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## COMMENTS

### FTC 5 AND ROBINSON-PATMAN: UNFAIR METHOD OF LEGISLATION OR FAIR METHOD OF ADMINISTRATION

The performance of Federal Administrative Agencies is perpetually a topic for conversation among the legal profession. Receiving more than its share of colloquy is the Federal Trade Commission's exercise of the power conferred upon it by FTC 5.

Congress vested the Commission with a broad and flexible mandate. But it did not endow it with the power to legislate. In the final analysis a democracy cannot permit its laws to be rewritten by administrative agencies or the executive. Where administration discloses defects or limitations in the laws drafted by Congress with which the techniques of interpretation are unable to cope, the remedy is to request supplemental legislation from the elected representatives of the people who, under our system of government, are the final arbiters of national policy.<sup>1</sup>

and

The words 'unfair competition' can grow and broaden and mold themselves to meet circumstances as they arise. . . .<sup>2</sup>

The deficiencies of the Robinson-Patman Act have been decried by what must be an endless number of commentators and, judging from the content of the criticism, angry commentators. Dispensing with an involved study of Robinson-Patman as being superfluous, the issue that commands this comment's attention is whether Section 5<sup>3</sup> of the Federal Trade Commission Act can be employed by the Commission when a discriminatory practice does not come within the purview of the Robinson-Patman Act because of a technical omission which denies jurisdiction to the regulatory body under that statute. The lines of intellectual battle have been drawn, as emphasized in the above statements by Professor Handler and Senator Cummins, around two very different philosophies of the law. One advocates the adherence to a literal interpretation of statutes by administrative agencies and the other condones a dynamic

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1. Handler, *Review of Anti-Trust Developments*, 17 THE RECORD 408 (1962). Judge Moore quoted this passage in his dissenting opinion in *American News Co. v. FTC*, 300 F.2d 104 (2d Cir. 1962); *cert. denied*, 371 U.S. 824 (1962).

2. 51 CONG. REC. 12871 (1914). (Comments of Senator Cummins.)

3. Federal Trade Commission Act § 5(a)(1), 38 Stat. 721 (1914), 15 U.S.C. § 45(a)(1) (1958).

interpretation of statutes as befits the time of its enforcement and the purpose of the legislation.

Seeking to provide justification for such dynamic interpretation, the Commission adopted the "spirit test"<sup>4</sup> in *Grand Union* in order to vindicate the use of Section 5, and thereby clarified the issues, leading to a full discussion of the situation.

## I.

### LEGISLATIVE EVOLUTION OF FTC 5 AND ROBINSON-PATMAN<sup>5</sup>

The inadequacy of the Sherman Act led to the passage of the Clayton Act and Federal Trade Commission Act in 1914.<sup>6</sup> The FTC Act created the FTC and granted it authority to enjoin "unfair methods of competition" as well as to implement the express sanctions of the Clayton Act.<sup>7</sup> A Senate Committee Report confirms the impression that Congress deliberately left the phrase "unfair methods of competition" undefined in order that new practices, harmful to competition, might be controlled. The Committee's dilemma arose in deciding whether they would endeavor to define the myriad array of unfair practices found in commerce or rather include only a general declaration of prohibition and thereby leave the determination to the Commission. The Senate Committee decided that the latter course was more realistic for the achievement of effective and comprehensive legislation.<sup>8</sup>

The conference Report emphasized the intended flexibility of the phrase "unfair methods of competition" by remarking:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

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4. *Grand Union Co.*, 57 F.T.C. 382, 422-23 (1960). Commissioner Secret's majority opinion contained these remarks:

We think that the most that can be said on this point from the legislative history and from a reading of the Act itself is that the practice charged in the complaint is not specifically prohibited by the Act. Certainly it cannot be inferred from this fact that Congress countenanced a practice which so clearly violates the *spirit of the statute*. . . . it is our opinion that it is the duty of the Commission to 'supplement and bolster' Section 2 of the amended Clayton Act by prohibiting under Section 5 practices which violate the *spirit of the amended Act*. (Emphasis added.)

5. § 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

6. See, Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Anti-Trust Law*, 5 ANTI-TRUST BULL. 161, 162-63 (1960). The FTC Act became law on Sept. 26, 1914. The Clayton Act became law on Oct. 15, 1914.

7. See, S. REP. No. 597, 63d Cong., 2d Sess. (1914); H.R. REP. No. 1142, 63d Cong., 2d Sess. (1914). The original statute had no substantive sanctions. The Senate added affirmative power to stop unfair methods of competition and depleted the express prohibitions of the Clayton Act as being redundant. The final delegation of power to the Commission resulted from a compromise between the Senate and House Conferees. One might wonder how the FTC Act was meant to bolster the Clayton Act when the FTC Act was passed first. H.R. REP. No. 533, 63d Cong., 2d Sess. (1914); S. REP. No. 698, 63d Cong., 2d Sess. (1914).

8. S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914).

It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.<sup>9</sup>

The Clayton Act was the second half of the legislation passed by Congress in 1914 to combat threats to competition. The Commission was given the responsibility for the enforcement of the Clayton Act,<sup>10</sup> which seemed to check the wide scope of authority granted by Section 5 through the listing of express prohibitions.

Motivated by problems originating from the practice of price discrimination, Congress passed the Clayton Act<sup>11</sup> which has subsequently been amended by the Robinson-Patman Act.<sup>12</sup> The 1914 legislation was haunted by a proviso which excluded price discriminations made "in good faith to meet competition." The twenty year period until the Robinson-Patman Amendment was to justify the fears of Congress that they were diluting the force of the statute by the addition of that proviso. Finally, Congress requested the FTC to investigate the matter.<sup>13</sup> In recommending that the law be amended the Commission stated:

Should the trend of the past 20 years and particularly of the last decade continue for a like period, we shall have a condition in some lines of chain-store merchandising that few will dispute is monopolistic.<sup>14</sup>

The Commission's report confirmed the suspicion that the main reason for the Act's failure to effectively control price discrimination was the provision that allowed sellers to defend on the ground that they were meeting competition in good faith. After a number of bills were introduced to surmount the deficiency in the original Clayton Act, the House Committee on the Judiciary reported favorably on the Patman bill:

. . . the existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger general injury

9. H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914).

10. For further explanation and study of the legislative history of the Federal Trade Commission Act and the Clayton Act see, HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924); Levy, *The Clayton Act — An Imperfect Supplement to the Sherman Law*, 3 VA. L. REV. 411 (1916); Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).

11. 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1958).

12. *Supra* note 6.

13. S. Res. 224, 70th Cong., 1st Sess. (1928).

14. The Federal Trade Commission, *Final Report on the Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. (1934).

result. Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protection of the public interest at the same time is achieved.<sup>15</sup>

The Robinson-Patman Amendment divided Section 2 of the Clayton Act into six sub-parts. Section 2(a)<sup>16</sup> is the basic price discrimination proscription. To establish a prima facie case under 2(a), one must show sales of the same product to two different buyers at different prices and that the effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce," or may be "to injure, destroy, or prevent competition."<sup>17</sup> It has been held to be unnecessary to show that the different customers of a seller, who are charged different prices, are competing buyers.<sup>18</sup> Section 2(b)<sup>19</sup> contains one of the three affirmative defenses available to the respondent charged with a 2(a) violation — the good faith meeting of an equally low price of a competitor.<sup>20</sup> The other two defenses, supplied by Section 2(a), are changing market conditions<sup>21</sup> and cost justification.<sup>22</sup>

Section 2(c)<sup>23</sup> is the so-called "brokerage clause." The section renders unlawful a payment of anything of value as a commission, brokerage, or other compensation, or "any allowance or discount in lieu thereof," either to the other party or to an intermediary, except for services rendered in connection with the sale or purchase of goods.<sup>24</sup> The purpose of the section is to prevent sellers and sellers' brokers from yielding to the pressures exerted by a large buyer. Section 2(d)<sup>25</sup> deals with discrimination in payments for, or the furnishing of, advertising or other merchandising services or facilities. The requirement that the furnishing of facilities or equipment be done on a proportionally equal basis is the aim of Section 2(e).<sup>26</sup>

Section 2(f)<sup>27</sup> concerns itself with buyer liability for the receipt of discriminations. This section was rendered useless by *Automatic Can-*

15. H.R. REP. No. 2287, 74th Cong., 2d Sess. (1935); S. REP. No. 1502, 74th Cong., 2d Sess. 8 (1935).

16. Robinson-Patman Act § 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

17. This section covers both primary line injury (competitive effects on the seller level) and secondary line injury (competitive effects on the customer level).

18. *FTC v. Anheuser-Busch*, 363 U.S. 536 (1960).

19. Robinson-Patman Act § 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).

20. The discriminating seller is allowed to discriminate as long as he can show that it was in "good faith." See, *Standard Oil Co. of Indiana v. FTC*, 340 U.S. 231 (1951).

21. This defense is virtually useless due to the overwhelming demands of the required proof. This defense is part of 2(a).

22. See, *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir. 1945), cert. denied, 326 U.S. 734 (1945).

23. Robinson-Patman Act § 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(c) (1958).

24. *FTC v. Broch & Co.*, 363 U.S. 166 (1960).

25. Robinson-Patman Act § 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958). The section is directed toward payments by the seller to the buyer for such things as cabinets, salesmen, or promotional advertising.

26. Robinson-Patman Act § 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(e) (1958). See, *Simplicity Pattern Co. v. FTC*, 360 U.S. 55 (1959); *Atlanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958).

27. Robinson-Patman Act § 1, 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1958).

teen.<sup>28</sup> The rationale of that decision was that the party bringing the action must show, not only that the buyer knowingly received the benefits of price discriminations, but also that the discriminations were not justified under any of the defensive provisions in 2(a) or 2(b). The final death toll for 2(f) was contained in the Court's interpretation that, absent justification, the party bringing the action must exhibit that the buyer knew or should have known that no such defense would be available to the seller.

Congress passed the Patman and Robinson bills overwhelmingly. Only sixteen opposition votes were recorded in the House of Representatives while none were recorded in the Senate. The legislation was enacted on June 16, 1936 and President Roosevelt signed the Robinson-Patman Act on June 19, 1936.<sup>29</sup> Although Congress' purpose in enacting the Act was to make *all* injurious price discrimination unlawful, legislative perspicuity should have foretold the advent of new inadvertent authorship deficiencies as well as further loopholes arising from judicial interpretation.<sup>30</sup>

## II.

### JUDICIAL EVOLUTION OF SECTION 5

Any belief entertained by the FTC that they were to have a free hand, due to their wide statutory authorization, was soon dispelled by the Supreme Court. In the celebrated *Gratz* case,<sup>31</sup> an order of the Commission forbidding the combination sale of cotton ties and bagging by a manufacturer as an "unfair method of competition" under Section 5 was set aside by the Supreme Court. The basic rationale for the Court's refusal to accept the Commission's order was that neither monopolistic design nor monopoly was shown. The Court also added:

The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. *It is for the courts, not the commission*, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never here-

28. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). For the test developed by the Court see note 60, *infra*.

