REMARKS OF

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FEDERAL TRADE COMMISSION

Before the

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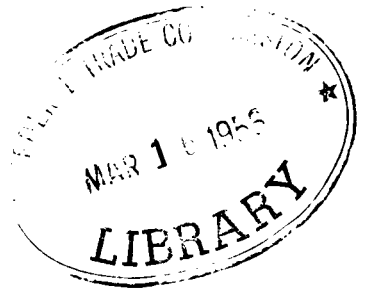

REMARKS BY COMMISSIONER WILLIAM C. KERN CONCERNING ROBINSON-PATMAN ACT ENFORCEMENT MADE AT BRIEFING CONFERENCE ON TRADE REGULATION SPONSORED BY THE FEDERAL BAR ASSOCIATION IN COOPERATION WITH THE BUREAU OF NATIONAL AFFAIRS, INC., CHICAGO, ILLINOIS, MARCH 1, 1956

It was my original purpose as Moderator on this program to pontificate briefly upon the history and background of the Robinson-Patman Act, its purposes and objectives, and its relationship to other regulatory laws.

I proposed to point out the harmful competitive practices uncovered by the Federal Trade Commission Chain Store Investigation of 1934, including special discounts and allowances made by hundreds of manufacturers and the many special discounts received by the large chains in excess of those granted competitors and even wholesalers -- practices, if you please, that the original Section 2 of the Clayton Act as judicially interpreted was unable to cope with. For, as you know, Section 2 of the Clayton Act then placed no limit on differences allowed on account of the difference in quantity; likewise it was understood to permit all discriminatory price differences made to meet competition.

I further proposed to make passing reference to the legislative history in order to demonstrate that the purpose of the Robinson-Patman Act was to protect the competitive opportunity of small business by prohibiting all price differentials other than those which could be justified by cost savings. I intended to point out the expansion of the original Section 2 to prohibit discriminations which may "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with the customers of either of them"; and to emphasize that the purpose of such expansion was to reach discriminatory practices resulting in injury to a single individual as well as to competition generally -- a marked departure from previous approaches to the antitrust problem. I likewise considered a discussion of the change whereby the old proviso permitting meeting competition in good faith was eliminated and re-adopted in a greatly modified form in Section 2(b) -- a feature which, as you know, has given rise to the long controversy of whether the defense was procedural or substantive -- a controversy partially laid to rest at least by the celebrated Standard Oil of Indiana 1/ case. Finally I intended pointing out that the main thrust of the Robinson-Patman Act, unlike Section 2 of the original Clayton Act, was to curb the predatory use of monopoly power by chain stores and mass buyers and to preserve the place of small business as well as to protect its competitive position.

However, I was advised by a bright young man, much more versed in the intricacies of the Robinson-Patman Act than I, that this approach was extremely naive and that I must recognize the fact that I would be talking to an extremely sophisticated group, so I will refrain from enlarging upon matters which are hardly novel to you. However, the emphasis of this bright young man upon the fact that this group was a most learned, a most intellectual, and a

1/ Standard Oil Co. v. FTC, 340 U. S. 231 (1951).

most sophisticated one gave me the idea to speak to you about your sophisticated approach to the problems involved in the intricacies of this complex statute. It is a matter which has been disburbing me for sometime.

There seems to me to be too great a disposition on the part of a considerable segment of the antitrust bar to indulge in over-intellectualization and over-sophistication in its approach to the antitrust laws generally including its approach to the Robinson-Patman Act. I have the uncomfortable feeling that far too many antitrust lawyers have forsaken the approach to the law that in the dim, dead past made the bar famous as a bulwark of our freedoms and our interests viewed in the broadest public sense. While I recognize that every lawyer has a duty to his client vigorously to present the facts fully and fairly to the Commission and vigorously to defend his client's position on the basis of such a record, nevertheless such a responsibility does not include the right to obstruct or to delay a proceeding or to confuse the issues.

In my preliminary remarks I touched upon the broad objectives of the Robinson-Patman Act as spelled out by the Congress. How many lawyers can say that they have given full recognition to these purposes and objectives in their analysis of the Act, in their advice to clients, and in their representation of litigants through formal proceedings growing out of a violation of the statute? Instead of such full recognition I fear that too many lawyers have treated a Robinson-Patman case as an intellectual exercise in legal ingenuity. Perhaps as Motions Commissioner I am overly sensitive on the matter of dilatory practices. However, too often have I seen quite adequate complaints challenged, quite reasonable subpoenas challenged, and then a welter of interlocutory motions thrown into the pot for good measure. Rather then concede a violation and settle a case expeditiously in accord with present procedures extended by the Commission as a matter of privilege, at savings to client and to the Government, far too many lawyers seem to derive satisfaction from a protracted rearguard action, even though in the end it leads to a cease-and-desist order. These lawyers realize, of course, that such an order, because of present inadequacies in the Clayton Act, is not final but requires enforcement in the courts which in turn requires added proof of violation before penalties may be awarded. So the upshop of it is that there exists today a small but growing number of lawyers who indulge in practices which have universally been frowned upon when practiced at lower levels of operation: what has been characterized as sharp practice at lower legal levels is considered at antitrust levels an intellectual and sophisticated approach. Furthermore I understand that there is considerable opposition within the American Bar Association to our legislative proposal to amend the antitrust laws to give finality to Clayton Act orders. I do not see how such a position can be seriously defended as compatible with the public interest.

