Georgia stamps. The only possible justification for this gratuity is to enlist the support of the chosen dealers in maintaining the outrageous tax. The tax per carton in the State of Georgia is 30 cents, or 3 cents per package. In many States the tax is as high as 40 cents per carton; and, in several, even as high as 50 cents per carton. And here we might add that it is becoming quite the custom for counties and municipalities to add from 10 to 30 cents per carton on top of all the other taxes. We maintain that the States who are attempting to get this bill enacted into a law are giving away to wholesale dealers, in the form of discounts, five times as much as the small amount of revenue they are losing through the shipment of cigarettes through the mail and in interstate commerce.

## III. LOSS OF REVENUE TO POSTAL DEPARTMENT, EFFECT ON PARCEL-POST DELIVERY, AND GENERAL INCONVENIENCE TO FARMERS AND RURAL DWELLERS

The passage of the bill in question would cost the Post Office Department many millions of dollars in revenue. Were a like law later passed applying to all commodities, practically all parcel-post shipments would cease, which would result in a loss of untold millions to the United States Government. And to this we might add that such a condition would be little short of disaster to the farmers and rural dwellers in general. It would inevitably make it impossible for the mail-order houses of all kinds to continue in business. We all know that these mail-order firms are to the farmer what the department stores are to the city dweller. As matters now stand, the farmer can purchase his merchandise with practically as little trouble as the urbanite can buy from his local department store. But imagine his consternation when, at the end of a particular month in

which he has made a number of mail-order purchases, he receives notice from his State revenue department that he is a criminal subject to heavy fines and punishment by imprisonment for the reason that he has not remitted the State taxes on such purchases. This notice, of course, is accompanied by a bill for the taxes, plus penalties, and the threat of more dire punishment should he so violate the law in the future. This suggestion is not exaggeration, because the several State revenue departments are doing this very thing today with the citizens of their States in connection with their so-called tobacco laws. It is easy to imagine how the general populace would rise in wrath and righteous indignation when such practice becomes general as would be the case if the bill in question is enacted into law. This would rise to uncontrollable proportions should such a law be extended or amended to apply to commodities in general in order to protect and assist the States in the collection of their so-called use or sales taxes. If such practices should be upheld by the courts, it would most surely mean the end of all mail-order purchases in interstate commerce and, as we have said before, would practically destroy our parcel-post system, which has been one of the greatest boons to farmers and rural dwellers. All of the testimony you gentlemen will hear from the proponents of this bill will be from State officials whose chief object is to lessen their task of collecting the taxes. You will not hear from the consumers, the majority of whom are not even aware of this proposed legislation; but, needless to say, we are in direct touch with these consumers and know their temper in respect to such measures.

#### IV. THIS BILL WILL NOT ACCOMPLISH ITS PURPOSE

This measure, if enacted into law, will reduce the Federal judiciary to the status of police courts and will no more stop the purchase of cigarettes without payment of State taxes than did the Volstead Act stop the purchase of prohibited liquors. Its actual effect will unquestionably cause a horde of clandestine runners who will carry cigarettes in private conveyances from nontax States to tax States. Once started, the volume of business they would do will undoubtedly far exceed what is now being done by mail-order houses through legitimate channels of interstate commerce, and the difficulty of controlling will far exceed the problem that the taxing authorities now have, particularly in view of recent United States Supreme Court rulings relating to the search of private individuals without proper search warrants as provided for by the United States Constitution and the constitutions of the several States. This, too, would impose upon the Federal Government incalculable expense in trying to prevent the practice. Certain it is that the cost to the Federal Government would far exceed the amount of taxes now being lost to the States by reason of the relatively small amount of business now being done by mail-order concerns. The tax States themselves will gain nothing and the Federal Government, in attempting to enforce the law, would lose untold millions of dollars.

#### V. HOW CIGARETTES ARE NOW TAXED

Few citizens know—in fact, it is our guess that few members of this committee have any realization of—the terrific tax burden placed on cigarettes by various taxing agencies. In some cases it far exceeds the tax on intoxicating liquors. We cite the following table for your enlightenment and that of other Members of Congress who might be interested.

Factory price (10-package carton, popular brands).....	\$0 67	\$0 67	\$0 67	\$0. 67	\$0. 67
United States tax (payable at factory).....	. 70	. 70	. 70	. 70	. 70
State tax (if) .....	. 20	. 30	. 40	. 50	. 80
Total United States and State tax on first sales price.....	. 90	1. 00	1. 10	1. 20	1. 50
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Total in percentages.....	135	150	165	180	221
If city tax 20 cents add .....	30	30	30	30	30
Total, all sources on first sale price.....	165	180	195	210	251

We challenge anyone to disprove these figures.

## VI. PERCENTAGE OF TAX ON AMOUNT OF TOBACCO CONTAINED, AND EFFECT ON TOBACCO GROWERS

It is an economic axiom that the higher the price the lower the consumption. How effectively this axiom is proven is well illustrated by a compilation made in 1939 from the records of Associated Retail Tobacco Dealers and published in the issue of the magazine *Business Week* of July 29, 1939, copy of which we quote:

"Cigarette-tax Blues: Tobacco dealers complain of reduced smoking. New York's 2-cent tax hits hard. On May 17 the New York legislature levied a 2-cent tax on cigarettes. On July 1 the tax went into effect. Prices in New York City, where tobacco dealers and consumers were burdened by an additional 1-cent tax for relief purposes, soared to 17 cents a pack for popular brands. Dealers across the river in tax-free New Jersey did a land-office business by mail and with thousands of commuters. Last week New York tax-enforcement authorities moved to halt the flow of bootleg cigarettes by stationing 35 inspectors at ferry slips, bridges, and tunnel entrances, but the contraband continued to flow across the Hudson.

"The picture was one that has grown familiar since the first cigarette tax passed in Iowa in 1921. At the beginning of this year, with cigarette consumption at 163,700,000,000 a year, 21 States had a tax on this form of smoking. So, when the legislature season opened with taxes proposed in eight additional States, retail dealers prepared to fight. Their principal concern was that in tobacco-taxing States cigarette consumption averaged 932 per capita; in nontaxing States it was 1,531.

"A final check-up revealed they had come out on the long end of a 5 and 3 score. New taxes in New York, Rhode Island, and New Hampshire brought the total of taxing States to 24."

So far as we know, this is the only careful survey of this nature that has ever been made, and please bear in mind that at the time these figures were compiled there were not more than a half dozen very small concerns engaged in business of shipping cigarettes through the United States mails. Worked out in percentages, the reduction in cigarette consumption amounted to (in round figures) 40 percent by reason of State taxes alone. We all know what effect such reduction means to the farmer in the price received for his tobacco. The following table will serve to show just how the tobacco that enters into the manufacture of cigarettes is taxed. Figures are on an assumed price of 60 cents per pound for tobaccos for cigarettes, which is about the present market. Each carton of cigarettes of 10 packages contains one-half pound of tobacco, and from these figures this table is chartered.

Price of tobacco per carton (approximately ½ pound).....	\$0.30	\$0.30	\$0.30	\$0.30	\$0.30
Government tax.....	.70	.70	.70	.70	.70
State tax (if).....	.20	.30	.40	.50	.80
Total tax.....	.90	1.00	1.10	1.20	1.50
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>
Percent per carton.....	300	332	360	400	500
If city tax of 20 cents per carton, add.....	66	66	66	66	66
Total tax percentage (all sources).....	366	398	426	466	566

## VII. EXAGGERATED TESTIMONY

The gentlemen of this committee, as well as the other members of the Senate, will be hearing some amazingly exaggerated figures from the mouths of those who are sponsoring the passage of the bill in question, none of which are supported by any reliable figures whatsoever. As a concrete example as to what may be expected in this direction, we respectfully refer you to the House debate as reported in the *Congressional Record* of May 28, 1948, volume 94, No. 97, pages 6888 to 6909, inclusive. This record divulges testimony or statements by various persons who estimate the tax being lost to the States from \$30,000,000 per annum to \$250,000,000 per annum. Your deponent has a fair knowledge of the concerns engaged in the shipment of cigarettes through the mails; and, as an outside figure, we would estimate the total volume of business done by them at not more than \$10,000,000 throughout the United States, and the taxes lost to the 38 taxed States as not more than \$3,000,000. As a further illustration of exaggeration and misrepresentation, we quote Congressman Rogers of Florida (reference: page 6898, column 3, of the *Congressional Record* above referred to): "I understand there is one dealer in

Missouri who ships as much as \$150,000,000 worth of cigarettes to the various States."

In answer to this claim, we venture the assertion that there has not been as much as \$150,000,000 worth of cigarettes shipped into the State of Missouri over the past 5 years, all included. But, why dwell further on such nonsensical and irresponsible statements.

VIII. WHO ARE THE REAL SPONSORS—WHO IS FINANCING THE TERRIFIC FIGHT FOR PASSAGE OF THIS BILL?

(a) Before conclusion, I beg leave to elaborate somewhat briefly on one of the vital points mentioned in paragraph 2, page 2, viz: the matter of enormous sums being allotted to large wholesale dealers under the so-called State tobacco laws under the guise of discounts to compensate these dealers for the expense of affixing tobacco stamps. We have charged and again reemphasize this charge; that these State tobacco laws are so drawn and designed as to channel all tobacco business within the respective tax States through the large wholesalers, which in effect grants them a monopoly with enormous profits accruing to their benefit by reason of the tax discount to allow for expense which is done at exceedingly low cost with automatic machines applying the stamp on the packages by rubber-stamp impressions. We have cited the case in the State of Georgia and the annual compensation to the dealers in that State of \$750,000. From the standpoint of population, Georgia only has about 2 percent of the total population of the 39 tax States, and one of the lowest tax rates. Using these figures as a basis of computation, it would appear that the large dealers in the tax States are profiting to an extent ranging between 45 and 60 million dollars by reason of these unwarranted gratuities under the guise of tax discounts. So far as we know, there is no other form of tax by the Federal Government, States, or political subdivisions that rebounds to the great benefit of any special group of people or interests both in the nature of cash and monopolistic franchise. We are not here making any specific charge of malfeasance or skulduggery; but, human nature being what it is, do charge that any such system easily lends itself—in fact, encourages—such practices. Therefore, in our humble opinion, it would be well for this body to make inquiry into the question of who the real sponsors of this bill are and who is putting up the money to fight for its passage.

(b) In view of the great generosity on the part of the several States with the wholesale dealers, it seems to us a colossal piece of effrontery for them to be here asking the Federal Government to assume an expense running into untold millions to help them save, at the outside, a mere matter of possibly \$2,000,000 in taxes that they may be losing by reason of mail-order cigarette concerns.

IX. CONCLUSION

In conclusion, allow us to say that if the State revenue departments who have sponsored this bill will have their tobacco laws changed and brought into line with the tax on other necessities, then all of the problems about which they complain will be solved. We, and all others likewise engaged, will gracefully retire from the field.

I humbly apologize to the committee for the length of this discourse, but this proposition presents so many facets that it would take volumes to properly discuss the many angles involved.

A DISCUSSION BY J. HARVEY WILSON, REPRESENTING CIGARETTE SALES CO. OF MURPHY, N. C.

In the interest of brevity, the following abbreviations will be used

S 879	Bill under consideration.
House	House of Representatives.
HWMC	House Ways and Means Committee.
Proponents	Those advocating passage of this bill.
Opposition	Those opposing passage of this bill.
HCR	House Ways and Means Committee report.
MATD	National Association of Tobacco Distributors.
MTTA	National Tobacco Tax Association.
SRA	State revenue charged with enforcement of tobacco laws.
SFA	State tobacco laws.

This bill is remarkable in that it is one of the shortest pieces of proposed legislation on record, as innocent in appearance and first reading as milk toast, but loaded with as much devastating explosive to the economic life of the Nation as is the atomic bomb for destruction of life and property.

How pertinent at this juncture the casual observation of the Honorable Robert L. Doughton, chairman HWMC (see page 99 of HCR covering the committee's hearing on H. R. 195 otherwise known as the Jenkins bill) viz: "I am wondering what we are opening the door to?"

Words as full of momentous portent as the famous inscription said to have been found on the ancient sundial in England, viz: "It is later than you think."

The burden of our discussion will revolve around that one question, "What are we opening the door to?" A question that should cause pause, deep concern, and long consideration to every citizen of this country, and as well, the Representatives of the people in the United States Congress. I am sure all of the gentlemen on this committee are fully conversant with the history of the original federation of States, and the conditions that arose thereunder, wherein there was no uniformity of money and each State created trade barriers which finally resulted in an almost complete stoppage of trade between the States, and which ultimately brought about the Constitutional Convention and the formation of our present Government. The trade impasse before mentioned was directly responsible for that famous clause in our Constitution, article I, section 8, Powers of Congress, paragraph 3: "To regulate commerce with foreign nations, and among the several States and with the Indian tribes."

This exceptionally broad and undefined power has been responsible for more court cases and decisions by the higher court than has any other section of the Constitution. It was left to the Supreme Court to define the rule, and for 160 years that august body has interpreted the meaning to be that no barriers or burdens such as taxes and other restrictions can be placed on the free flow of commerce between the States, one against the other, and under this interpretation the industry and wealth of this country have flourished like the Biblical green bay tree; flourished in a measure amazingly greater than has any other nation of people in all recorded history. Now, let us see who it is that comes here asking you to alter this great beneficent rule; what their motives are; wherein the Nation as a whole is to benefit.

Allow me to digress for a moment to say that it is not my purpose here to bore you with legal citations and arguments except to touch on them in a general way. The legal details and arguments I leave to our eminent and competent counsel, Judge Thurman Arnold.

The first subject for inquiry is the National Tobacco Tax Association. This apparently is a political pressure group composed of the tobacco law enforcement agents of the various tax States (see Krone testimony, HCR, p. 112) whose principal mission is to influence the passage of such legislation as we have before us. I fail to find in any of the State laws any provision to cover expenses used for lobbying purposes. It would be interesting to ascertain where the money is coming from to defray the heavy expenses of a campaign such as they are carrying on in this particular matter. Whatever the source of this organization's revenue, it is admitted that they are working hand-in-glove with NATD—National Association of Tobacco Distributors—an organization composed of some 5,100 to 6,000 members made up of wholesale tobacco dealers throughout the country, which also claim to represent upwards of 1,200,000 retail tobacco dealers whose interests it is also promoting (see Kaufman testimony, pp. 117 et seq., of HCR). It is this organization that next arises for a somewhat lengthy discussion.

First, under the heading of NATD, I wish to file as a supplement, or exhibit, to this statement pages 5 and 6 of the publication Tobacco Leaf, issue of November 27, 1948, covering statements by Mr. Kaufman which will speak for themselves and, unless it is your wish, will not take up your time in reading them in their entirety, but will only sketch the high lights herein. On page 5 is an article headed "Improved State Cigarette Technique" reporting an address made to NTTA in San Antonio, Tex., in which he makes this significant statement: that collections by the States under their tobacco laws will have increased from \$300,000,000 in 1947 to \$375,000,000 to \$400,000,000 for 1948, and cites as an outstanding example the State of New Jersey whose collections for the first 4 months of 1948 were \$7,000,000 against an estimated amount of \$14,000,000 for the entire year. This indicates an annual total of \$21,000,000, or 51 percent over the estimates. He goes on to attribute this great increase to improve technique on the part of enforcement officials, and also to the fact that the States have made greater appropriations for enforcement facilities and last, but not least, to the excellent co-

operation of NATD with State officials. If you will allow me to digress for a moment, Mr. Kaufman in this same address warns his hearers of the threat of "Federal, State and municipal tobacco taxes \* \* \* The seemingly unquenchable desire for more and more higher and higher tobacco taxes \* \* \* which, if not checked, will result in fewer sales and diminished tax returns." This is a phase which I will touch on later and proceed to the main subject under this heading.

Now, then, to the statement by Mr. Kaufman on page 6 of the afore-mentioned exhibit, titled "Unfair Sales Acts Up before 16 States." This I shall read in its entirety:

"Jerome Kaufman, director of public affairs and industrial relations for the NATD, says that more than 16 States not now having an Unfair Sales Act, have either definitely decided to sponsor such legislation or will consider it when the various State legislatures convene in January. Among those States considering some form of action in the matter are: Michigan, Pennsylvania, New York, Nebraska, Kansas, Alabama, Arkansas, California, Illinois, Indiana, Iowa, Kentucky, Louisiana, Missouri, Texas, and Tennessee. Most of these States will seek unfair sales laws pertaining specifically to cigarettes, according to Mr. Kaufman. They will be patterned after those acts already in force in such States as Rhode Island, Maine, Massachusetts, Connecticut, and Colorado."

All of these "Unfair sales tax laws," applying to cigarettes only, have been sponsored by NATD, and those States which pass them have done so with patent disregard of their own and United States antitrust laws. Two of these with which your deponent is most familiar are those recently enacted into law in the States of Georgia and Tennessee. The Georgia law provides that no wholesaler can sell to a retailer at a price less than \$1.76 per carton, as a minimum, and no retailer can sell to the consumer at a price less than \$1.92 per carton, and from information gained from Tennessee newspapers, the law in that State has identical provisions. Allow me to digress here to point out that the formula for cigarette pricing which has prevailed in the many years that I have been acquainted with the business is as follows:

The manufacturer makes a nominal price which is supposed to be the approximate price to the consumer. He allows the wholesaler two discounts on this nominal price, one of 10 percent and one of 2 percent. The 10 percent is to allow for retailer profit, the 2 percent for the wholesaler's profit. When I first engaged in this business in a very small way, that was the pricing rule, and still is the rule in States where there are no State taxes nor unfair sales acts. My first purchases were from a member of Mr. Kaufman's organization, the NATD, at a price which allowed him a margin of 2.2 cents per carton (under today's manufacturers' price the wholesaler margin would be 2 $\frac{2}{3}$  cents per carton) and this was the price to retailers regardless of the quantity purchased, and I might add that in my case the seller had to transport the goods approximately 100 miles, part of which was unpaved. However, he must have been satisfied with the price because he protested vigorously when notified that we had made other arrangements for our supplies. The retailer's margin under that system was 10 cents per carton and that in the days when one could buy popular brands of cigarettes at 25 cents for two packages. Let us see how the matter stands now. In those States having these laws sponsored by NATD, the net price paid by the wholesaler, after the above-mentioned discounts, plus discounts allowed by the States on the tax stamps, is \$1.34 per carton, giving him under the Unfair Sales Act a margin of 12 cents per carton against the former margin of 2 $\frac{2}{3}$  cents, or an increase of more than 400 percent. Likewise the retailer's margin is increased from 10 cents per carton to 18 to 22 cents per carton. It would appear from the foregoing that Mr. Kaufman had the NATD looking well to the interests of his five thousand-odd members, as well as the 1,200,000 retailers whom he claims to represent indirectly, but with cruel disregard for the interests of a probable 80,000,000 consumers who are now having to pay from 20 to 23 cents per carton more for their cigarettes by reason of the NATD-sponsored unfair sales acts.

I cite these details to bring forcibly to your attention the NATD's great interest in trying to bring about the passage of the bill before you, and to substantiate the charge that I have made elsewhere that the chief effect and purpose of the various State tobacco laws and the Unfair Sales Act laws is to channel all of the tobacco business through certain wholesale dealers within those States, thereby creating a monopoly and barring the free flow of interstate commerce in tobacco products.

The following is a copy of the article taken from publication Tobacco Leaf, issue of November 27, 1948:

## "IMPROVED STATE CIGARETTE TAX TECHNIQUE

"By Jerome Kaufman of the NATD.—an Address Before the National Tobacco Tax Association in San Antonio

"Collections of State tobacco taxes, which have shown marked increases from year to year, will approximate \$375,000,000 to \$400,000,000 in 1948. That is a prodigious sum. Compared with State tobacco tax collections of approximately \$300,000,000 in 1947, this is an increase of about 36½ percent. Whenever any enterprise advances at such a tremendous rate, its operations become more complex and require increased efficiency and better planning. This meeting will, I am certain, do much to prepare all of you to cope with the problems presented as the result of this growth and expansion.

"Most of the tobacco tax States have already attained a measure of increased efficiency in the vast majority of those States, considerable progress has been made toward improving the tax-collection machinery and technique. This is true both in States where cigarette taxes have been in effect, and where new taxes have been recently imposed. An outstanding example of efficiency has been demonstrated by the State of New Jersey which, in the first 4 months of a new cigarette tax law, has collected approximately \$7,000,000, whereas the estimated income for the entire year was only \$14,000,000

"The successful administration of this law is due to several factors. First the New Jersey Legislature had the foresight to incorporate in the cigarette tax law, a licensing provision that provides the State with sufficient funds to enforce the unfair Cigarette Sales Act, the companion measure to the cigarette tax law. Another factor is the action by the State tax department in placing the administration and enforcement of both these laws in the extremely capable hands of Commissioners Homer C. Zink, Aaron K. Neeld, and Amos Tilton. These men have set an outstanding example of efficiency and of effective and cordial relations with the industry.

"In this formula, New Jersey, Massachusetts, Ohio, Connecticut, Maine, and New Hampshire have discovered a means for solving many of the problems which arise in the administration of the tobacco tax laws. If this pattern is followed by the other tobacco tax States, the task of every State tax administrator will be eased and facilitated.

"The NATD takes just pride in the part that we and our member tobacco distributors throughout the country have played in the development of this excellent legislative formula. We believe that the success that has been attained by the tax States in the administration of their tobacco tax laws is attributable in great part to the desire of the State tax administrators and ourselves to cooperate and to work together toward a common goal, the effectuation of more efficient tax systems with the greatest possible benefit and least discomfort to everyone concerned.

"This commendable cooperation is also revealed in our joint efforts to promote the enactment of the Jenkins-Rogers bill which, unfortunately, because of the lack of time during the last congressional session, was not acted upon by the Senate. When the new Congress meets in January, you may be assured that we shall be with you in championing this bill to obtain its passage.

"I am hopeful that we will continue to work together in complete harmony in many other constructive ways. The prospect of more and more Federal, State, and municipal tobacco taxes, for instance, offers a threat to you and to us and to the entire tobacco industry and to the consumer. Whatever action is needed to combat this danger which, if not checked, will inevitably result in fewer sales and diminishing tax returns, I am sure that we will all agree, should be undertaken. While I recognize that you as tax administrators cannot act directly on such matters we, as distributors, can take a vigorous part in combating the seemingly unquenchable desire for more and more, higher and higher tobacco taxes. Our influence, individually and collectively, together with your encouragement and counsel, can carry a great deal of weight in retarding excessive and destructive taxation.

"In April of next year the NATD will hold its greatest annual convention in New York City. It is my personal pleasure, on behalf of our association, and Joseph Kolodny, its managing director, to extend to each of you a cordial invitation to participate in our deliberations and convention functions. We shall welcome the opportunity and will extend to you and your womenfolk the same courtesies and accommodations as at the last convention."

The greed of the members and officials of the NATD seems to be without bounds and by reason of their confidence that Congress will enact this bill into

law they have been emboldened to proceed with having these minimum price laws enacted by all the States having the tax on cigarettes, and with what Mr. Kaufman chooses to term "The cooperation" of the "National Tobacco Tax Association." Why shouldn't they be here to cooperate in prevailing on you to pass this measure into law? In view of the foregoing facts and further facts relating to the enormous and unconscionable rake-off they are getting from the States—by reason of discounts allowed them by the tax States on tobacco stamps—let us take the figure (Tobacco leaf exhibit, p. 5) of \$375,000,000 as being the amount of cigarette taxes collected in 1948 by the States. The members of his association are allowed discounts on the stamp purchases varying from 5 to 10 percent—let us assume an average discount of 7½ percent and that the total collections add up to \$375,000,000—that "take" on these taxes collected from the people amounts to the outrageous sum of \$30,500,000. This neat little gratuity has no doubt been granted by the States on account of the "friendly cooperation" of the National Tobacco Tax Association, and is done under the guise or pretense of "an allowance for the expense incurred in placing the stamps on the cigarettes." I might add here that this stamping is mostly done with automatic machinery impression at a cost which would be a mere fraction of the amount allowed them for that purpose. I would be delighted to take the contract to do this work at 10 percent of the amount they are receiving and bear all the expense for the members of the NATD, providing the remainder goes into the State treasuries.

#### TAXATION AT SOURCE

If cigarettes are necessities and in the same class as other common necessities (as I contend and as is admitted by proponents—(See HCR, Glanders et al, p. 103 et seq.) and if, as contended by said proponents, it is within the province of the Federal Government to assist the States in the enforcement of their own State laws, then why undertake it in this manner prescribed by the bill before you—a method which would be enormously expensive; which would clutter up the Federal courts and reduce them to the status of police courts; and which would make a mockery of Federal laws as did the Volstead Act? Why do they not request you to pass a law that would require collection of State taxes at the source, or I may say at the factories, just as the Federal tax is now being collected? Such a law would be 100 percent effective and the expense attached negligible. Allow me to answer my own question. It is because such a simple procedure would completely eliminate the necessity for State enforcement officials and all of the members of the National Tobacco Tax Association and their employees would lose their jobs, and it would naturally follow that the NATD would lose \$30,000,000 now so generously provided them and this amount would go into the States' coffers instead. This, gentlemen, is the last thing that these proponents would ask of you for the obvious reasons just cited.

For my part I will never believe that the makers of our great Constitution ever contemplated any such assistance to the States in this respect, nor did the States themselves. There were red-blooded men in those days who were exceedingly jealous of their States' sovereignty; men who never conceived that they would be succeeded by mendacious (this word is my coinage) and obsequious supplicants at the Federal Capitol pleading impotence and inability in enforcing their own laws by begging help from Congress for the passage of such a bill of assistance as are coming here before you. The only suggestion of any assistance to the States found in the United States Constitution is article IV, section 4, which reads:

"The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

No doubt that there was much difficulty in getting the consent of the sovereign States to even agree to this concession, and to make certain that there would be no further assumption of State powers by Congress, the tenth amendment was adopted, which I quote: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It would seem to me, a layman, that when the excerpts from the Constitution just cited are read in conjunction with each other, the only logical conclusion is that the bill before you is without constitutional warrant, and that Congress is definitely limited in this matter of assisting the States in the enforcement of their own laws to the one condition, viz, "domestic violence," and that only when requested specifically by the States—the only exception being that law

governing liquor shipments as provided for in the twenty-first amendment to the Constitution. The proponents of this bill in their testimony before the House committee have seen fit to use United States Supreme Court decisions in numerous liquor cases as argument that these cases set a precedent for S. 879, evidently overlooking the words of this twenty-first amendment, viz: "Article XXI, section 2: The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Even the constitutional provision would hardly be necessary, because the higher courts had long held that intoxicating liquors come within the police powers, viz: Those relating to "public peace, public morals, and public safety," which powers lie within the State. For some unknown reason, in the long, long ago, cigarettes to the exclusion of all other forms of manufactured tobacco, were considered as being in the same category as intoxicating liquors. Cigarette paper wrappers were reputed to be impregnated with opiates and cigarettes were termed "coffin tacks," "coffin nails," and what not. (My own father many times told me that he would rather see me drink whisky than to smoke cigarettes.) This feeling and belief was general with the generation ahead of mine—let us say the latter half of the nineteenth century. The State of Tennessee went so far as to pass a law prohibiting the sale, purchase, possession, or consumption of cigarettes under the threat of heavy penalties. The law was passed during the latter part of the nineteenth century and remained on the Tennessee Statutes until around 1910 when it was repealed, because everyone ignored it. The effect of the law was quite similar to that of the famous Volstead Act. As I have said that was in the long, long ago. Since then many scientists and doctors have made exhaustive tests to discover any deleterious effects from cigarettes, but without success, and cigarettes have been looked upon as necessities, certainly by the United States Government, since World War I, when it was most diligent in seeing to it that our soldiers were at all times well provided with them, and during World War II, not only provided them to our soldiers but as well shipped millions abroad for the use of Allied soldiers and civilian populations under lend lease, and, if I am correctly informed, our Government is still shipping cigarettes to sustain civilian morale under the European recovery program. Perhaps it is superfluous for me to have gone into the foregoing details because the proponents of this bill have admitted through one of their chief witnesses that cigarettes are not in any different category from that of other commodities (see Glanders HCR, pp. 103, 104, and 111). I would like to observe that the method many of the States have of taxing different forms of tobacco products—e. g., cigarettes up to 125 percent of first sale values, cigars at 1 to 2 percent, smoking tobacco, chewing tobacco, and snuff not taxed—is about as logical as would be a similar tax on the consumption of eggs. Let us say that the man who eats his eggs fried would pay tax for that privilege of upward of 100 percent, the person who takes his scrambled would pay 1 percent, and those who take them in all other forms no tax at all. It is this unwarranted discrimination that has brought upon the States all the sorrows of which they complain, and it is this unreasonable discrimination which proponents are here asking the Federal Government to become a party to by the passage of this bill. While freely admitting in their testimony before the House committee that there is no distinction between cigarettes and other common commodities, the proponents' main argument for passage of this bill is that, "The States have singled cigarettes out for taxation"—away out of all proportion to other commodities—and for that reason the Government should assist them in enforcing this discriminatory tax. All of the tobacco law States assign various and sundry purposes for which the money is to be used, such as paying soldiers' bonuses, special educational trust funds, paying pensions to Confederate soldiers and their widows, etc., apparently for camouflage reasons, to allay resistance on the part of the cigarette consumer, but no good reason is given as to just why the cigarette user should be called upon to pay the expense of these special State activities on top of all other taxes which they pay along with other citizens of the States. Certain it is that the children of nonsmokers are as much in need of education and other benefits as are those of cigarette smokers. The most outstanding example of this type of camouflage is to be found in the Georgia law which assesses the tax "to care for Confederate soldiers and their widows \* \* \*. Any overage to go into the State general funds." This they did, well knowing that sentimental southerners will, without complaint, readily give the shirts off their backs for such a purpose, and the majority of whom are little aware that there is at present only one surviving Confederate soldier in the State of Georgia, and that less than \$75,000 is being used by the State for

the stated purpose under which Georgia is collecting upward of \$9,000,000. May I say that if these relics of the Confederacy had had to rely on the paltry sums paid them as their only means of sustenance all of the veterans and their widows would have died of starvation years ago. This is a fair sample of the type of law which you are being asked to fortify with Federal legislation.