29. PATMAN, *COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT* 10 (1963).

30. For further study of the legislative history of Robinson-Patman see, PATMAN, *COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT* (1963); ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* (1962). A scathing criticism of the Robinson-Patman Act was delivered by Dean Landis to President-elect Kennedy. Part of that report is as follows:

... the Robinson-Patman Act is an extremely poorly drafted statute. The scope of its operation has been muddled rather than clarified by court decisions. Nor has the Federal Trade Commission been able to fabricate clear standards out of its melange of generalities, qualified by proviso upon proviso. Remedial devices in this field can only be had from Congress, which must make up its mind as to what this legislation is really intended to accomplish. Some better analyses of these problems could, however, be made by the Federal Trade Commission. Landis, *Report on Regulatory Agencies to the President-Elect*, Sub-committee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. 50-51 (Com. Print, 1960).

31. *FTC v. Gratz*, 253 U.S. 421 (1920).

tofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.<sup>32</sup> [Emphasis added.]

The creative powers of the Commission were stifled for at least two decades in the rigidity of interpretation demanded by the Court. In 1934, the Court repudiated the restrictive interpretation of the *Gratz* decision and freed Section 5 from the chains of common law prohibitions and Sherman Act violations for defining "unfair trade practices."<sup>33</sup>

The 1940's witnessed an expansion in the application of Section 5 flowing from the dicta of Supreme Court decisions in all Clayton Act areas.<sup>34</sup> A group boycott by the garment industry was prohibited in the *Fashion Originator's Guild* case.<sup>35</sup> The Commission's use of Section 5 was upheld by Mr. Justice Black as he alluded to the evident illegality of the boycott when correlated to the Sherman Act and the Clayton Act. When the ". . . purpose and practice runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."<sup>36</sup> The majority opinion suggested that, perhaps, Section 5 had a greater scope than the total prohibitive effect of the Sherman and Clayton Acts.

Mr. Justice Black was also responsible for the majority opinion in the 1948 *Cement Institute* decision.<sup>37</sup> The Section 5 prohibition issued by the Commission was founded upon a price fixing charge. Appeal was filed, contesting the Commission's jurisdiction, since the first count of the complaint was descriptive of a Sherman Act violation.<sup>38</sup> The Court found sufficient evidence to support the Commission's finding of a combination, but, in a footnote, enunciated that this "does not mean that existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the FTC Act."<sup>39</sup>

The *Fashion Guild* and *Cement Institute* opinions of Mr. Justice Black became the cornerstone for the forward step taken in *Motion Picture Advertising Service*,<sup>40</sup> where the Court observed:

The 'unfair methods of competition' which are condemned by Section 5(a) of the Act, are not confined to those that were illegal at common

32. *Id.* at 427-28. For an application of the *Gratz* doctrine see, *FTC v. Curtis Pub. Co.*, 260 U.S. 568 (1923); *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923).

33. *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 310 (1934): "Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories." See also, *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

34. Howrey, *supra* note 7 at 170.

35. *Fashion Originator's Guild v. FTC*, 312 U.S. 457 (1941).

36. *Id.* at 463.

37. *FTC v. Cement Institute*, 333 U.S. 683 (1948).

38. *Id.* at 689-93.

39. *Id.* at 721 n.4.

40. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). The FTC employed Section 5 to prohibit the acquisition of exclusive exhibitor's rights.

law or that were condemned by the Sherman Act. . . . Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.<sup>41</sup>

But the opinion's greatest impact came from the intimation by the Court that trade practices which potentially transgressed both the Sherman and Clayton Acts could be stopped in their incipient stages under Section 5. Since the Clayton Act already allowed an incipency stoppage,<sup>42</sup> fear arose that an extreme test of minimal standards was being advocated.<sup>43</sup>

However, the expanded use of Section 5, to reach conduct not prohibited under the Clayton Act, still demands an evidentiary framework and a showing of anti-competitiveness comparable to that required by the Clayton Act. Actually, the increased use of Section 5 by the Commission has been concentrated upon behavior of the type outlawed by the Clayton Act, but not within the itemized provisions of that statute. For example, promotional allowances are violative of Section 2(d) of the Robinson-Patman Act. But Section 2(d) contains no sanction for the large buyer, who is an integral party in any such transaction, and Section 2(f), the buyer liability section, has been interpreted as excluding a 2(d) violation. In light of this statutory imperfection, the Commission has initiated the use of Section 5 to encompass the buyer, who is as guilty as the seller, if not more so — in fact, it is usually the buyer's leverage that activates the illegal transaction.

### III.

#### *Grand Union* AND ITS AFTERMATH

In recent years, the Commission has attempted to use Section 5 to circumvent the *Automatic Canteen*<sup>44</sup> requirement that Section 2(f) of

41. *Id.* at 394.

42. See, *e.g.*, *FTC v. Raladam Co.*, 283 U.S. 643, 647 (1931); *Dictograph Products v. FTC*, 217 F.2d 821, 826-27 (2d Cir. 1954). Section 3 of the Clayton Act condemns sales or agreements where the effect of such sale or contract of sale "may be to substantially lessen competition or tend to create monopoly. . . . But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or create an actual tendency to monopoly." (Emphasis added.) *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-57 (1922). See also, *FTC v. Morton Salt Co.*, 334 U.S. 37, 46, n.14 (1948). A Section 2 (Robinson-Patman) violation does not require a showing that actual injury to competition occurred but only that there is a reasonable possibility that respondent's behavior "may" have such an effect. See also, 10 VILL. L. REV. 734 at 780, for a discussion of the incipency doctrine as it is applied to the merger provision of Clayton.

43. Justice Frankfurter's dissent in *Motion Picture Advertising* is actually an excellent essay on administrative principles pertaining to the Commission. The essence of the dissent is that the determination of the scope of Section 5 was left for ascertainment by the Court. And if not "the curb on the Commission's power would be relaxed, and unbridled intervention into business practices encouraged. . . . [H]e is no friend of administrative law who thinks that the Commission should be left at large."

44. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). Mr. Justice Frankfurter's decision placed so strenuous a burden of proof upon the Commission that 2(f) became, for all intents and purposes, inoperative.

Robinson-Patman be applied only to the knowing receipt of discriminations in price but not to the knowing receipt of allowances.<sup>45</sup>

The debate over the Commission's actions began in earnest when *Grand Union*<sup>46</sup> raised the issue of whether Section 5 could be used when a discriminatory practice fails to come within the Robinson-Patman Act due to a deficiency in its proscriptive language. The Commission's complaint proposed that a buyer's liability under Section 2(f) of the Robinson-Patman Act applied only to a price discrimination under 2(a) and does not include a 2(d) promotional allowance or a 2(e) services or facilities violation.<sup>47</sup> Section 5 was invoked to remedy the gap in jurisdiction.<sup>48</sup> The Commission did not use the usual statutory interpretation techniques to harmonize the use of Section 5 with the failure of the buyer's liability section — 2(f) — to include 2(d) allowance violations. Rather, the majority expounded a rationale that went further than some thought proper and presented a major weapon for potential use by the Commission.

After reviewing the legislative history of Robinson-Patman, the majority found that Congress primarily sought to combat the use of leverage by large buyers as a means of inducing discriminatory promotional concessions from suppliers. From this finding, the "spirit test" was derived.<sup>49</sup> In fact, Commissioner Tait's dissent was based on his distrust of the word "spirit."<sup>50</sup>

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45. *J. Weingarten, Inc.*, No. 7714, FTC, Aug. 13, 1963; *American Radiator and Standard Sanitary Corp.*, No. 7835, FTC, Dec. 21, 1961; *Benner Tea Co.*, No. 7866, FTC, July 25, 1961; *Individualized Catalogues, Inc.*, No. 7971, FTC, Sept. 26, 1962; *Giant Food Shopping Center, Inc.*, No. 6459, FTC, June 1, 1961; *Foster Publishing Co.*, No. 7698, FTC, July 26, 1962; *Food Fair Stores, Inc.*, 54 F.T.C. 392 (1957); *United Cigar — Whalen Stores Corp.*, 53 F.T.C. 102 (1956).

46. *Grand Union Co.*, 57 F.T.C. 382 (1960); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

47. See, Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 839 (1961).

48. Commissioner Secrest stated:

In the absence of evidence of Congressional intent not to render unlawful practices related to those specifically prohibited by the Robinson-Patman Act, there is no substance to respondent's argument that the Federal Trade Commission Act cannot be extended to proscribe discriminatory practices which do not come within the purview of the Robinson-Patman Act. The rule of statutory construction is that general and specific statutes should be read together and harmonized, if possible, and that the specific statute will prevail over the general only to the extent that there is conflict between them. There is no dispute as to whether the specific provisions of the Robinson-Patman Act are controlling insofar as they specifically prohibit certain practices. There is nothing in the Act itself, however, which conflicts with the Commission's broad authority under Section 5 to define and proceed against practices which it deems to be unfair, including those which may come within the periphery of the later Act, although not within its letter.

49. *Supra* note 5.

50. Commissioner Tait stated his position in this most entertaining manner:

... thousands of businessmen must first determine if the business practice is legal under the Robinson-Patman Act. Then they must also determine whether the practice is legal under a vague standard, herein stated to be 'the spirit of the amended Act.' I am in vigorous disagreement with an approach to the law which has too much sail and too little anchor, or too much supplement and too little bolster. *Grand Union* could have been decided on the theory that it was an inadvertent congressional failure rather than deliberate *casus omissus* that 2(d) was not included in the coverage of 2(f). See, CRAWFORD, *CONSTRUCTION OF STATUTES* § 169 (1940); 2 SUTHERLAND, *STATUTORY CONSTRUCTION* § 4924 (3d ed. 1943).

The majority indicated that the power they enunciated in *Grand Union* extended to the prohibition of such a practice without a showing of adverse effects on competition where the practice had been construed as a "per se" violation.<sup>51</sup> The dissent stated that the Commission was assuming legislative power as well as departing from the statutory requirement that "probable injury to competition" be shown.

It does seem, however, that every argument the Commission made in *Grand Union* to justify the use of Section 5 could as well be cast in the face of its decisions holding that the "meeting competition" defense was unavailable in Section 2(c) and 2(d) cases. *Simplicity Pattern*<sup>52</sup> upheld the Commission ruling that the defenses of cost justification and that of the effect on competition apply only to 2(a) and not to 2(c), (d), or (e). Balance seems lacking in this type of arrangement, as seen by the following statement of the Commission:

We cannot supply what Congress has studiously omitted.<sup>53</sup>

A recent case<sup>54</sup> used a philosophy formerly espoused by the Commission, that of denial of the meeting competition defense — 2(b) — to sellers whose products were in greater public demand, to reverse a cease and desist order of the Commission based on a 2(a) violation. The court remarked that "we cannot approve of the Commission's construing the Act inconsistently from one case to the next as appears most advantageous to its position in a particular case."<sup>55</sup>

*American News Co. v. FTC*<sup>56</sup> was decided on the same day as the *Grand Union* case. American News had appealed an order of the FTC directing them to "cease and desist from inducing, receiving, or contracting to receive any payment for sales services which suppliers were forbidden by Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act, to make."<sup>57</sup> The Court of Appeals held that a buyer who knowingly solicited and received from a supplier such improper promotional allowances as were forbidden by 2(d) was engaged in unfair methods of competition in violation of the FTC Act.<sup>58</sup> The court reiterated the *Grand Union* philosophy. Acknowledging that Section 2(d) does not, of itself, include buyers, the court found that the omission was not

51. Sections 2(c), 2(d), and 2(e) of Robinson-Patman are considered "per se" violations.

52. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959). There is an argument that if all sections of Robinson-Patman had defenses, the Act would be too difficult to enforce and for that reason only Section 2(a) violations have the right of defense.

53. *Exquisite Form Brassiere, Inc.*, F.T.C. Dkt. 6966 (Oct. 31, 1960).

54. *Borden Co. v. FTC*, 339 F.2d 133 (5th Cir. 1964).

55. *Id.* at 138-39. An answer to the court's reasoning would be that a 2(b) defense is a matter of legislative grace and that while consumer public acceptance is used in the 2(b) area it should not be used for jurisdictional purposes, as in *Borden*.

56. 300 F.2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962).

57. *Ibid.*

58. The News Company was in a position of near dominance. While they had 930 newsstands, their largest competitor had but 57. *Supra* note 47, at 107.

“purposeful”. Since the buyer plays an important role in the transaction, he is part of the evil the Act was designed to correct. The court reasoned that the Congressional declaration, that the use of large buying power to obtain price discriminations was against public policy, justified the use of FTC 5. The test set down in *Automatic Canteen*<sup>59</sup> was extended to other similar FTC 5 proceedings.

The novel allegations found in *R. H. Macy & Co. v. FTC*<sup>60</sup> concerned the use of buying power leverage by Macy to encourage contributions from sellers for the store’s 100th anniversary celebration. Though the store rendered no direct promotional service for the vendor’s product, the court upheld the order on the basis that the activity constituted a Section 5 violation. The court found it unnecessary to determine whether Macy’s conduct was coercive or whether Section 5 authorized the Commission to prohibit any trade practice which it believes to be in contravention of Robinson-Patman. Reasoning that Macy’s inducement of the seller’s 2(d) violation sufficed, the conclusion emerged that where “activity” runs “counter to the public policy declared in the Sherman and Clayton Acts, the FTC has power to suppress it as an ‘unfair method of competition’.”<sup>61</sup> The court also noted that a buyer who induces a vendor to commit a violation of § 2(d) by soliciting special promotional and advertising payments has committed a *per se* violation of the FTC Act.

In light of the above cases it is most perplexing to consider what the Commission reported in 1934:

It does not follow, however, that a discrimination in price which falls short of the first (Section 2 of the Clayton Act) may be attacked under the second (Section 5). . . . The point cannot be overlooked that if price discrimination was included under the general prohibition of unfair methods of competition when the FTC Act was passed, the latter expression of legislative will in the Clayton Act dealt specifically and in detail with the subject and would therefore seem to take precedence over the more general statutory prohibition.<sup>62</sup>

The only explanation for this reversal of opinion by the Commission is that they are but a compendium of the time and people they serve.

#### IV.

#### CONCLUSION

The FTC was established by Congress in 1914 to protect business and the public against unfair methods of competition and to prevent

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59. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). The test determines whether the buyer has knowledge that the payments he induces and receives are illegal. The court in *American News* went on to say that the knowledge need not be proven by direct evidence; circumstantial evidence may suffice. For factors considered sufficient to prove knowledge see, *supra* note 56, at 110.

60. 326 F.2d 445 (2d Cir. 1964).

61. *Fashion Originator’s Guild v. FTC*, 312 U.S. 457, 463 (1941).

62. *Supra* note 15, at 65.

practices which would lessen competition or tend to create monopoly. The Commission is, in short, charged with the basic duty of protecting our competitive free-enterprise system.<sup>63</sup>

After the *Gratz*<sup>64</sup> decision of 1920 was put to rest by *Keppel*,<sup>65</sup> the expansive use of Section 5 of the Federal Trade Commission Act became a source of discussion for both worried conservatives and jubilant progressives in the anti-trust field. This extensive use of Section 5 has wrought problems on the one hand, at the same time that it has provided solutions on the other.