I have detected an undue desire on the part of some members of the antitrust bar to avoid the simple approach of applying applicable judicial precedents to a particular practice. These gentlemen would far rather depend upon sophisticated legal monographs and articles which attempt to minimize the clear impact of plain judicial precedents or critizice them as being unworthy to be followed. I confess that I am just a simple country lawyer but I have always preferred relying upon applicable judicial precedents of the highest courts in a resolution of controverted legal issues. Law professors and

economic pundits have their place — and a very distinguished place — but it seems to me that their place has been unduly elevated by a certain segment of the antitrust bar.

And so I frankly feel that the antitrust bar should search its conscience with respect to its approach to the fulfillment of its responsibilities in connection with the enforcement of the antitrust laws including the Robinson-Patman Act. I believe that ours is a great profession with a great destiny. I believe that we all have a duty, whether within the Government or out, to aid in the enforcement of the laws laid down by the Congress and especially the antitrust laws which are the last bulwarks against Socialism.

May I demonstrate by several examples the overly sophisticated approach I have attempted to describe in general terms. While Section 3 of the Clayton Act, which is devoted to tying clauses, exclusive dealing and full requirements contracts, falls outside of the Robinson-Patman Act it is closely related thereto and the reaction of the bar to the case law on the subject is singularly illuminating. When the International Salt decision 2/ was handed down involving tying clauses and categorically holding that it was illegal per se to foreclose competitors from any substantial market, just as price fixing is illegal per se, its impact was universally played down and minimized by those legal writers who commented upon it. Almost universally its per se approach was deplored and the limitation of its application to tying clauses was universally stressed. And the Standard Stations case,3/ involving full requirements or exclusive dealing contracts, was likewise severely criticized in most quarters. More often than not it was misquoted in briefs and arguments which stressed the language of Mr. Justice Frankfurter distinguishing such contracts from tying contracts but which failed to quote the conclusion of Mr. Justice Frankfurter that the same principle was nevertheless applicable. The fact that the rule of reason was discarded in any consideration of the illegality of the practices was politely ignored.

The Anchor Serum 4/ and the Dictograph Products 5/ cases therefore came as an apparent surprise to those experts who had indulged in their own peculiar intellectual approach towards earlier decisions. However, a typically sophisticated reaction to these decisions found expression in the following footnote of a somewhat controversial current antitrust study:6/

> Some dicta in the recent Court of Appeals opinions affirming the Federal Trade Commission's orders in the Dictograph and Anchor Serum cases are susceptible to a contrary interpretation as reverting to a rigid per se rule. * * * Apart from the merits of these decisions on their particular facts, the Committee disapproves any "quantitative substantiality" implications as offensive to a reasonable construction of the Supreme Court's Standard Stations opinion and rational antitrust policy as well.

2/ International Salt Co. v. United States, 332 U. S. 392 (1947).
3/ Standard Oil Co. of California v. United States, 337 U. S. 293 (1949).
4/ Anchor Serum Co. v. FTC, 217 F. 2d 867 (7th Cir. 1954).
5/ Dictograph Products, Inc. v. FTC, 217 F. 2d 821 (2d Cir. 1954), Cert. denied 349 U. S. 940 (1955), petition for rehearing pending.
6/ Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, p. 143, n. 58.

A final graphic demonstration of the former naive approach of the Federal Trade Commission to Robinson-Patman enforcement as opposed to the more sophisticated approach of respondents' counsel may be found by examining a group of cosmetics cases. In 1936-37 the Commission issued a number of complaints against cosmetic manufacturers alleging violation of Sections 2(a) and either 2(d) or 2(e) of the R-P Act. One of these cases, the Elizabeth Arden case, as you know, went to order, was appealed, was affirmed by the Circuit Court of Appeals, and certiorari denied by the Supreme Court.7/ The other cases, after protracted hearings, were concluded in 1942 but instead of there being issuance of orders, they were held up pending protracted trade practice conference proceedings and eventually were dismissed upon the basis of the parties respondent being signatory parties to trade practice rules outlawing the complained-of practices. Respondents, represented as they were by competent counsel, apparently persuaded the Commission that they would abide by the rules and that the public interest did not require pressing the formal proceedings to final conclusion. As a result of a check on compliance with trade practice rules the Commission has been given reason to believe that many of these respondents are in open and flagrant violation of the rules and are continuing the very practices which were the basis of the original complaints. As a result the Commission has recently instituted a group of new proceedings, which are now pending. It is impossible for me to defend the handling of these cases as an example of effective enforcement of the Robinson-Patman Act.

In closing may I make it clear that I believe my paramount duty rests in the fair but vigorous enforcement of the Robinson-Patman Act in accord with the Congressional mandate and applicable judicial interpretations. This I shall endeavor to do with all the vigor at my command. I shall strive to do so with fairness and impartiality. And in my efforts I shall not be disturbed by the fact that some of the case law on the subject seems discordant with legal theory laid down in other cases. Wherever I see probability of substantial injury to competition from the facts in a record, I shall utilize any applicable precedent in order effectively to curb the practice. I shall leave to legal theorists the problem of reconciling the various judicial precedents that have grown up in connection with the administration of the Act. These precedents are on the books. They are the law. They are guides to follow. I believe it incumbent upon both the Bench and the Bar to recognize them as applicable authority.

7/ Elizabeth Arden, Inc. v. FTC, 156 F. 2d 132 (2d Cir. 1946), cert. denied 331 U. S. 806 (1947).