EXAGGERATED, EVASIVE, CONFUSING, AND CONFLICTING TESTIMONY—WHO IS TO BE BELIEVED?

We will examine in a brief way some of the testimony submitted by proponents at the House committee hearing on a similar bill. Your deponent made this statement in the course of that hearing: "There is no law, either State or Federal, that attempts to make our business illegal, and it is conducted with the knowledge and cooperation of the United States Postal Department to whom the merchandise is entrusted for carrying and delivering."

Which statement went unchallenged throughout the hearing. I will here discuss the testimony of the Honorable Thomas A. Jenkins, Representative in Congress, from the State of Ohio, who is the author of the House bill commonly referred to as the Jenkins bill or H. R. 195:

"Mr. JENKINS. \* \* \* Of course there is nobody that accuses anybody of being in any illegal business, but the law of these States provides that cigarettes must carry a tax. That does not mean that a man selling cigarettes in my State is in an illegal business but a man in my State has got to pay taxes for the cigarettes he sells, and we think that a man from North Carolina who sells cigarettes in my State ought to pay taxes too" (HCR, p. 28).

Compare the above denial of any accusation of illegality by Mr. Jenkins with the following:

"\* \* \* The relief provided under this bill is relief from a gross injustice done through the *dishonest* use of interstate commerce. \* \* \* Without the aid of interstate commerce facilities. \* \* \* this *dishonest* traffic could not be carried on" (HCR, p. 125, italics mine, statement of Mr. Jenkins entered in HCR).

Also again Mr. Jenkins: "\* \* \* The action of the shipper is just the same as the man who would help another commit a crime. \* \* \* The connivance of these shippers with their consumers *rob* the States of at least \$30,000,000 per year" (HCR, p. 126).

Then Hon. Tom Steed, Representative in Congress from the State of Oklahoma: "\* \* \* I heard some of the testimony where they complained of being called bootleggers, but I can assure you that in Oklahoma they are considered bootleggers because they operate in the way we have always known bootleggers to operate" (HCR, p. 128).

May I observe here that never before have I heard that "bootleggers" ship their goods through the United States mails with both the address of themselves and the consignee imprinted on the parcel.

Then again the Honorable Mr. Steed: "They operate in Oklahoma as bootleggers and are so considered," etc. (HCR, p. 129).

The Honorable Hale Boggs, Representative in Congress from the State of Louisiana: "\* \* \* because of the heaviness of the tax in Louisiana the amount of bootlegging—and I think that is the proper terminology—is tremendous" (HCR, p. 131).

Please compare the foregoing statement with that of C. Emory Glanders, tax commissioner for Ohio, which reads: "The second thing I should like to answer is the argument which was advanced by the shippers who were represented the other day to the effect that theirs is a perfectly lawful business, not a nefarious business, and the resentment they expressed because of the statements which had been made in those hearings".

"Well, now, of course, no one will deny that for the most part what they are doing is perfectly lawful right now. It is because it is that we are here \* \* \*"

(HCR, p. 106).

And again: "In other words, under the cloak of constitutional protection certain individuals, etc. \* \* \*." (HCR, p. 108).

We would be interested in having Mr. Glanders advise us under what other kind of "cloak" could any citizen engage in any activity?

It would be pertinent at this point to cite what Mr. Justice Davis had to say on this subject. Here is an excerpt from the opinion written by him in the case *Ex parte, Milligan* (4 Wall. 2, pp. 120-121), which I quote:

"\* \* \* The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shields of its protector all classes

of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Government."

Now, back to our main subject. Similar odious references were made by other witnesses at the House hearing all of which we of the opposition contend was malicious, without basis of fact and with the sole intent of inculcating prejudice in the minds of the Congressmen who were to vote on the law. My reason for laying so much stress on the above portion of the House testimony is this: As a prelude to my testimony before the House committee I, off the record, read an addenda to my statement which I did not want to have go into the record if it was agreed that the obnoxious references to the opposition would not be used in that hearing as was the case on the Jenkins bill in the Eightieth Congress committee hearing. After Mr. Jenkins made his statement (HCR, p. 28) and other off-record remarks I felt that the hearing was to be conducted on a higher plane than in the former hearing and agreed not to place the addenda on record, but proponent witnesses who followed me did not conform to what I thought was a definite understanding. Therefore I wish to file the same in the records of this committee meeting, which is as follows:

"ADDENDA TO THE ATTACHED TESTIMONY—A REQUEST AND A PROTEST

"We sincerely request that the term 'bootlegger', so freely, unjustly, and indiscriminately used by proponents at the committee session during the Eightieth Congress hearings, be dispensed with at this hearing. There is no law, either State or Federal, that attempts to make our business illegal and it is conducted with the full knowledge and cooperation of the United States Postal Department, to whom the merchandise is entrusted for carrying and delivering. If such recriminations are to be indulged in, we can successfully charge the opposition with being outright violators of both State and Federal laws by making illegal searches and seizures, violating postal laws, by shadowing mail deliveries, by actual and attempted bribery of postal employees, and otherwise violating the rights of citizens, and by illegal trials of accused persons by State revenue officials."

Now let us look into the wildly exaggerated claims, guesses, and estimates of taxes being lost to the States, by reason of the business of us shippers. None of these apparently are based on any logical statistics or other substantiating data. On this score we give the testimony of the proponents' witnesses in the order in which they appeared before the House committee. First, the testimony of Hon. Dwight L. Rogers, Representative in Congress from the State of Florida.

"Mr. ROGERS. This bill was introduced at the suggestion of James T. Vocelle who is the Director of the State Beverage Department of Florida and chairman of the legislative committee of the National Tobacco Tax Association. \* \* \*

"I presume the reason I introduced this bill was Mr. Vocelle was from my State and Mr. Jenkins came in and very willingly agreed to assist in getting the legislation out. \* \* \* These men living in the non-taxing States ship in and evade the taxes.

"As a result of that there are *billions of dollars* lost by the States of this Union" (HCR, p. 97).

Gentlemen, please note that Mr. Rogers talks in terms of billions of dollars. Let me say that if every one of the 39 tax States had a tax of \$1 per carton on cigarettes and not 1 cent of it uncollected by reason of proponents' activities the sum lost to the States would still be far short of one billion dollars.

The question of possible losses to the States will be dealt with further on in this paper.

Now, then, the testimony of Mary Krone, New York director of miscellaneous tax bureau, and also president of National Tobacco Tax Association:

"From the survey we have made through the national organization we find that roughly 10 percent of the total amount of revenue being collected in the country is probably being evaded because of this type of business we have been discussing today" (HCR, p. 113) (all italics by writer).

And then comes Joe M. Whittaker, vice chairman, Oklahoma Tax Commission, also member of the executive board of the National Tobacco Tax Association, claiming to represent 39 States: "We are collecting two-thirds or 60 percent." (HCR, p. 114). (Comment implies loss of 40 percent.)

And next Jerome Kaufman, director of industry and public affairs, National Association of Tobacco Distributors, claiming to represent directly between five and six thousand wholesale distributors and indirectly one and a quarter million retail tobacco dealers (HCR, p. 117): "We have estimated the tax loss to the States to be between 15 and 20 percent of the total amounts collected." (HCR, p. 118.)

Question by Mr. Jenkins: "Would it be safe to say that you represent directly or indirectly at least 30 times as much business as these fellows who ship in without regard to paying the tax in to the States into which they ship?"

Answer by Kaufman: "I would say many more than that." (HCR, p. 118).

Comment: If witness Kaufman meant as much as three and one-half times by the use of the indefinite word "many," the amount being done by mail-order concerns must be negligible which, gentlemen, I believe to be the true status of this matter and which I hope to prove beyond any doubt further on.

Next we have Hon. Tom Steed (previously identified) with a simple formula by which extent of tax evasion can be arrived at.

"MR. STEED. \* \* \* There is a point or two I would like to make. A lot of this has already been covered, but just to give the committee a simple formula by which you can get an idea of the extensiveness of this evasion; if you were to assume that out of 2,500,000 people in Oklahoma that only 100,000 of them smoked a package of cigarettes per day, bought cigarettes by mail, and we have a 5-cent State tax, in a year's time that 100,000 people would smoke 36,500,000 packages of cigarettes bought outside the State on which the State collected no tax. At the rate of 5 cents a package, that would amount to a loss to the State of \$1,825,000" (HCR p. 127). Comment: I think all of us should feel greatly indebted to Mr. Steed for this simple clarification of so complex a subject.

Under this heading we wish to direct especial attention to a telegram, submitted for the House hearing records by Hon. Hale Boggs, Representative in Congress for the State of Louisiana (HCR, p. 017), which I quote:

"NEW ORLEANS, LA., March 31, 1949.

"Hon. HALE BOGGS,

*House Ways and Means Committee, Washington, D. C.:*

"Have over a period of time confiscated some 500,000 cartons of cigarettes shipped into Louisiana by mail in contravention of Louisiana tax laws. Hundreds of thousands of additional cartons received without possible chances of detection. Jenkins bill indispensable to State taxing authorities, who are now subject to worst form of interstate racketeering. Your support will be deeply appreciated here.

"FRANK W. MANNING,

*Chief Enforcement Officer,*

*"Louisiana State Department of Revenue."*

This statement we denounce. Whether it is made in ignorance or as a willful and outright misrepresentation of the facts, we do not know, but do challenge Mr. Manning to submit detailed data which we believe he cannot or will not do. Five hundred thousand would be a high percentage of all cigarettes shipped into Louisiana in any one year and far more than has ever been shipped by mail into that State. He avers, mind you, that this 500,000 cartons claimed confiscated were shipped through the United States mails. We challenge him to show wherein, whereby, or how he obtained the information about these shipments without contravening the United States postal laws by the shadowing of United States mails. It is a singular coincidence that just as this paragraph was in preparation, the post brought to your deponent a registered letter of which the following is a true and correct copy, as is evidenced by photograph of the same also hereto attached. The letter follows:

DEPARTMENT OF REVENUE,

STATE OF LOUISIANA,

*New Orleans, La., April 27, 1949.*

CIGARETTE SALES CO.,

*Murphy, N. C.*

(Attention Mr. Henry Wilson.)

GENTLEMEN: A citizen has just handed me a copy of a circular sent out by your company, entitled "Nothing to worry about."

You infer, in that circular, that the mail fraud charges were the result of counterfeit tobacco tax stamps. For your information, that is incorrect. The counterfeit case had nothing to do with those indictments. They were indicted for using the mail to defraud the State of Louisiana via the shipment of cigarettes by mail.

The writer has seized a great number of shipments of cigarettes shipped via mail to citizens of our State. Many of them have been convicted in criminal district court, others have had to pay civil penalties. Statements taken from these individuals indicated they had received circulars from your company, and

that they were of the opinion no tax was due when they were for personal consumption. Much hardship has been imposed upon our citizens by these circulars. Now, therefore, in order to familiarize yourself and company with our tobacco tax law, which has been upheld by the Supreme Court of the State of Louisiana, I have taken the liberty to enclose herewith a copy of said law. See page 4, section D.

So, in the future, with reference to your circulars sent into Louisiana, I strongly suggest you refrain from sending out any literature that may be construed as misleading, or the deletion of any pertinent fact that would cause, or make a citizen feel it was perfectly all right for he or she to order cigarettes without being called upon to pay the tax.

Revenue officials, over the entire Nation, are well aware of the fact that companies like yours rely solely upon getting cigarettes through to a customer without possible detection, or upon the so-called sanctity of the mails. In view of what is going on throughout the Nation, whether or not this sanctity exist is problematical. Competent law enforcement officials have been and will continue to find ways and means to enforce its laws with or without help from the Post Office.

Now that you have been made familiar with our tobacco tax law, I am of the opinion that it will be a serious error on your part to continue to circularize our State, knowing that under our law it is a violation of the Tobacco Tax Act to possess untaxed cigarettes, and that it is the duty of the party receiving cigarettes to pay the tax on them, whether for sale, use, or consumption.

I do hope your future circular, if any, contain a true statement of facts.

Yours truly,

FRANK W. MANNING,  
*Chief Investigator, New Orleans Division.*

This letter speaks for itself, but I would like to comment on paragraph 4 which says, more by innuendo than by direct expression when he refers to the sanctity of the mails as "*so-called sanctity of the mails. \* \* \**" "In view of what is *going on* throughout the nation, whether or not this sanctity exists is problematical. \* \* \*" "Law enforcement officials *have been and will continue* to find ways and means to enforce its laws with or without help from the post office." It would seem to me that the implications of Mr. Manning's letter warrant any investigation by the post office officials or some other authorized agency.

Going back to the heading of this section, it is patent on the face of the foregoing testimony that all of the estimates are wild vagaries and generalizations unsupported by one scintilla of fortifying data. If there is any reasonable basis for any of these "estimates" it would be that the deponents in arriving at their figures have proceeded on the assumption that their sales of cigarettes should be, after the taxes were imposed, equal to sales before the imposition, not taking into account the normally reduced consumption due to the tax. This reduction is enormous as set out in my own testimony at the House hearing. (HCR, p. 33). which I quote [all italics by writer]:

"It is an economic axiom that the higher the price the lower the consumption. How efficiently this axiom is proved is well illustrated by a compilation made in 1939 from the records of Associated Retail Tobacco Dealers and published in the issue of the magazine Business Week of July 29, 1939, copy of which we quote:

"At the beginning of this year, with cigarette consumption at 163,700,000,000 a year, 21 States had a tax on this form of smoking. So when the legislature season opened with taxes proposed in eight additional States, retail dealers prepared to fight. Their principal concern was that in tobacco-taxing States cigarette consumption averaged 932 per capita; in nontaxing States it was 1,531' \* \* \*."

So far as we know this is the only careful survey of this nature that has been made, and please bear in mind that at the time these figures were compiled there were not more than a half dozen very small concerns engaged in business of shipping through the United States mails.

#### MUCH ADO ABOUT NOTHING

While admitting that any definite figures are most difficult for any of us to obtain, I am undertaking to give you a logical basis for arriving at a closely approxi-

mate figure as to the quantity of cigarettes moving into tax States and not reported to taxing agencies:

Note A. Total number of cartons moving into domestic consumption.....		1, 715, 000, 000
Note B. Total accounted for in 39 tax States....	1, 351, 450, 000	
Note C. Total accounted for in 9 nontax States..	270, 290, 000	
	<hr/>	
Total accounted for.....		1, 621, 740, 000
		<hr/>
Remainder to be accounted for.....		93, 260, 000
Note D. United States armed forces and VA hospital patients and personnel.....	26, 250, 000	
Note E. United States Territories and reservations, including District of Columbia..	46, 767, 000	
	<hr/>	
Total as above.....		73, 017, 000
		<hr/>
Remainder to be accounted for.....		20, 243, 000
Note F. Sales by mail order houses.....		9, 477, 000
		<hr/>
Total unaccounted for in above tabulations.....		10, 766, 000

Since the above computation was prepared I have discovered that the State of New Jersey only began taxation in midyear of 1948, so an additional quantity for sales into that State will have to be added to "totals" accounted for, the minimum amount of which would be in excess of 35,000,000 cartons.

In addition to the above, sales made as listed below will have to be taken into account—sales on which no estimation can be logically based but which must run into a great many millions of cartons and can well account for any error in the main calculations above:

1. Motor tourists who travel each year by hundreds of thousands into nontax States and who avail themselves of the opportunity to buy large quantities of cigarettes for future needs at low prices.

2. By thousands of traveling salesmen plying from State to State and who not only purchase their own but friends' needs for future use.

3. *Gifts.*—Cigarettes are one of the favorites among presents to both men and women and these alone can account for many thousands of cartons sent through the mails.

4. *Friendly purchases.*—A large percent of citizens of tax States have friends or relatives residing in nontax States upon whom they call to make purchases for them which is done, of course, at no profit. No doubt hundreds of thousands of cartons are shipped each year in this manner out of the District of Columbia, alone, for the reason that the Government employees in the District of Columbia have congregated there from every State in the Union.

5. *Border purchases.*—It is quite the custom for merchants and citizens of tax States bordering on nontax States to drive across the State line and purchase their needs, both for themselves and friends, and I might observe that your deponent resides in a small town in North Carolina closely bordering three tax States and that hundreds of motorists drive into this community weekly to purchase their cigarette needs, and I might say further that among these motorists are many law-enforcement officers from the tax States.

6. *Express shipments.*—There is no way to ascertain what volume might be moved through express agencies who neither inquire nor have any way of knowing the contents of any parcel presented to them for transport.

7. *Clandestine runners.*—Under this heading would be persons who drive from tax States to nontax States and load up their cars with large quantities of cigarettes for resale in tax States, quantity not ascertained, but we all know that such quantities must be enormous and were this bill to be enacted into law this practice would be greatly intensified.

8. State institutions which are exempt from State taxation under most of the State laws. This population will, of course, run into many, many thousands, but I have no way of ascertaining figures.

*Note A.*—This figure arrived at by taking total United States Government taxes collected at factories for year 1948 which amounts to the sum of \$1,208,000,000.

Rate of United States tax is 70 cents per carton which, divided into total collections, gives absolutely correct total of all cigarettes that went into domestic consumption, or 1,715,000,000 cartons.

*Note B.*—This figure is arrived at as follows: The net taxes collected by the 39 States after discount allowances on stamps was \$374,933,000. (See HCR, p. 72.) Average tax rate was 30 cents per carton. (Ref. HCR, p. 72. Figures compiled and published by the National Association of Tobacco Distributors.) To which must be added the sum of \$30,500,000 discount on stamps averaging 7½ percent. (Ref. tax laws of 39 tax States.) These two sums combined amount to \$405,433,000 and this divided by average rate of 30 cents tax, gives total number of cartons, 1,351,450,000.

*Note c.*—This figure is low because it was based on the same average rate of consumption, as that accounted for in tax States (note b), but by reference to HCR, page 33, it is to be noted that consumption according to survey made by the Association of Retail Tobacco Dealers was reduced by approximately 40 percent owing to State taxes.

*Note d.*—From the best information obtainable the total of the armed forces (Army, Navy, Air Forces, and Marines) plus patients of veterans hospitals and personnel plus the attendants amount to 1,750,000. To arrive at the number of cartons, we multiplied this figure by 15, which is the general United States per capita average, including all men, women, and children, which is patently too low. This average would more likely be 50 cartons per annum instead of 15, which difference could well account for any errors I have made in my other computations.

*Note e.*—Total population for United States territories and possessions, according to United States census for 1940, was 3,117,824 which I multiplied by factor of 15, average United States per capita rate of consumption. This factor may be too high except as modified shipments from the District of Columbia as set out under "friendly purchases."

*Note f.*—This figure of 9,477,000 has been arrived at by your deponent largely through his membership in the Consumers Mail Order Association of America. This association is comprised of all (with one exception) of the larger mail-order shippers or, that is, concerns doing an annual volume of \$50,000 or over. There are some 75 or 80 small operators who are not members and in my computations I have estimated for this small group a total business of 50 percent of that of association members, which I sincerely believe to be over rather than under the actual figures. It happens that some 8 or 10 of these small shippers operate in my own community and their combined volume does not equal that of my own company which in itself is not by any means a large business. Most of these operators do not even have an office or carry stock. Upon receiving an order, they purchase the quantity needed to fill it from local wholesalers where they package the parcels and then drop them into the post office.

*Taxes lost to the States less than \$3,000,000.*—It is worthy of note that these mail-order shipments amount to only 7/10 of 1 percent of the amount of sales which the tax State's records show to have been taxed, or the relatively insignificant sum of \$2,843,100. It is certainly insignificant in comparison with the NATD estimate of \$56,220,000 (HCR, p. 72) and the Honorable Dwight L. Roger's statement that "the States were losing billions of dollars in taxes." (See HCR, p. 97.)

If the proponents of this bill have any disposition to challenge these figures or find any better way to arrive at a solution of this complex problem, I gladly invite them to do so. It would probably necessitate a large corps of expert accountants to do the job, and after finishing I do not believe they can come any nearer to the correct figures than I have done in this tabulation.

There is an old saying "Figures don't lie but liars figure" which might stigmatize me in this instance as a "liar," but I do not believe that those who lie with figures are as big "liars" as those who make wild statements and "guesstimates" without the benefit of figures.

Reference is made to the statistical data appearing above. The essential thing, in your deponent's opinion, is to get some unprejudiced and factual data on this situation.

After the preparation of the main part of this document and, as a matter of fact, while I was on the train coming up here, it just occurred to me that this could be done with very close approximation through the Post Office Department and without violating in any way the sanctity of the mails. Practically every mail-order concern of any consequence uses a postage meter, and each post office from where their goods are shipped keeps a complete record of the amount of postage

used on that meter. The volume of business done by the smaller operators who purchase ordinary postage is exceedingly small but, even at this, the local postmasters could tell with reasonably close accuracy the amount of postage purchased by those people.

My own concern sells in 10 different States, and our records show that the average cost of postage is 3½ cents per carton (of 10 packages each), and we believe that this 3½ cents per carton would be very close to the average of that paid by all of the mail-order shippers. So, after having obtained through the postal department the total amount of annual postage, the total number of cartons shipped could be closely ascertained by dividing the total postage in dollars and cents by the 3½ cents constant.

The association of which I am a member, viz, the Consumers Mail Order Association of America, can and will give fairly accurate data as to the various shippers throughout the country, which could easily be supplemented and checked by the records of the various State tax-enforcement officials.

I know of no more reasonable approach to this matter than this, and believe confidently that, when the results are ascertained, they will be within 1 percent of the figure that I have given you, or a total of 9,477,000 cartons.

And if this committee desires accurate information before coming to a decision on this measure, namely, S. 879, it does seem reasonable for us to request that this procedure be taken prior to any decision or recommendation by the committee, because, if my estimate is correct that the taxes being lost to the States are less than \$3,000,000, it would certainly hardly warrant or justify the passage of a Federal law to correct it, the expense of which to the Federal Government in its administration would run many times the foregoing figure, to say nothing of establishing a precedent which would lead to all manner of complications, as I have set out in the main body of my testimony.

#### ADVERTISING

Much bitter complaint by proponents has been registered because of the fact that we advertise. (In order to shorten the record I will not undertake to cite the individual testimony on this point other than to say that the House committee hearing report on H. R. 3345, Eightieth Cong., is replete with reproductions of such advertising and this is also true of the record of the House hearing on H. R. 195.) When, may I ask, has it become either illegal or reprehensible for any commercial enterprise to advertise in this country? These proponents will have to admit that the advertising as a whole has been modest and circumspect. They have freely admitted that there is no difference in the character or nature of our business as compared to that of merchandise moving from one State to another State that is subject to general sales taxes except that cigarettes are taxed (which they also freely admit) extraordinarily high as compared to the general run of taxable commodities. The penalties for violation are similar in each case. What then? Every newspaper, every magazine, or any other publication that carried advertisements tempting purchasers to buy, from without the State, articles taxed under general sales tax is in the same position as we with respect to our advertising. Particular stress has been laid on a phrase used in my own advertising, viz: "U. S. mails are inviolate." We should all be thankful that this statement is true and pray that it shall ever be true. However, from the behavior of many of these State enforcement officers they are not aware of the verity of that statement, or, being aware, continually disregard it.

#### MISCELLANEOUS

May I point out here that at the hearing on H. R. 3345 (a like bill as the one before you, 80th Cong.) two of the proponents' chief witnesses, viz: Adrian W. DeWind, tax legislative counsel, Treasury Department, and Michael J. Horan, attorney, Office of the Assistant to the Attorney General, Department of Justice, were, we think, significantly not called at the time of the same committee hearing on H. R. 195, nor was their previous testimony offered for the record in the hearing on H. R. 195. Therefore, I request permission to file the record of those gentlemen's testimony as it appears on pages 3, 4, 5, 6, 7, of hearing before the Committee on Ways and Means, House of Representatives, Eightieth Congress, second session on H. R. 3345, March 1, 1948.

## STATEMENT OF ADRIAN W. DEWIND, TAX LEGISLATIVE COUNSEL, TREASURY DEPARTMENT

Mr. DEWIND. Mr. Chairman, at the outset I would like to state that the Treasury Department is fully aware of the administrative problems that face the States in the enforcement of taxes which involve products which are shipped in interstate commerce, particularly the State taxes on tobacco, and the department is also fully aware of the desirability of cooperating to the fullest extent possible with the States in meeting their tax problems and exchanging information in all areas where it will be helpful.

At the same time in this particular situation the Federal tobacco tax is a tax which is imposed on only manufacturers and accordingly the Treasury Department in its administration of the Federal tax on tobacco has no experience with the problems which arise out of the shipment of tobacco and therefore the administrative machinery which the department now has in existence for administration of the Federal tax on tobacco does not provide either any experience or any machinery which will be helpful in trying to promulgate regulations as provided in section 3 of this bill.

Mr. REED. May I ask a question right there? Do you contemplate, in the event that this is reported out of this committee and becomes a law, that you will require more employees to enforce it? Is that the idea?

Mr. DEWIND. Yes, Mr. Chairman; it certainly would. The Department has no machinery at the present time for handling this type of problem.

Mr. REED. Is that the chief objection?

Mr. DEWIND. I think not only the fact that it would require additional personnel, but the fact that the Department would lack any experience and has lacked experience with the problems that would arise, the problems that would face the States.

Not only that, but the States, because they have different types of tax laws have problems which vary from State to State, and it would be very difficult to have uniform rules and regulations.

Mr. REED. You would not want this escape from taxes to continue merely on that ground?

Mr. DEWIND. As I said at the outset, we are fully aware of the problems involved here. We merely feel the Treasury Department would not be a proper agency, because of its lack of experience with this type of problem to administer the laws and regulations under it, so the Department suggested that section 3 of the bill be eliminated.

Mr. REED. Are there any questions?

Mr. KEAN. New York City has a sales tax. Now I buy something in New York City and I do not have to pay that tax if I have sent it to my home in New Jersey. Is there any great difference between that and this? I mean perhaps the Treasury Department under this theory would have to also send notices around to the people who were not paying the New York City sales tax and try to collect it for them.

Mr. DEWIND. I think as a precedent there would tend to be some expansion to other areas. I think that is true, but I think primarily it is our feeling that the Department is just not equipped to handle the particular type of problem.

Mr. COOPER. Mr. Chairman.

Mr. REED. Mr. Cooper.

Mr. COOPER. Then, am I correct, Mr. DeWind, in understanding that with the elimination of section 3, as was indicated by Mr. Jenkins, the Department is not to offer any objections to the bill?

Mr. DEWIND. Mr. Cooper, with the elimination of that section the bill would not affect the Treasury Department in any way.

Mr. COOPER. Is that not the section you are going to take out, Mr. Jenkins?

Mr. JENKINS. That is right.

Mr. CURTIS. Cigarettes, and similar tobacco products are somewhat in a class by themselves as compared to a general tax imposed by a State. Is that not true because they are singled out for a special tax by many States? Is that not correct?

Mr. DEWIND. I believe that is right.

Mr. CURTIS. Also they are a type of merchandise than can be mailed very easily.

Mr. DEWIND. That is right.

Mr. CURTIS. They are not heavy and the postage charges are not very much. It seems to me that unless something is done to meet the situation, as long as there is one jurisdiction in the Federal Union were there is no cigarette tax they

could supply the other 47 States with cigarettes or a considerable portion of them and avoid the tax.

Mr. DEWIND. As I understand it, the States that do impose taxes have done a great deal to work out cooperative enforcement measures. What you say of course is perfectly true that a State that does not have any State tobacco tax is not in the same position to cooperate as the States that do.

Mr. CURTIS. Now here is another thing. This matter of not collecting a general sales tax when merchandise is purchased and shipped out of the State, that usually is a condition that obtains in a nearby territory, contiguous territory.

Mr. DEWIND. I believe that is the case.

Mr. CURTIS. That is not a mail-order business. It may be delivered in some manner but it is not set up as a mail-order business, delivering to save tax, is it?

Mr. DEWIND. As I understand, in this area there are both types of problems, the sort of shipment you refer to and also a mail-order shipment.

Mr. CURTIS. That is all.

Mr. REED. Are there any other questions?

We thank you sir, for your appearance.

Mr. DEWIND. Thank you, Mr. Chairman.

Mr. JENKINS. Does the gentleman from the Internal Revenue Department wish to make a statement?

Mr. REED. Will you please state your name and the capacity in which you appear?

STATEMENT OF CHARLES W. STEWARD, CHIEF OF THE TOBACCO AND CAPITAL-STOCK TAX DIVISION OF THE BUREAU OF INTERNAL REVENUE

Mr. STEWARD. My name is Charles W. Steward. I am the head of the Tobacco and Capital-Stock Tax Division of the Bureau of Internal Revenue.

I believe Mr. DeWind has already fully covered the subject from the Treasury Department's standpoint and I do not think I have any additional information to offer but I shall be glad to answer any questions in the event that anyone wishes to ask additional information.

Mr. REED. Are there any questions?

Mr. JENKINS. In other words, you agree with Mr. DeWind, of the Treasury Department?

Mr. STEWARD. Absolutely.

Mr. REED. Are there any other questions? If not, we thank you for your appearance, Mr. Steward.

Mr. STEWARD. Thank you, Mr. Chairman.

Mr. JENKINS. Mr. Horan, from the Attorney General's office is here. That Department has also filed a report.

Mr. REED. Will you give your name to the reporter and the capacity in which you appear?

STATEMENT OF MICHAEL J. HORAN, ATTORNEY, OFFICE OF THE ASSISTANT TO THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. HORAN. My name is Michael J. Horan, attorney, in the Office of the Assistant to the Attorney General, Department of Justice.

The Department has nothing to add to its report of July 29, 1947, on H. R. 3345 as presently drafted.

Mr. COOPER. I suggest that you had better read that report. Do you have it there?

Mr. HORAN. Yes, sir.

Mr. COOPER. Read it to us, please.

Mr. HORAN (reading): "MY DEAR MR. CHAIRMAN: This is in response to your request for the views of this Department relative to a bill (H. R. 3345) to assist in collecting sales and use taxes on tobacco. The bill would provide that any person selling or disposing tobacco products in interstate commerce whereby such products are shipped to 'other than a distributor licensed by or located in' a State taxing the sale or use of tobacco products, shall each month forward to the tobacco administrator of the State to which the shipment is made a memorandum or a copy of the invoice covering every such shipment made during the previous calendar month to that State, the memorandum or invoice to include the name and address of the person to whom the shipment was made, the tobacco product, and the quantity thereof.

"A violation of the measure would be punishable by a fine of not more than \$1,000 or imprisonment for not more than 12 months, or both.

"The bill would authorize the Secretary of the Treasury to issue rules and regulations for the enforcement of the proposal.

"Such a measure may set a precedent for similar legislation with respect to other items upon which the States have imposed or may impose a sales or use tax. As to what proportions such Federal assistance may reach or the extent of Federal expenditures which would be required in enforcing such laws and regulations is, of course, speculative. Whether the bill should be enacted presents a question of legislative policy concerning which this Department has no suggestion to make.

"With respect to the construction of the bill, however, it is suggested for purposes of clarity that the words 'distributor licensed by or located' should be deleted from line 9, page 2, and the words 'licensed distributor' be inserted in lieu thereof.

"The Director of the Bureau of the Budget has advised that there is no objection to the submission of this report.

"Sincerely yours,

"D. W. MCGREGOR, *Assistant to the Attorney General.*"

Mr. REED. What was the date of that?

Mr. HORAN. July 29, 1947.

Mr. REED. That was written before the agreement to strike out section 3; is that right?

Mr. HORAN. That is right.

Mr. REED. Are there any questions?

Mr. JENKINS. I would like to ask one question.

You make a suggestion with reference to the deletion of certain words and the insertion of others.

Mr. HORAN. That is right.

Mr. JENKINS. I think your suggestion is very good, and if it is approved by these experts who are here representing the various States I shall recommend that that amendment be offered, because I think, with you, that it does clarify the language.

Mr. HORAN. Yes, sir.

Mr. JENKINS. Now, then, I wish also to state to the committee that Mr. Horan, in talking with me, indicated it would not be necessary to have the words "guilty of misdemeanor" in section 4. I think it would be well to leave them there, because that would indicate that it cannot be more than a misdemeanor, and it was not the intention of anybody in passing this bill to make any special hardship on anybody and build up any big fines or sentences of any kind.

Personally, if it is all right with you we will leave the word "misdemeanor" in because that will be a limitation beyond which they cannot go.

That is all.

Mr. REED. Are there any questions at this time?

Mr. KEAN. Under the suggestion of the Treasury Department all of the enforcement of the provisions would be passed on to you?

Mr. HORAN. Yes, sir; but, as I stated, our report is based on the bill as presently written. If that deletion is made I am afraid the Department would have to reconsider it.

Mr. KEAN. The Department certainly would not like to have to do all the enforcement work themselves. It would cost a great deal of money, and, as you say, if this precedent is established that would be a precedent for the Federal Government to enforce all the State tax laws, would it not?

Mr. HORAN. It might possibly grow into that. We do not offer it as an objection, however. That is a matter within the discretion of the elected Representatives of the people.

Mr. KEAN. Then your report is not correct at the moment because you would want to make further comments if this section 3 was eliminated?

Mr. HORAN. I believe we would, sir. The last print does not have the deletion, and that is what I am basing my report and appearance on, Mr. Kean.

Mr. KEAN. Thank you.

Mr. REED. Are there any other questions?

Mr. CURTIS. I have just one comment in that connection. These mail-order concerns are actually using an agency of the Federal Government at the present time to promote the business. I have a sales advertisement from one of them. It says: "Our best reference is the fact that we are conducting our business through the United States mail, therefore it is strictly legal."

I just want that for the record. I do not suggest that you comment on it.

Mr. REED. Are there any other questions? If not, we thank you, Mr. Horan, for your appearance.

Mr. HORAN. Thank you, Mr. Chairman.

## EXAMINATION OF SOME SO-CALLED STATE TOBACCO LAWS

Here I would like to discuss briefly some of the provisions of these laws and to submit such of them as I have been able to corral as evidence in this hearing in order that you may know the type of thing on which proponents are asking you to put the stamp of Government approval and which would give them, in effect, the full force and authority of any Federal law by reason of such approval.

Your deponent is not a lawyer, but does claim to have a fair knowledge of the English language, and to me they appear as masterpieces of polygot and gobble-de-gook. These laws, we think, should be studied and carefully analyzed before any action is taken by this committee or the Senate as a whole. It is significant that the proponents have never, in the present instance, nor during the Eightieth Congress hearings, submitted a single one of these amazing documents for inspection by Congress whose approval they are asking. The laws speak for themselves and it is not my intention here to discuss them in detail, but only to highlight a few of the extraordinary provisions they contain, some of which not only are in contravention of the Constitution, both State and Federal, but as well are contrary to all of the established rules governing interstate commerce.

First, it will be noted that the laws for the most part are designated as a special privilege or license tax on dealers, and not a sales tax at all, as is contended by the proponents throughout their testimony before the House committee. Most contain a short and obscure clause which would require a consumer who purchases direct from without the State to place stamps on cigarettes within one to two hours after receipt which is a tax for the privilege of use.

In order to embrace or include the user of cigarettes and collect taxes thereon, the States have used varying devices, the most outstanding of which is to be found in the Tennessee tobacco tax law. You will note that the act opens with a list of "definitions," each of which are lettered. I will quote definition (b) of that law (all underscoring and italics by writer):

"SEC. 1. (b) The term 'distributor' means and includes every person engaged in the business of receiving, manufacturing, importing or handling tobacco products and making the first sale, gift, or distribution of such products; or *making the first use or consumption of such products in this State.*

"SEC. 2. \* \* \* provides that all dealers, distributors, etc., shall apply for a license before a given date each year, giving name, address, etc., and that: 'The application for license shall be accompanied by a fee of \$5 for "distributors" license, and a fee of \$2 for a "dealer's" license.'

Comment: In other words, if a consumer desires to buy cigarettes from outside the State, he must first apply for and obtain a distributors' license for which he pays \$5 before he can import his needs. Having done so, he then has to comply with all the restrictions, conditions, etc., the same as a distributor or dealer and then:

"SEC. 4. Be it further enacted, that every dealer or *distributor* of tobacco products as herein defined shall pay to the department of finance and taxation for exclusive State purposes a *special privilege tax* in addition to all other taxes as follows:

"1. (a) When retail sales price is less than 1 cent per cigarette, the rate shall be one-fifth of 1 cent for each cigarette.

"(b) When retail sales price is more than 1 cent per cigarette, the rate shall be 20 percent of the sales price.

"SEC. 5. \* \* \* That (a) the tax shall be paid by purchase from the commissioner of stamps of such design etc., \* \* \*

"SEC. 7. \* \* \* That all manufactured tobacco products which are or shall be owned or possessed by any person in \* \* \* violation of any of the provisions of this act, are hereby declared to be contraband goods and the same *may be seized* by the commissioner \* \* \* *without a warrant* and the said goods shall be delivered to the department for sale at public auction. \* \* \* Any vehicle, not a common carrier, which may be used for transportation for the purpose of *distribution, gift, or sale* \* \* \* shall likewise be subject to confiscation. \* \* \*

"SEC. 10. \* \* \* That every common carrier in this State, transporting cigars, cigarettes, manufactured tobacco, or snuff, in this State, shall keep a complete record of all tobacco products handled in each transaction, separately, and shall show the transportation of such tobacco products, both *interstate* and *intrastate*. Every common carrier in this State shall give and permit the commissioner free access to such books and records, and furnish such information and reports as the commissioner may require, and any person violating this section shall be guilty of a misdemeanor."

Comments: (a) We are wondering what they propose to do with reference to express companies who do not know nor inquire as to contents of any parcel, nor do they have any waybilling of any nature.

(b) Considering the vast interstate movement of tobacco products, this alone imposes a terrific burden on the transportation companies. What will the burden be when the principle is extended to all commodities covered by the general sales tax laws of the various States? We cite the record of HCR hearing, both on this bill and the hearings on H. R. 3345 superseded by H. R. 5645 in the Eightieth Congress, wherein the proponents state that, in all probability, Congress will be called upon to enact such legislation if this bill proves successful as far as cigarettes are concerned. You gentlemen have no doubt read all of this testimony and therefore there is no use of my making a rehash of it here.

When I began preparation of this portion of the paper, I had before me only a few of the State tobacco laws, but since have unexpectedly received copies of such laws from more than half the States, and, since reading these monstrous and extraordinary documents, I feel compelled to add a few more comments on this chapter. All of these State laws should be in the record, but to so place them would be quite an imposition on the Government—certainly though they should be on open record somewhere in order that people might see and know what those laws are on which you are being asked to place the Government stamp of approval. I shall make my comments as brief as possible:

1. The tax on cigarettes is variously designated as "privilege or license tax on dealers," "sales tax," "excise tax," "luxury tax," "use tax," etc.

2. Practically all contain the following provisions:

(a) Various word devices are used to bring the consumer within the purview of the law, the most of which classify him in the dealer category (particularly those consumers who purchase in interstate commerce and who are required to obtain a license or permit to buy for personal needs) and require that he shall affix tobacco stamps to contents of parcels within 1 to 2 hours after receiving, but which make no provisions whereby he can purchase said "stamps," such privilege being only allotted to recognized dealers. They also require him to make reports to taxing authorities and other restrictive measures. Failing in any one of these, he is subject to dire penalties such as thousands of dollars in fines and up to 2 years' imprisonment. All of the foregoing is patently designed to stop any person from making a purchase of cigarettes beyond his own State borders.

(b) Further restrictive measures provide that no salesman can sell cigarettes either in intrastate or interstate commerce without first obtaining a license or permit for which he has to pay.

(c) All persons suspected by State agents are subject to search and seizure without warrant.

(d) Many State courts are denied injunctive powers insofar as these laws are concerned: the first legal remedy provided to accused persons is a hearing before tax commissioners who have the power to confiscate goods and assess penalties, which means that the commissioner, as accuser, is both judge and jury.

(e) Any conveyance, "other than a common carrier," having within any unstamped cigarettes can be searched without warrant, and the cigarettes and the conveyance as well can be confiscated, this part of the laws extending even to a tourist while en route across the tax State if he has more than three packages of cigarettes carried for his own use.

3. All of these State laws provide for discounts to dealers in amounts varying from 3½ to 10 percent on tobacco stamps for which the small dealer and consumer have to pay 100 percent. The reading of any one of these laws will quickly convince anyone that their sole purpose and design is to stop all interstate commerce in cigarettes and other tobaccos except through channels stipulated by the State. If these laws are not in their very nature the height of despotism and tyranny then I don't know the meaning of those words. It would be interesting to compare them with the famous Stamp Act promulgated by England against the American colonies which was largely instrumental in bringing about the Revolution. (Proponents' answer to this will be that if the citizens of the States do not approve they can change their lawmakers. My answer to which would be: First, that many United States citizens without those States are affected but have no voice; second, just let anyone try, through a State court, to have any tax law set aside and see what the result, provided those affected by the law are in the voting minority.)

## IMPORTANT ADMISSIONS BY PROPONENTS OF THIS BILL

I would like to cite a few of these admissions as they appear in the House committee report on the Jenkins bill, H. R. 195. They follow:

(Hon. Dwight L. Rogers, Florida, testifying:)

"Mr. CARROLL. As a matter of fact I was going to ask that same question because the fruit growers of Florida are beginning to ship fruit by mail, by mail order. I know some of it is coming to Colorado and Colorado has a sales tax. I am just wondering because I was so impressed by the argument of my colleague, Mr. Cooper, in the debate of this thing last year. I believe I voted for it but now a question is beginning to arise in my mind when I see the extent to which we are going. About 25 States in the Union have a sales tax and we begin to see the interstate movement of goods, fruits from Florida, pecans from some other State, fruit from Texas, and my fruit merchants do not like it. As a matter of fact it takes revenue away from our people, but I wonder how we can stop it.

"Mr. ROGERS. I do not think you would find any objection on the part of Florida shippers.

"The CHAIRMAN. I am wondering what we are opening the door to.

"Mr. ROGERS. I do not think you would find any objections from a shipper out of Florida.

"Mr. EBERHARTER. Would it be all right if we put that amendment in the bill? You said you did not think any merchant would have an objection.

"The CHAIRMAN. The chairman recognizes requests in the order in which they are made, Mr. Eberharter.

"Mr. Eberharter. You said you did not think any merchant in Florida dealing in fruit would have any objection to sending a copy of his invoice or at least a memorandum, or the name and address of the purchaser of any fruit that was shipped outside the State?

"Mr. ROGERS. If they had a sales tax in the State to which it was going and the purchase was made for the purpose of evasion of that tax.

"Mr. EBERHARTER. Let me ask you this, Mr. Rogers: Florida manufactures a great many cigars?

"Mr. ROGERS. Yes, sir.

"Mr. EBERHARTER. The cigar manufacturers do a tremendous direct-to-house-and-office sales business from Florida; do they not?

"Mr. ROGERS. I could not answer that. I presume they do some business.

"Mr. EBERHARTER. I can tell you, as a matter of fact, that they do. Now, in Pennsylvania newspapers carry many ads such as 'Buy your cigars direct' from Tampa and various other cities in Florida. Pennsylvania has a special tax on cigars. Florida is shipping those cigars direct and the people that buy these cigars from Florida do not pay the Pennsylvania special tax. Are you willing to have this bill amended to cover cigars that you ship to Pennsylvania?

"Mr. ROGERS. I am only here covering cigarettes. In many other States the main revenue is derived from cigarette tax.

"Mr. EBERHARTER. Let us suppose that the revenue in Pennsylvania is derived in large part from the tax on cigars.

"Mr. ROGERS. I could not say; I do not know.

"Mr. EBERHARTER. What would be wrong with including an amendment in regard to cigars as a protection to Pennsylvania?

"Mr. ROGERS. There are very few States that have a tax on cigars.

"Mr. BOGGS. Mr. CHAIRMAN?

"The CHAIRMAN. Mr. Boggs.

"Mr. BOGGS. Why would you object to putting in cigars?

"Mr. ROGERS. I do not think it is a source of great revenue.

"Mr. BOGGS. Then certainly there would not be any objection at all.

"Mr. ROGERS. Thirty-nine States have a tax on cigarettes and none of them so far as I know have any on cigars.

"Mr. EBERHARTER. But my hypothesis was that Pennsylvania has such a tax and that it is one of our main sources of revenue.

"The CHAIRMAN. Mr. Eberharter, do you still wish to question the witness?

"Mr. EBERHARTER. What about the fruit? Mr. Carroll says there are a lot of fruits shipped from Florida to Colorado. I know in Pennsylvania there are people that buy these specially made up fruit boxes from merchants in Florida. We do not have a sales tax in Pennsylvania, but we may have one next year.

Would you object to inserting in here any merchandise shipped from Florida or from any States that does not have a sales tax into a State that has a sales tax?

"Mr. ROGERS. Let us wait until you have a sales tax.

"Mr. EBERHARTER. We want protection to let us know whether or not Pennsylvania desires to pass a sales tax.

"Mr. ROGERS. Mr. Eberharter, I think you know there is not a sufficient amount of those transactions to effect the revenue, whereas you are taking something here that brings in millions of dollars.

"Mr. EBERHARTER. Mr. Rogers, I think this committee wants to legislate on the basis of principle and not only consider the dollar value. You say this is a good bill as a matter of principle to stop the evasion of collection of taxes. Insofar as cigarettes are concerned, the principle is the same. The people are evading the payment of taxes to the State of Pennsylvania, but yet you object—do you, or do you not—to having cigars included in Mr. Jenkins' bill?

"Mr. ROGERS. I am not asking that cigars be included. No, because I do not think there is a sufficient amount of business done in cigars to warrant a law.

"Mr. EBERHARTER. You just want to give the cigar manufacturers in Florida a special exemption?

"Mr. ROGERS. I am trying to help every State in the Union that has this law on cigarettes.

"Mr. SIMPSON. Will you yield, Mr. Eberharter?

"Mr. EBERHARTER. Yes.

"Mr. SIMPSON. It is my understanding that we do not have a special sales tax on cigars in Pennsylvania; that we have the tax on cigarettes only.

"Mr. EBERHARTER. I was informed over the telephone only a few minutes ago that there is a tax on cigars.

"Mr. SIMPSON. Your principle is still argumentative, however.

"Mr. CARROLL. Mr. Chairman?

"The CHAIRMAN. Mr. Carroll.

"Mr. CARROLL. I appreciate your sincerity, and I listened to your arguments the last time. However, I think it is the principle involved, and I am very sincere when I say to you that fruit is coming from Florida into Colorado, hundreds of miles away, by cargo ship-airplanes—and I am wondering if we should establish the precedent as set forth in this bill.

"You are going to have people sending invoices back and forth, and you will have a regular avalanche as a result of the reporting if the sender has to send an invoice on every small item.

"Mr. ROGERS. I think that is really a weak argument when it comes to considering the amount of revenue that is raised on cigarettes.

"The Supreme Court has dealt with the liquor on the same item that is herein involved on cigarettes. They did the same thing with convict-made clothes. I see no reason why you should extend this to include any other commodity except cigarettes because that is the source from which each State has singled out its revenue. They have not singled out these other things, but they have done so with cigarettes.

"This is only to help the State collect the tax that they are entitled to collect and the only thing we are asking you is to let this man over here send an invoice.

"Mr. CARROLL. Mr. Rogers, I must say to you that in Colorado and about 25 States, they do impose a sales tax on these commodities which are extremely important. For example, I know you are very much interested in the pension movement and the old-age pensioners live on the sales tax.

"Mr. ROGERS. A lot of them live on, and the schools are run by, the cigarette tax.

"The CHAIRMAN. Mr. Reed?

"Mr. REED. This has raised quite a question mark in my mind. We are just flooded with these beautiful Colorado melons in New York City where we have a sales tax.

"Mr. CARROLL. Exactly; and I do not want my shippers sending in vouchers to you because they have enough work without that.

"The CHAIRMAN. We have a State sales tax in our State and quantities of merchandise are sent in with losses in revenue to the States. I am wondering while we are opening the door whether we could get some relief in our State whereby our merchants who lose business with loss of State revenue could be aided.

"Mr. ROGERS. Let us first try the working of this bill, Mr. Chairman. Let us try the working of this bill and if it works out, we will consider the next.

"Mr. CURTIS. Most of this cigarette tax is on an ad valorem basis in the various States and runs from 12 to 50 percent.

"Mr. ROGERS. The sales tax is about 2 to 5 cents a package, I think.

"Mr. CURTIS. Yes. That would be on an ad valorem basis of about 12 percent. In some States, there is a tax of 50 percent. That creates a problem whereby there is an inducement to avoid the tax. Your general sales tax, in most States, runs 2 percent.

"Mr. ROGERS. Two to three, and four in some.

"Mr. CURTIS. I do not think you have a comparable situation at all.

"Mr. CAMP. This general sales tax collected on sales such as Mr. Doughton referred to, in North Carolina, is an entirely different tax from the use tax that these States have on cigarettes. You pay that sales tax when the sale is consummated and you buy the goods. This cigarette tax is paid long before they go on the merchant's shelf.

"Mr. BOGGS. But can you make that same distinction on the cigar tax?

"The CHAIRMAN. Thank you, Mr. Rogers.

"Mr. ROGERS. Thank you, Mr. Chairman" (HCR, pp. 99-102).

\* \* \* \* \*

C. EMORY GLANDER, tax commissioner, Ohio, testifying:

"\* \* \* It is not a sales tax because the State of Ohio has no constitutional right to levy a 3 percent sales tax on a sale consummated in another State—but I being a citizen of Ohio am subjected to the laws of the State insofar as the use is concerned.

"The State of Ohio may say that we are going to introduce a 3-percent tax for the privilege of using something. That is a use tax and it is a supplementary type of tax to the sales tax.

"Now Judge Arnold, the other day, in his comments, said there is a grave danger that the type of legislation we are dealing with here today may be extended to other commodities and you may have, as the gentleman suggested, a crisscrossing of these notices from shippers to taxing authorities of several States. I would be unfair to this committee if I were to argue that there is a fundamental difference in principle. I think there is no difference in principle whether you are dealing with cigarettes or anything else, but there is a vast difference in practice and in the factual situation with which you are dealing" (HCR, p. 103).

"\* \* \*. So that what I am admitting first of all to this committee is that there is no fundamental difference in the principle but, as a matter of fact, of realistic and practical considerations, we do not have the difficulty with respect to administering sales or use taxes as to other commodities, and I do not think we are likely to have it.

"The CHAIRMAN. Suppose you find some other commodity in which you do have the difficulty that you have on cigarettes, would you say that they should be protected like cigarettes?

"Mr. GLANDER. I would say that if a situation developed; yes.

"The CHAIRMAN. If it is the same in principle and practice?

"Mr. GLANDER. I would have no hesitation in saying that, if a situation should develop that would be analogous, I would be in favor of extending the principle.

"The CHAIRMAN. What would be analogous?"

"Mr. GLANDER. My argument, Mr. Chairman, is that as a practical consideration I do not think it is going to happen.

"The CHAIRMAN. You do not think it will happen in this situation if we do this?

"Mr. GLANDER. No; I do not think so. I would like to touch on that point a little bit later.

"The CHAIRMAN. I want to go along with this bill, but I also see certain dangers.

"Mr. GLANDER. That is why I admit that there is no fundamental difference in principle.

"The CHAIRMAN. I do not have it clear yet as to the distinction between the sales tax and use tax" (HCR, p. 104).

"Mr. GLANDER. That is right. The reason for levying the tax is that the State cannot constitutionally levy a State sales tax on a sales transaction which has been consummated outside of its borders" (HCR, p. 105).

"Mr. CARROLL. One thing more. In principle, as I understand it, you agree that this could be extended to other commodities under similar situations?

"Mr. GLANDER. I could not deny that; that would be unfair to the committee if I did. The second thing I should like to answer is the argument which was advanced by the shippers who were presented the other day to the effect that theirs is a perfectly lawful business, not a nefarious business, and the resentment which they expressed because of the statement which had been made in these hearings.

"Well, now, of course, no one will deny that for the most part what they are doing is perfectly lawful right now" (HCR, p. 106).

"Mr. KING. \* \* \* I have just one qualm about this legislation and I voiced it the other day. Since then, it just happened that one of the Members of Congress from one of the Southern States had sent to me, and I presume other Members, an almanac. I had not seen one in 25 years. Eight or 10 pages at the back of this almanac were devoted almost entirely to the direct shipment of articles, books on love and marriage, and all sorts of things. I thought it was pertinent to our discussion here. I am wondering, as I have been since this hearing on Mr. Jenkins' bill started, why the bill itself is limited to cigarettes only when it is acknowledged and known that hundreds of thousands of dollars of merchandise is being shipped, avoiding taxes in your State and my State.

"I do not believe that my State of California should have literally millions of dollars of merchandising business transacted by this method that evades the tax on sales.

"Mr. GLANDER. In the early part of my testimony I attempted to answer that.

"Mr. JENKINS. Will you repeat it?

"Mr. GLANDER. In the first place there is no fundamental difference in principle. I concede that. It so happens that the traffic in untaxed cigarettes has assumed proportions way beyond anything that exists in connection with any commodity and that is because it happens to be a commodity that is purchased frequently by almost everyone and the tax in relation to the amount involved is high, you see.

"Mr. KING. I see.

"Mr. GLANDER. A 2-percent tax as you have in California on any other commodity is on the dollar.

"Mr. KING. Yes.

"Mr. GLANDER. But when you take in some States that have a tax as high as 8 cents on a package of cigarettes, that may be 50 or 60 percent. So that the inducement to violation is gigantic in this case and not in the other" (HCR, p. 111).

\* \* \* \* \*

CHARLES F. CONLON, executive secretary, National Tobacco Tax Association, Chicago, Ill., testifying:

"\* \* \* \* On the other hand, the ordinary case confronting the tax administrator involves a purchaser who simply orders by mail for his own consumption.

"There is no reason to limit H. R. 195 to cigarettes. It should be extended to all taxable commodities" (HCR, p. 123).

HON. MIKE MONRONEY, a Representative in Congress from the State of California, testifying:

"\* \* \* \* Our tax is 33 $\frac{1}{3}$  percent on cigarettes. The item is a standard item whether it comes out of a back room in Missouri or whether it is sold over the counter in Missouri. It is a recurring purchase, not like my hat or a dress, or something like that you want a personal selection. These are standing orders as Mr. Steed has mentioned" (HCR, p. 111).

The foregoing citations are given to show that advocates of this bill definitely have in mind extending the principle to apply to other interstate commerce. It is to be inferred from their testimony that they are "flying a kite" with this bill as a preliminary to others that will follow.

#### SUMMING UP

My abject apologies for the length of this discourse, but as a matter of fact, to adequately cover the many facets which the subject presents would require several hundred times the number of pages this paper contains. To make it anywhere near complete a thorough analysis of the 39 State laws should be included. But even that would have no great meaning because the States are continually changing and amending their laws on tobacco products. Yet, as S. 879 is worded, it will not only apply to the State laws as of the present, but as well to any future laws their legislative bodies choose to enact. And without any deterrent there is no limit to which they might not go. You will note a variation in these cigarette taxes as they now stand of 800 percent (e. g. West Virginia tax rate 10 cents per carton—Louisiana 80 cents).

