In short, establishment of a MAC for any drug would inevitably represent an intrusion by the federal government into the professional freedom of physicians and pharmacists. This result is particularly disturbing in light of the fact that HEW is not now in a position to assure that the brands advantaged by the program are equal in quality or therapeutic effect to those usually prescribed by the physician or stocked by the pharmacist. Until HEW can provide an assurance of uniform equivalency, the MAC proposal will conflict with the non-interference and freedom of choice provisions of the Medicare-Medicaid legislation.

B. Arbitrary and Capricious Nature of the MAC Proposal

The fact that the basic assumptions of quality assurance and therapeutic equivalence underlying the MAC proposal are unfounded means also that the program is arbitrary and capricious as a matter of law.

One of the fundamental principles of administrative law is that agency action which is irrational or unsupported by the relevant facts is arbitrary and capricious. Since, as noted above, the Medicare-Medicaid statutes preclude implementation of a MAC program unless findings of quality assurance and therapeutic equivalence can properly be made, HEW must consider the evidence dealing with these two highly relevant issues.[36/] The Secretary himself seemed to concede as much, when, in his December 19, 1973 testimony before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, he expressed the Department's belief that: