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REMARKS OF

WILLIAM C. KERN, COMMISSIONER

FEDERAL TRADE COMMISSION

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Mr. Chairman and Members of the National Congress of Petroleum Retailers, Inc.: I am delighted at this opportunity to address your convention. I am told that about 30,000 individual retail service station operators belong to the various groups that make up your Congress. That certainly makes this meeting wonderfully representative of independent small business. I believe that independent small business is at the very heart of the political and economic traditions of America. Our free enterprise economy will remain viable and strong so long as the average citizen is free to start a new business, to make his own business decisions without coercion or intimidation, and to succeed, if possible, in making his business grow into big business by dint of his own initiative and hard work. It is the duty of all of us to keep it that way; that is what we at the Federal Trade Commission are trying to accomplish. However, as I shall point out later, in my judgment the spokesmen of many businesses, both small and big, are asking our Government to do more for them than they legitimately should ask with the result that individual initiative and hard work may, like the Indian, be vanishing from the American scene. Government handouts, special purpose and privilege legislation, and the curse of subsidies may be causing a spiritual atrophy that endangers our very existence as a nation. Too many demands are being made both upon the Congress for legislation and through the Congress upon the public treasury for the solution of every difficulty. It is about this that I wish to speak to you today.

But before I discuss this subject may I assure you that the Commission is thoroughly aware that your line of business has its troubles -- and plenty of them. The Federal Trade Commission has been alive to those problems for a long time and has tried to do something about them. Indeed perhaps our activity in this area has been disproportionate to our overall responsibilities. Let us review that activity for a moment.

As early as 1915, the Commission made its first general investigation of gasoline prices and of competition in the marketing of gasoline. From that time, over the years, there have been no fewer than twelve general investigations of various aspects of petroleum distribution and a number of other investigations on related subjects. In addition to such general inquiries, there have been a great many specific investigations of suspected law violations and a considerable number of these have ended in formal Commission proceedings. There has never been a time when matters involving some aspect of your industry were not pending before the Commission.

I am sure that you are just as familiar as I am with the situation out of which these problems arise. The major oil companies are competing more-or-less vigorously among themselves for shares of the branded gasoline market. At the same time they are also competing with the unbranded products in the total market for gasoline. The supplier of gasoline frequently may be strongly tempted to reduce prices in particular territories or to particular stations -- for example, to meet the price of a local competitor or cut into his volume, or to dump a temporary and localized surplus of gasoline without disturbing prices over a broad area. If the supplier is able to discriminate in price among his customers, it is obvious that his individual customers who do not receive the favored price will absorb most of the hard knocks of this competition.

Now the Commission has no business interfering with legitimate competition, even though a competitor might be injured or even destroyed as a result of it. Risk is inherent in business. But the Commission does step in when any of the laws it is charged with enforcing is violated. In relation to the pricing of gasoline, the competitive situation has frequently given rise to

charges of price discrimination and price fixing -- practices which do violate those laws.

The Standard Oil*/ case was one of the Commission's most frustrating experiences. The essential facts are that in the Detroit market the Standard Oil Company sold gasoline to so-called "jobber" customers, who resold both at wholesale and also at retail. These "jobber" customers were charged 1-1/2¢ a gallon less than regular service stations which competed directly with the so-called "jobbers" for retail business. The Commission's complaint charged that this price difference violated the Robinson-Patman Act. After long litigation, however, the Supreme Court decided that this was a price discrimination but did not violate the Act because Standard Oil's lower price fell within an exception to the Act that permits a seller to meet its competitor's price in good faith.

Depending upon one's point of view, the Supreme Court's decision either created or revealed a vast loophole in the Robinson-Patman Act. The price-meeting defense was held to be absolute. Thus, under this decision a supplier is perfectly free to discriminate in favor of a customer once that customer has been offered a lower price by a competing supplier -- and this is true even though the discrimination might have a disastrous effect upon competition with the seller or with the buyer. Likewise, the powerful buyer is free to solicit discriminatory prices from various suppliers by the use of offers from other suppliers.

It goes without saying that the Standard Oil decision was completely contrary to the Commission's interpretation of the Robinson-Patman Act. From the beginning I strongly

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*/ Standard Oil Company v. Federal Trade Commission, 340 U.S. 231 (1951).

favored new legislation to close this loophole and supported the bill known as S. 11 or the "equality of opportunity" bill. In supporting that bill before the Senate Committee on the Judiciary I stated:

> "It would be folly to permit a zeal for preserving an abstract 'meeting competition' concept to overshadow the main purpose of the Clayton Act, which was to outlaw practices leading to unlawful trade restraints or nurturing monopoly. That legislation of this kind should contain an exemption which, in the name of 'meeting competition in good faith,' actually lessens competition on the small-business level is an inexcusable anomaly calling for the correction offered by S.11, which would permit the absolute defense except where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce. In my opinion, a complete defense should not be granted to discriminatory practices that will suppress competition or foster monopoly."

However, I would be less than frank if I did not tell you that a well organized opposition to this bill has made it so controversial that in my judgment its chance of favorable consideration by the Congress is not very bright.

Meanwhile, the Commission continues its efforts to halt illegal pricing practices in the petroleum industry.

The Sun Oil*/ case, which we decided this year, involved two charges arising out of a price war in Jacksonville, Florida. Without lowering prices to its other dealers in the vicinity, Sun cut one dealer's price by 1.7¢ a gallon to assist him in reducing the gap between his price and that of a neighboring off-brand station.

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*/ Matter of Sun Oil Company, F.T.C. Docket 6641 (Jan. 5, 1959).

From all the evidence and the circumstances surrounding the transaction, the Commission concluded that the dealer in return agreed to reduce his price by 3¢. On these facts, the Commission found that Sun's price discrimination violated the Robinson-Patman Act. We held that the defense of "good faith meeting" of a competitor's price was not available to a supplier who discriminated to permit its customer to meet the price of the customer's competitor. We also held that the agreement between Sun and its dealer to fix and maintain the 3¢ lower price was a price fixing conspiracy in violation of the Federal Trade Commission Act.

The Sun case presented some of the typical problems of the price war. I think that it is a significant decision. It is particularly important because it limits the "good faith meeting" defense to the strict boundaries of the Act.

Several other gasoline price cases are pending before the Commission. Generally they arise out of price wars. In addition to charges of price discrimination between competitors, some of them also involve such charges as territorial price discrimination, the use of temporary consignment contracts to coerce uniform prices and various kinds of pressure by suppliers to control retail prices. You will understand that it would be improper for me to discuss the merits of cases such as these while they are still under consideration. I mention them only to indicate that gasoline pricing problems continue to be among the Commission's major concerns.

Entirely aside from the pricing matters I have been discussing, another type of antitrust problem is common in your industry. This problem is caused essentially by the vast contrast in the economic power and trading positions of the oil companies and their service station customers. One aspect involves the use by the supplier of its economic leverage in one commodity, or as a landlord, to influence or coerce the business choices of its customers or lessees in another field which the supplier does not dominate. The famous Standard Stations*/ case decided that an express

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*/ Standard Oil Company v. United States, 337 U.S. 293 (1949).

contract between the supplier and dealers for the purchase of their "full requirements" of gasoline and TBA items violated Section 3 of the Clayton Act when the effect was to foreclose a substantial part of the market to competitors. Following that case, the Federal Trade Commission became very active in preventing such contractual arrangements and I, as a trial attorney, tried a number of the more important cases in this field. As a result of this litigation, suppliers are no longer very apt to put full requirements, exclusive dealing or tying arrangements into written contracts.

Evidence is now being taken by Commission examiners in three important matters known as the TBA cases. The complaints allege that oil companies supplying certain service stations and distributors exercise their influence and control over those stations and distributors to persuade them to purchase their TBA supplies from certain tire manufacturers. In return for this service, the complaints allege that the tire manufacturers pay the oil companies "override" commissions of varying amounts up to 10% on TBA items sold to stations and distributors dealing in the products of those oil companies. Once again, you will understand that I am unable to comment on the merits of these cases before they have been decided by the Commission.

In addition to economic problems of the kind I have been discussing, the Commission also protects the consuming public from the false and misleading advertising and labeling of products sold in commerce. Such phony or exaggerated claims by over-zealous sellers are "deceptive practices" within the meaning of the Federal Trade Commission Act and may be prevented by cease and desist orders.

The reprocessed oil cases are typical exampales of such practices touching on your business. There respondents distributed reclaimed and reprocessed oil in containers just like those in which new oil is marketed. They either did not disclose at all or disclosed inadequately that the contents of the cans had been previously used in automobile crankcases. The respondents argued that their product was just as good as new oil and, therefore, that the public was not injured by the practice. The Commission

did not agree. We held that the consumer is entitled to know what he is buying and issued orders requiring clear and conspicuous disclosure, both on the oil containers and in advertising.

There is a constant procession of such cases from your line of business. Some deceptions that the Commission has proceeded against recently include --

> A seller who advertised as "new" tires that had been previously used and then cleaned and painted to look new.
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> A manufacturer that falsely represented that its gasoline and oil additives are approved or recommended by the United States Government.
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> A dealer who represented as "top-quality snow tires" ordinary tires that merely had a few additional grooves cut in them.

I could add many more examples. The Commission is constantly vigilant against such practices and the volume of our work in this field is steadily increasing. While we will never be able to put a halt to all false and misleading advertising, our persistent campaign against deception will restrain the more blatant offenders.

I hope I have not bored you with too much lawyer's talk. My point is that the Federal Trade Commission is acutely aware of the serious problems in the petroleum distribution industry. In fact we have an unprecedented number of pending cases involving your industry.

At the same time, we are experimenting with new means of securing voluntary compliance with fair advertising standards in your field of activity. The Tire Advertising Guides are an example. The public has been very much confused by the flamboyant advertising claims of tire makers and dealers. Last year the Commission attempted to relieve this confusion by issuing twelve specific guides to give the industry detailed notice of what the Commission

considers to be deceptive about tire labeling and advertising. We hope that they will eliminate much of the deception caused by these claims. For those who persist in deceptive advertising, of course, the Commission's mandatory procedures will still be available.

Now let us leave your own industry problems and consider the vastness of our overall responsibilities. At present these include the Federal Trade Commission Act of 1914, as amended by the Wheeler-Lea Act of 1938 and the Oleomargarine Act of 1950; Section 2 of the Clayton Act, as amended by the Robinson-Patman Act of 1936; Sections 3 and 8 of the Clayton Act; Section 7 of the Clayton Act as amended; the Export Trade Act known as the Webb-Pomerene Act; the Wool Products Labeling Act of 1939; the Lanham Trade-Mark Act of 1946; the Fur Products Labeling Act of 1951; the Flammable Fabrics Act of 1953; and most recently the Textile Fiber Products Identification Act passed by the last Congress.

The sum and substance of all this legislation is a Congressional mandate to the Commission to prevent unfair methods of competition and other unfair trade practices, to correct and prevent commercial deception of the American public, and to keep the channels of commerce free from the types of undue restraints and tendencies to monopoly condemned by these various statutes: a broad mandate indeed.

To accomplish this mandate we have an annual appropriation of some six million dollars which enables us to hire a small staff of some seven hundred employees. Yet the economy we are expected to police has increased its national product from approximately $100 billion in 1940 to $483 billion in 1959. But lest you think that I am a typical bureaucrat seeking additional appropriations to augment an already swollen bureaucracy, let me state that I would gladly accept even a cut in our meager appropriation if I could by so doing bring about a cessation of what I have at the outset referred to as government handouts, special purpose and privilege legislation, and the curse of subsidies which are threatening to engulf our entire free enterprise system. You and I as representatives of

the great American middle class may well be the principal victims caught between high taxes on the one hand and a cheapened dollar on the other. Of course, many factors contributing to this problem do not come within the purview of the Federal Trade Commission. Nevertheless as a citizen and, I hope, a patriotic one, and as a member with you of that great middle class, and as an official close to the Washington scene, I am disturbed -- and I feel that if I can alert intelligent groups like yours to the problem, perhaps your influence and the influence of others like you may be brought to bear on the power centers in Washington. This is not or should not be a partisan matter and both great parties might not only take heed but even join forces to combat the evil. For if foreign policy is traditionally considered bi-partisan, why should not the preservation of our free enterprise system be viewed with a similar bi-partisan approach? The leadership of both our great political parties might well join in a blueprint plan for a victorious solution of this problem of keeping our economy strong. Now what might that blueprint consist of? The overriding public interest in controlling threatened inflation, strengthening the dollar, balancing the budget and eventually reducing the tax burden on our people must be given paramount priority. Special handouts, subsidies (both domestic and foreign) must be eliminated in all areas, except those absolutely vital to national security. Small business and its sponsors can play a vital part. I believe you should have the right to a competitive position which permits you to fight it out fairly and openly with your competitors both large and small in the marketplace. But you should have no more than that. Nor do I believe that you require any built-in special security. I only wish that some of your small business champions had the same confidence in you that I do. We at the Commission are concerned about many legislative proposals granting special exemptions which would break down the antitrust laws. For example, several bills have been introduced to limit manufacturers in selling direct to retail outlets unless price differentials are established to protect the profit margins of competing wholesalers. Under such proposals the Federal Trade Commission would be required to investigate every wholesaler whose business would be

affected and determine what his profit margin should be. This would put the Government in the price fixing business and eliminate price competition at the wholesale level in the businesses affected. Such proposals are inconsistent with the free enterprise system and with the basic principles of antitrust law.

Other bills introduced seek to give auto dealers a virtual monopoly to sell cars at probably higher prices in territories assigned to them by the manufacturers, and any dealer selling outside his own territory would be required to pay a commission to the dealer in whose territory the sale was made. It seems clear to me that such special privilege legislation providing for built-in territorial monopolies would not be in the best interests of the consumer nor does it foster the principle of vigorous competition at the retail level. Other bills of like character have been introduced; and, of course, we have as always a fair trade bill with us in some form or other. Yet let us not ignore so-called big business, or the farmer, or the unions from a consideration of this legislative search "to get theirs". Subsidies to the air lines, subsidies to the shipping lines, oil and gas depletion allowances and subsidies, and farm subsidies run into billions. Sometimes I wonder if there is any organized group in our economy that is without benefit of some subsidy. It seems to me there is only one forgotten group without some subsidy -- the American Taxpayer.

The unions continue to benefit by immunities granted under the antitrust laws at a time when labor was weak and fighting for its life. They should be continued to be fostered as an indispensable part of our economic fabric. However, now that labor is as powerful in the industrial arena as any combination of capital, surely the public interest suggests that these immunities be reexamined. Yet current criticism of some of the activities of some unions, such as "union feather bedding", bring to mind similar abuses on the part of industrial management. For example, I am reasonably certain that many corporate managements have successfully insulated themselves against some of the more serious effects of our present very burdensome tax structure by the creation of various

schemes which may well be described as "executive feather bedding" such as overly liberal executive retirement and pension plans, stock option agreements, executive incentive plans and the like.

Nor are our state governments beyond blame for another tremendous drain upon the public treasury. Increasingly vast sums are going out as grants in aid to the states. Even the most ardent states righters are agreeable, and indeed receptive, to federal largess to the states. While federal grants in aid for everything from highways to free lunches may seem desirable, certainly these expenditures should be weighed against the old-fashioned question "where do you find the money"? In my judgment only when disaster or emergency creates a situation beyond the control of local communities or the states should the powers of the federal government be brought into action; somehow and soon there must be a return to state, local and individual responsibility. The whole area of grants to the states should be reexamined.

Finally, the Federal Government itself must bear its full measure of blame. Failure to resist the pressure of the farm lobby, the union lobby, yes, and the small business lobby, is a part of the story; failure to recognize that it is more important to keep our Nation strong than to attempt to win dubious allies by the inept use of vast sums in foreign aid is also part of the story; and above all, failure to make a real effort to abolish these practices -- failure to think in terms of the public interest as a whole, completes the story.

Now do you think I am a disillusioned cynic and view the situation as hopeless? No, I don't. Americans have always been able to rise to any crisis once they recognize it. None of us would tolerate for a moment seeing America reduced to a second-class power or, worse, to a slave state. With leaders brave enough to rise above political expediency and show us the way, we can and will remain indomitable. But the leadership must truly represent a resurgence of the public conscience -- a conscience which recognizes that subsidies must be vastly curtailed or limited, a conscience which recognizes

that special purpose and special privilege legislation must be abandoned, a conscience which recognizes that there should never be allowed to exist peculiar favorites of the Government at the expense of the general public.

I firmly believe that what this fine group and other important groups in our economy need is not more legislation to protect them and insulate them from competition or from price declines. Needed, instead, is the will to fight it out fairly as vigorous competitors in the marketplace, protected only by being assured that the competition required to be met is itself fair, free, and open. This leads me back to the thought I expressed at the outset of these remarks, namely, that I conceive it as the paramount duty of the Commission to preserve and foster such a wholesome competitive climate. To accomplish this requires not a relaxation, but a more vigorous enforcement of the antitrust laws.

I am satisfied that the greatest boon to business, both small and large, would be a sizable reduction in the present burdensome tax structure. You want to get the Government off your backs. But you will never accomplish this unless all the pressure groups get off the back of Government.

In closing may I say that above all else we need a courageous leadership, able to rise above sectionalism and political pressures. The type of leadership I envisage (and don't misunderstand me, for there are quite a few of them in this category in Washington today -- for example, the names of Rayburn and Johnson stand out as veritable towers of strength and patriotic courage) -- the kind of leadership which I envisage is happily expressed in a few lines of verse which I read to you now:

> "God give us men. The time demands
> Strong minds, great hearts, true faith, and willing hands;
> Men whom the lust of office does not kill;
> Men whom the spoils of office cannot buy;
> Men who possess opinions and a will;
> Men who have honor; men who will not lie;
> Men who can stand before a demagogue
> And damn his treacherous flatteries without winking;
> Tall men, sun-crowned, who live above the fog
> In public duty and in private thinking."