I have shown by the testimony of proponent witnesses a definite liaison existing between State tax officials and their chosen wholesale dealers, or NATD, and that they, at the expense of cigarette smokers, are profiting to an extent upward of \$30,000,000. I have also shown by these same witnesses that, with the assistance of NTTA, NATD is actively engaged in fostering so-called unfair sales acts throughout the States, many of which have already been passed. These "unfair" sales laws fix a minimum price at which cigarette dealers can sell and are so designed that the wholesalers' profits will be enhanced by at least 400 percent, or to a figure well in the excess of \$100,000,000.

It is self-evident that these cigarette-tax laws, in conjunction with the minimum-price laws will create what might properly be called State-created monopolies by which the consumer-taxpayer will be robbed of untold millions of dollars. And, because of decreased demand occasioned by increased prices, the returns to the tobacco grower will be greatly diminished.

I have definitely shown by proponent witnesses that cigarettes have been "singled out" for taxation at a rate out of all proportions to other common products; that they contemplate "singling out" other common commodities should this bill become a law and prove effective. One of the witnesses goes so far as to say \* \* \* "It should apply to all States that have a general sales tax."

I have shown (by what I believe to be reliable computations) that the outside amount being lost to tobacco-tax States by reason of mail-order business is less than \$3,000,000, and I challenge proponents to disprove that figure. Three million dollars, mind you, a sum equal to less than one-tenth of the amount these States are gratuitously handing out to wholesalers under the guise of "discounts on tax stamps."

I have also shown by proponent witnesses, including Hon. Thomas A. Jenkins, author of H. R. 195, that they recognize that there is neither State nor Federal law that remotely suggests that the business of selling cigarettes through the United States mail in interstate commerce is in any way illegal. Therefore, being legal, it should not be interfered with and I might say that it should be encouraged because, as matters stand now, it is the only deterring factor in slowing the heavy hands of these State law makers in the imposition of discriminatory, inequitable, and unjust taxes—under laws so drawn as not only to burden interstate commerce but as well to destroy it insofar as cigarettes are concerned. Therefore, we hold that enactment of this bill into law would establish a precedent which when extended to other commodities would completely eliminate all free commerce between the States and lead us back to the same conditions that existed when first Constitutional Convention was called to meet in the year 1788.

Proponent witnesses blandly and naively state that the administration of this proposed law will not cost the Federal Government anything—that State officials will assemble all evidence and bring the charges before United States district attorneys for handling, etc. (Apparently they labor under the delusion that United States courts are operated at no cost to the Government.)

And now back to our main theme. By enacting this bill into law:

#### WHAT ARE WE OPENING THE DOOR TO?

(a) Setting a precedent by putting a blanket stamp of Government approval on a mass of laws (many of which are widely divergent) by 39 States, as they stand today or as they may be changed in the future, or others that may in the future be adopted by other States. Laws that may or may not square with the Constitution of the United States. Laws which, in fact, in many respects contravene the fundamental law of the Constitution.

(b) Setting a precedent for a multiplicity of other laws to follow as the States from time to time "single out" other common commodities for discriminatory taxation such as State taxes now imposed on cigarettes.

(c) Setting a precedent, ultimately, for a law to protect all States in the operation of their general sales-tax laws all of which are designed and intended to control and virtually throttle the free flow of interstate commerce, the effect of which would, in the end, be to:

- (1) Create monopolies.
- (2) Place control of all business in the hands of State administrators.
- (3) Clutter up the Federal courts and reduce them to police-court status.
- (4) Impose on the Federal Government incalculable expense in supervision.
- (5) Make a mockery of Federal law, as happened under the Volstead Act.
- (6) Impose on the citizens of this Nation these and other burdens and restrictions inconsistent and incompatible with a free democracy and all of our prior concepts of law and justice regulating the behavior of the inhabitants of a free State.

And you gentlemen are being asked to set off this explosive chain of economic reactions for what? Nothing more than to save certain States the paltry sum of \$3,000,000.

I thank you in advance for any consideration which might be given this humble attempt to point out the evils and viciousness embodied in this proposed legislation.

The CHAIRMAN. Mr. Freeman? Is Mr. Milton Freeman in the room?

Mr. FREEMAN. Yes. I will be only 1 minute or 2, Mr. Chairman, Colonel Story has left and will not testify. So with Mr. Dils, and just 1 minute from myself, we will be through by 1 o'clock.

The CHAIRMAN. All right, Mr. Dils.

**STATEMENT OF FRANK LEE DILS, ATTORNEY, OF COVINGTON, KY., FOR MODERN SALES, ROANOKE, VA.**

Mr. DILS. Mr. Chairman and gentlemen, cigarettes are a legitimate article of commerce and the subject of dealing that is Nation-wide. This article has been singled out as only one of the many thousands of articles that move in interstate commerce. Cigarettes are not considered bad at the place of origin or at the destination when moved from one State to another.

Congress to this date has not set a precedent for this type of legislation: that is, the lending of aid to the various States in the enforcement of revenue laws. The prohibition of shipments that Congress has regulated are noxious articles or such articles as intoxicating liquor or convict-made goods, the traffic in which is forbidden or restricted by the laws of the State of destination.

It is not the article or subject matter that moves in commerce that proponents of this type of legislation are trying to regulate. They are admitting their inability or the laxity in the conduct of their own citizens. It is the local act of the customer of a shipper of an article that moves through the medium of interstate commerce that creates the tax liability, if any, to the State of destination.

The sales taxes or use taxes are considered excise taxes. They are an inland importation levied upon the consumption, use, control or sale, and thus a method of raising revenue upon the performance of an act by the customer, not a tax on the article or the subject matter that moved in commerce. The various State taxing statutes to be constitutional give an exemption of the tax in the State of origin, if the act falls in the category of interstate commerce, thus permitting exportation without tax liability to the shipper. It does not matter whether the article that moved in commerce is in the original package or has been broken, it is the excise tax that the States are attempting to collect, not a tax on the article. This is far removed from the article that moved in commerce.

As to the control of the act of the citizen—customer—or taxing the act of the customer, all State statutes are not uniform. Some States have no use or consumption tax; and in some States it is obnoxious where the fair trade laws have been tied into the cigarette-tax-law structure or policies, amounting to price-fixing accomplishment. Why should this Congress assist in this type of venture? The information that certain tax administrators are asking for is aid in the enforcement of the collection of either the use tax or the sales tax. In the States that have no use tax at all, this information would be of no advantage to the tax administrator. The noxious condition that certain States are complaining about is their inability to have all their citizens declare and pay the use tax. This is certainly a matter of local concern and under their own police power and taxing power they can control such matters by their own State legislature. The Federal Govern-

ment should not lend its aid in helping solve this kind of problem; that is, after the goods have moved through commerce and come to rest within the State. The tax liability only attaches when some act of the citizen applies to the subject matter. That is, when they are sold, used, or consumed. They are attempting to neutralize the advantages belonging to the place of origin, which would be the shipping point.

Why should this Congress impede the movement of an article in commerce and destroy the area of free trade protected by the Constitution? The State tax administrators are attempting to have this Congress set up a discriminatory economic trade barrier. As Mr. Justice Reed said, in the United States Supreme Court case of *Best & Co., Inc. v. Marwell* (31 U. S. 454):

The commerce clause of the Federal Constitution forbids discrimination, whether forthright or ingenious. The freedom of commerce which allows the merchant of each State a regional or national market for their goods is not to be fettered by legislation, actual effect of which is to discriminate in favor of intrastate business, whatever may be ostensible reach of the language.

The law places a condition precedent upon the movement of the cigarettes in commerce at the place of origin. The practical application of the proposed law determines the condition under which an individual may engage in interstate commerce, with the threat of fine and imprisonment added. The proposed law lifts a component part of the intercourse from the contract that causes the exportation of the article, the name of the buyer, his address and what he purchased, and interferes with their past contracts. Both the shipper and the customer are guaranteed the freedom of contract by reason of the Federal Constitution. This clause applies to expressed and implied, executed and executory contracts (6 Cranch 127). The branding of one's own property with a stigma is a deprivation of property without due process of law; thus, an undue and unreasonable burden on interstate commerce. *Collins v. New Hampshire* (171 U. S. 30).

There is a vested property right in the customer's name. The shipper cannot be deprived of his property without due process of law. The principles embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away from its essential attributes, comes within the purview of this limitation upon legislative power.

This Congress would be exerting an enlarged power to a subject which, under the constitutional guaranties, such enlarged power cannot be applied.

The courts have been very cautious when dealing with the commerce clause, as so ably stated by Justice Harlan in the case of *Champion v. Ames* (23 Sup. Ct. 321), where he said in effect that the whole subject (of what is proper for Congress to regulate) is too important and too difficult of solution to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause.

By this type of legislation Congress would be giving the States extraterritorial jurisdiction. All court decisions to this time hold the States to their territorial limits. The State cannot have a sister State act as its agent, as stated in *Moore v. Mitchell* (30 F. 2d 600):

It is repugnant to settled principles of private international law which precludes one State from acting as a collector of taxes for a sister State and from enforcing

its penal or revenue laws as such. The revenue laws of one State have no force in another. The taxing power of the State is, by the Federal Constitution (amendment 14), limited to persons and property within its jurisdiction.

Therefore, it is an elementary principle of law that what cannot be done legally direct cannot be accomplished indirectly. The doctrine of "the end justifies the means" should not be considered in passing this type of legislation to cover the laxity of their own citizens in declaring or paying an excessive tax.

The law is to aid States to collect excise taxes, which some States have no legal right to collect. In Illinois the court declared the use tax unconstitutional in the case of *Johnson et al v. Daley, Director of Revenue* (case No. 31021). Another example is in Michigan, where it requires a license at great cost before the citizen can enjoy the privilege of dealing through the medium of interstate commerce, as in the case of *Nippert v. Richmond* (327 U. S. 424 (1946)). This would be clearly unconstitutional, in my opinion.

This Congress should not blindly aid in this type of legislation without knowing all the regulations, statutes, and ramifications attached thereto which may trammel the right of the purchasers in the various States and violate the privilege-and-immunity clause of the Federal Constitution.

The distributor of tobacco products would be in a perilous position at all times. He does not know who are licensed distributors, or if so, they may be revoked by operation of law, canceled or expired. His list of customers may be thrown to the four winds or wrongfully used. He has no remedy because he cannot sue the State without its consent. It should be remembered that powers not granted to the Congress by the Constitution are prohibited, reserved in the people, and this type of legislation calls for very careful consideration of the many clauses of the Constitution which are entwined or affected through this type of proposed legislation.

In conclusion, this type of legislation would impede the free movement of the article in commerce, be discriminatory, take the shipper's property without due process of the law and give him no remedy if wrongfully used. It is doubtful if it would have any effective use in making an airtight tax-collecting system or policy in any of the States that are complaining. It certainly trammels the rights of the citizens in many States, as they, under this system of government, have a right to choose a market in which they want to purchase merchandise, and they feel that the States by their own overburdening method of taxation have caused the people to go elsewhere to purchase merchandise.

This type of legislation, if enacted, would set a dangerous precedent applicable to all commodities in interstate commerce and destroy the effect of the commerce clause, thus clogging the mobility of commerce.

The entirety of this bill to help States collect excise taxes which the Constitution forbids them to collect should be disregarded by this Senate committee.

Honorable members of this committee, I urge you to give this hearing your most able and worthy consideration.

The CHAIRMAN. Thank you, sir.

Is there any question?

Thank you very much for your appearance.

Mr. DILS. Thank you.

The CHAIRMAN. You said you would have a statement to make, Mr. Freeman.

**STATEMENT OF MILTON V. FREEMAN, ATTORNEY, WASHINGTON, D. C.; CONSUMER MAIL ORDER ASSOCIATION OF AMERICA**

Mr. FREEMAN. My name is Milton V. Freeman. I am with Judge Arnold's law firm, and I would just like to call a few matters to the attention of this committee.

The CHAIRMAN. You reside in Washington?

Mr. FREEMAN. Yes; I do.

The CHAIRMAN. All right, sir.

Mr. FREEMAN. I hope to clear away some of the emotion which has surrounded this matter on behalf of the supporters of the bill. Although the National Association of Tobacco Distributors figures have been pretty well exploded, I would like, in addition to the matter which has been brought out by questioning here, to point out that Mr. Rogers of Florida stated that his State was losing, estimated, between \$250,000 and \$500,000 in revenue, and the NATD figures purport to show that there is close to a \$2,000,000 loss for Florida.

The chairman of this committee stated that he had information from the Georgia tax commissioner that they thought their loss ran about a half million dollars. The figure stated is \$1,249,000 in the NATD figures.

What I want to point out is that, while the NATD estimates are obviously distorted, out of line, and unreasonable, the tax commissioner's estimates also are adopted with a feeling that interstate sale is an improper kind of thing; that they are opposed to it, and naturally they are inclined to exaggerate the loss.

I think a dramatic example of that is the fact that at the request of Senator Lucas there was introduced into the record a telegram from the Illinois State tax commissioner, saying that he was in favor of this bill, and that it would help him.

Now, there was introduced into this record by Judge Arnold the opinion of the Illinois supreme court, decided May 19 of this year, which says that the Illinois tax commissioner is prohibited by law and it is unconstitutional for him to collect taxes on these interstate shipments. So that, if the Congress should pass this bill, it would require a shipper, say, from North Carolina, or from Indiana who shipped into Illinois, to send to the Illinois tax commissioner an invoice on every shipment that he made into the State of Illinois. But the Illinois tax commissioner would be prohibited by law from collecting one penny of taxes on that. And yet the Illinois tax commissioner sends a letter or telegram to this committee saying he is still in favor of the bill. It seems to me clear that he has no legitimate interest in the passage of this bill because he cannot collect these taxes. And this committee should not aid in requiring these shippers to take the tremendous burden of shipping this material to State tax commissioners who have absolutely no use for the material.

Secondly, there has been a good deal of discussion about the large mail-order houses, Montgomery Ward and Sears, Roebuck. They are organized in an association, the Mail Order Association of America. I am informed that they have not only previously expressed their opposition to this bill, but that they have written a letter to the chair-

man of this committee and have asked that that be placed in the record of these hearings.

And I wanted to state that so that it could be known.

Now, as to my last point, as far as the law on this matter is concerned, we are very happy to find one area in which we can agree with the proponents of this bill. You heard Mr. Jenkins say that he wanted you to read Judge Arnold's brief. And we concur heartily. We also urge that you read Judge Arnold's brief. And we agree heartily with our opponents on that.

That is all I have. Thank you.

Senator McGRATH. You heard the testimony, did you not, as to their opinion of the brief?

Mr. FREEMAN. I did not want to agree with their opinion of the brief. I want this committee to read the brief and determine whether my opinion of the brief, or Mr. Jenkins' opinion is an accurate picture of what the brief is.

Senator McGRATH. I have a very high opinion of Judge Arnold. He is not accustomed to writing meaningless briefs. I will say that.

Mr. FREEMAN. I think you will find that this one is not of that character.

The CHAIRMAN. Thank you very much, Mr. Freeman.

Is there anyone else who wishes to be heard now, or wishes to put any statement in the record?

Mr. WILSON. Mr. Chairman, I would like the permission of extending my remarks by a later statement. My attention has just been called to the fact that the printer of the House committee report garbled what Mr. Conlon said, and he was not intending to say what I quoted him as saying. I would like the opportunity to correct that.

The CHAIRMAN. You may do so. You may furnish a letter to the clerk of the committee, and we will be glad to put it in the record.

Mr. WILSON. Thank you, sir.

(The extension of Mr. Wilson's remarks appears on p. 100.)

The CHAIRMAN. Before we conclude I have several letters that will be inserted in the record at this point.

(The letters referred to follow:)

BALSON SALES CO.  
St. Louis, Mo., February 18, 1949.

Senator FORREST C. DONNELL,  
United States Senate Washington, D. C.

DEAR SIR: As a member of the Consumers Mail Order Association, we have just been informed that bill S. 339 introduced by Senator Thomas of Oklahoma has been referred to the Senate Finance Committee.

The Consumers Mail Order Association lists among its members the companies engaged in the selling of tobacco products by mail directly to consumers. There are about 15 companies in the St. Louis area alone and many more in other cities in Missouri.

If the Thomas bill is passed it will result in our being forced out of business. The intent of the bill is to make prohibitive the selling of our products in interstate commerce. This will have a more reaching effect than just making us cease operations. Ten employees will lose their jobs and the University City post office will lose approximately \$2,000 worth of postage per month. Multiply this by the approximately 100 companies doing business in Missouri and you can realize the importance of careful consideration of such a bill. The St. Louis Star Times carried an article on Tuesday, February 14, stating that the revenue in 1948 for the St. Louis post office showed a 14.71 percent increase over 1947, the largest in its history. In addition, this increase was the highest of any post office in the country.

Last year the Jenkins bill, a bill similar to the Thomas bill, was introduced in the House and approved by the Ways and Means Committee without our association being allowed to testify. This bill was then sent to the Senate where the Senate Finance Committee voted disapproval and decided that no action be taken.

The Mail Order Association of America, which lists among its members, Sears Roebuck, Montgomery Ward, and Speigels, also was given no opportunity to testify although they indicated in writing their many objections to the passage of such a bill.

This bill is in our opinion decidedly unfair in that it discriminates by singling out one kind of business for regulation. In effect, it blocks interstate commerce. But even more important, it sets a dangerous precedent by establishing a Federal agency or method whereby the Federal Government assists the individual States in handling their tax problems. This has never been done before.

For your information, in September last year, the Illinois State Supreme Court rendered a ruling in favor of the consumer. It stated that as long as the cigarettes were purchased for the individual's personal use, the State could not force the payment of taxes on cigarettes purchased in interstate commerce.

We respectfully request that you see that an adequate hearing is provided before the Senate Finance Committee and that you yourself strongly oppose its approval.

Respectfully,

BALSON SALES CO.,  
LEONARD F. ROSENBAUM.

CAPITAL SUPPLY CO.,  
Joplin, Mo., June 3, 1949.

HON. FORREST C. DONNELL,

*Senate Office Bldg., Washington, D. C.*

DEAR SIR: We are writing you with regard to the Jenkins bill, H. R. 195, a bill which would require the Federal Government to assist States in collection of their cigarette taxes, and destroy the free flow of trade through interstate commerce.

This bill is now before the Senate Finance Committee and we would appreciate your expressing your opposition to this kind of legislation as we believe that it is a bad bill. We would also appreciate your requesting the Senate Finance Committee to give us a full hearing before acting on this bill. We were granted a hearing before the Ways and Means Committee, but our hearing was before the proponents of this bill were heard and it gave us no chance to answer their arguments.

Thanking you for your cooperation in this matter, we are

Yours very truly,

LEONARD ROYER, *Manager.*

JERSEY CITY TOBACCO CO., INC.,  
*Jersey City, N. J.*

The New Jersey State cigarette tax went into effect on July 1, 1948. Two or three weeks before the effective date of the New Jersey State tax, consumers of the entire State were virtually bombarded with circulars from mail-order houses located in other States pointing out ways and means of circumventing the law by securing their cigarette needs through the mails from mail-order houses.

Notwithstanding the fact that the imposition or increase of a tax, is invariably accompanied by strong public resistance and resentment, in the instance of the cigarette tax, that resentment has been further aggravated by elements who set out to capitalize on the situation for their own selfish purposes. In the process, they have undermined a statute constitutionally enacted by the legislature of the sovereign State of New Jersey. What have been the consequences?

Uncalled for difficulties have been endured since the early stages of the operation of the law. Retailers have been subjected to all kinds of disparagements. The flow of cigarettes into the State is reaching terrific proportions; there is barely an apartment house, office building, industrial plant, or service station that does not receive cigarettes by mail from outside the State to the detriment of (a) the State tax administration, (b) 45,000 retailers, (c) 150 wholesalers.

The wholesalers and retailers of this State are cooperating admirably with the tax authorities in the administration of the law but the intrusion and infringement of mail-order houses quite often renders their efforts unavailing.

JERSEY CITY TOBACCO CO.,  
E. A. WEEKS

THE MACK CO.,  
St. Louis 5, Mo., February 17, 1949.

Senator FORREST C. DONNELL,  
United States Senate, Washington, D. C.

DEAR SENATOR: I have just received a letter from the Consumer Mail Order Association of America informing me that the following bill has been referred to the Senate Finance Committee: S. 339, introduced by Senator Thomas of Oklahoma.

If this bill is passed, it will mean that we are forced out of business. We are engaged in the selling of tobacco products by mail directly to consumers all over the country. And if the bill is successful in its intent, it will make prohibitive the selling of our products in interstate commerce.

Last year the Jenkins bill, a bill similar to the Thomas bill, was introduced in the House and was approved by the Ways and Means Committee without our association or the Mail Order Association of America being allowed to testify. Sears, Roebuck, Montgomery Ward, and Spiegels are among the many houses who make up the Mail Order Association of America. Our organization, the Consumer Mail Order Association, represents well over a hundred companies who are in the same business as we. The Jenkins bill was then referred to the Senate Finance Committee which disapproved it and recommended that no action be taken.

There are approximately 15 such companies in the St. Louis area. We alone employ 10 people and are using approximately \$2,500 worth of postage a month. This revenue, all of which goes through the University City post office, directly means that a certain number of people are employed in that post office. In addition, there are several other companies who operate through the University City post office, and it is my estimate that another \$7,500 worth of revenue is derived from their operation. It is rather significant to note that the revenue in the St. Louis post office increased 14.71 percent in 1948 and that this increase was the highest shown by any post office in the country.

Aside from the direct effect that this bill has on us, the bill itself is wrong, being discriminatory in that it singles out one kind of business for regulation. It has the effect of blocking interstate commerce and goes even further in that it sets up a Federal agency or methods of aiding the individual States to handle their tax problems. This is a dangerous precedent for never before has the Federal Government been asked to do this.

May I also call your attention to the fact that in September last year, the Illinois State Supreme Court decided in favor of the consumer on the purchase of cigarettes in interstate commerce. The ruling was that as long as the cigarettes were purchased for the individuals personal use, the State could not force the payment of taxes.

I strongly urge that you see that an adequate hearing is provided before the Senate Finance Committee and that you yourself oppose its approval.

Respectfully,

THE MACK CO.  
MAURICE GOLDBERG.

THE MACK CO.,  
St. Louis 5, Mo., June 3, 1949.

Senator FORREST C. DONNELL,  
United States Senate, Washington, D. C.

DEAR SENATOR: Your attention is invited to our letter of February 17 in which our objections to the passage of the Thomas bill, S. 339, were presented.

Since that time, its companion bill in the House, the Jenkins bill, H. R. 195, has been passed by that body and has been sent to the Senate. It is at present before the Finance Committee of the Senate.

This bill must not become a law. Admitted that the bill has a direct and disastrous effect on our business, yet the inherent bad features of the bill affect not only us but all mail-order houses and all concerns doing business in interstate commerce.

Here we have a bill which is picking out one single commodity for legislation, discrimination of the worst kind. In addition, this commodity is being sold in interstate commerce, a province which Congress has time and time again held should be free from any restraints by either the Federal Government or the individual States.

The bill sets a shattering precedent in that for the first time the States are asking the Federal Government to step in and help them with State taxation

problems. Never before has the Federal Government's aid been sought on problems which are peculiarly the State's own. Furthermore Congress has always believed that the States' right theory should be followed unless the problem under consideration was of national scope. The cigarette-tax legislation can hardly fall into that category.

The bill sets forth no way of establishing the Federal agency which would be responsible for enforcement if the bill were enacted into law. And if such agency is found, where is the money coming from for its expenses? The bill is an incomplete piece of legislation in the above respects as well as several others. We find that the Federal Government, constantly faced with demands for a smaller budget, is here being asked to spend money to help the States to collect taxes.

And more important, the constitutionality of the States' right to collect these taxes is most questionable. The Superior Court of Illinois held last September that the State of Illinois could not collect taxes from individual consumers who purchases cigarettes in interstate commerce for their personal use. This finding was upheld by the Illinois State Supreme Court in a decision handed down last month.

Many other objections to the passage of this legislation can be raised. We have taken the liberty of asking Mr. Thurman Arnold of the law firm of Arnold, Fortas & Porter to send you a copy of the brief which he has drawn on the bill. We would appreciate your giving some thought to the arguments set forth by Mr. Arnold.

We respectfully request that you recommend to the Finance Committee that the bill be reported on unfavorably. We further request that you ask the committee to hold full hearings on the bill before taking any action.

Respectfully,

THE MACK CO.,  
MAURICE GOLDBERG.

UNITED STATES SENATE,  
Washington, June 17, 1949.

HON. WALTER F. GEORGE,  
*Chairman, Finance Committee of the Senate,*  
Washington, D. C.

DEAR CHAIRMAN GEORGE AND MEMBERS OF THE FINANCE COMMITTEE: I have received a number of inquiries from my State, manifesting an interest in House Resolution 195, now before your committee.

The commission of revenue and taxation of my State of Kansas is the department charged with the collection and administration of the cigarette tax of our State. Our State has experienced the loss of tremendous amounts of revenue by reason of mail-order shipments coming into the State of Kansas from at least three of the surrounding States.

Fred Horn, the chairman of the commission, and the other members, Dale A. Fisher, C. I. Moyer, and Bert E. Mitchener, have requested that I make known to your committee the attitude of the Kansas commission, and are desirous of indicating to you the hope that this bill be favorably received and approved by the committee. I leave it to your good judgment to determine, but thought it advisable to present this matter to you.

Sincerely,

ANDREW F. SCHOEPEL.

TOPEKA, KANS., June 14, 1949.

Senator ANDREW F. SCHOEPEL,  
*Senate Office Building, Washington, D. C.:*

Senate Finance Committee will conduct hearings Wednesday morning on H. R. 195. This bill will require reports of mail order shipments of cigarettes into Kansas and thus materially aid in collection of Kansas tax. We believe this bill will prevent loss of large amount of revenue to Kansas and therefore urge your support of the bill.

STATE COMMISSION OF REVENUE AND TAXATION,  
FRED HORN, *Chairman,*  
DALE A. FISHER, *Commissioner,*  
C. I. MOYER, *Commissioner,*  
BERT E. MITCHNER, *Director of Revenue.*

ELI WITT CIGAR & CANDY Co.  
ATHENS, GA., June 14, 1949.

HON. WALTER F. GEORGE,  
*Senate Office Building, Washington, D. C.*

DEAR SIR: You will no doubt recall that we have written you on a previous date in an effort to impress the importance of the revenue department of the State of Georgia of collecting as much tax as possible in an effort to continue the services of the State that the citizens are rightly entitled to. You no doubt feel as we do that it is very unfair for a certain group of citizens to avoid a just tax that is paid by the great majority of our citizens. You are no doubt acquainted with the condition as it now exists whereby certain unscrupulous citizens are avoiding the State cigar and cigarette tax by entering into a conspiracy with dealers of other States to use the mails in an effort to defraud the Georgia revenue department of the tax imposed on cigars and cigarettes.

We have written you before requesting your support on a bill which would require any shipper of taxable cigars or cigarettes to report to the tax commission of the state into which any non-tax paid cigarettes or cigars were mailed, the quantity of such products mailed, and the address of the consignee. This bill has been passed by the House and it is our impression that it is now in committee for consideration before being introduced on the floor of the Senate for a vote. We will greatly appreciate your using your influence to have this committee report this bill out for consideration.

We realize that the remainder of this session will be filled with legislation of great importance to the Nation as a whole, but in our opinion, with the number of States now having a cigarette tax, it is of great importance that each of these States realize the revenue for which they are justly entitled to expect from the number of cigarettes consumed in their State. Should this bill be allowed to die in committee, we understand that it would have to be reintroduced at the next session and be passed by both Houses. It is also our impression that this was the situation at the last session of Congress. To allow this to recur, it would naturally result in all the work and effort of the members of the House being lost in addition to the amount of revenue that would continue to be lost by the various States.

We are enclosing for your consideration a pamphlet prepared by the National Association of Tobacco Distributors which may give you additional information.

Assuring you of the appreciation of ourselves as well as of all taxpayers in Georgia, we are

Yours very truly,

ELI WITT CIGAR & CANDY Co.,  
A. D. SOAR, *Manager.*

(The information referred to in the pamphlet will be found on p. 84.)

The CHAIRMAN. This brings to a close the oral hearing on this bill. The committee is now recessed until the next regular meeting date, Thursday of next week.

(Whereupon, at 1 p. m., hearing in the above-entitled matter was closed.)

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