The criticisms<sup>66</sup> leveled at the Commission's increasing use of Section 5 usually take the form of harangues against the uncertainty of the law.<sup>67</sup> The illegalities are too difficult to define since "spirit" as well as "substance" is now a proper basis for an FTC 5 order. The commission amends on an *ad hoc* or *ex post facto* basis. Assuring compliance with the law requires that there be both certainty and fairness in the law. When limitations are found in the Congressional language, the Commission may, if unable to overcome the deficiencies by statutory construction, employ the vague guidelines inherent in the phrase "unfair method of competition" as an independent reservoir of power.

It is now obvious that FTC 5 may be used to plug loopholes. Certain practices are well known to be repugnant to competition. A buyer who solicits price discrimination is on notice that he is soliciting prohibited activity. The quality of legislation can be evaluated only after its implementation. The major accomplishment of the current use of Section 5 is that it enables the Commission to correct the unforeseen inadequacies of legislation caused by Congressional oversight.

Although counselling has become more difficult with the development of Section 5, *Grand Union* seems to announce two tests which must

63. FTC Reg. A, 16 C.F.R. § 1.1 (1960) (Origin and Purpose of the Commission).

64. *Supra* note 32.

65. *Supra* note 34.

66. Criticism is prevalent at the debut of any innovation. When the project of an administrative commission to regulate competition in interstate commerce was first under consideration, so distinguished a lawyer as W. B. Hornblower, Esq., said, in the course of an address before the American Bar Association:

These schemes for control by executive action . . . are, I submit, repugnant to our American traditions and principles. It has always been our boast that no one should be condemned except by the courts after an opportunity to be heard, and upon competent testimony. . . . It seems to me incredible that the American people should consent to have their acts approved or condemned and their property rights and their business rights licensed or outlawed by executive mandate. If this is to become a government by executive edict or by bureaucratic domination, the days of republican institutions are certainly numbered. I for one am not prepared to admit that we are reduced to this extremity. 36 *Reports Amer. Bar Ass'n* 304, 325-36 (1911).

67. "What is an unfair method or practice within subsection (a) of this section (§ 45) is a matter of judgment in determination of which weight must be given to the expert judgment of the Commission." *Mytinger and Casselberry, Inc. v. F.T.C.*, 301 F.2d 534 (D.C. Cir. 1962).

be met in order for FTC 5 to be employed by the Commission. The practice being attacked must be closely similar to, and parallel to, one that is prohibited by the Clayton Act, but which does not come within the purview of that statute because of a technical omission. And there must be some evidence that Congress did not mean to countenance the practice being examined.<sup>68</sup>

The *Grand Union* rationale might extend to such areas as agency or bailment transactions and services where price discrimination or exclusive dealing practices similar to those proscribed by the Clayton Act are present.<sup>69</sup> But it should be noticed that the qualitative standards prescribed by Congress for the Clayton Act are in no way lessened by the *Grand Union* decision.

A distinguished commentator<sup>70</sup> in the anti-trust area has suggested guides for harmonizing Section 5 with the Clayton Act in jurisdictional deficiency cases. First, when a practice is covered by the specific provisions of the Clayton Act, the action should be brought under that statute. Second, when a technical jurisdictional deficiency makes it necessary for the Commission to use Section 5 in dealing with a practice analogous to a Clayton violation, standards of proof should parallel those that would be maintained for the Clayton proceeding. Third, when the Commission asserts a Section 5 violation in the same complaint with a Clayton violation, separate and non-redundant counts should be used. There should also be identification of the particular statutory provisions. Finally, Section 5 should never be used for practices specifically within the prohibitions of the Clayton Act.<sup>71</sup>

It is apparent that our complex economic system requires a regulatory body with powers broad enough to confront new situations. The use of Section 5 in dealing with problems in the Robinson-Patman area is an example of the development that has made the Commission a body capable of handling novel devices that are harmful to competition. Those who fret that the Commission might translate their statutory authority into a display of raw power have the inherent safety of judicial review with which to allay their fears. The intention of Congress to make the Commission an instrument to effect flexible administrative determinations in the light of administrative expertise and future experience is achieving fruition.

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68. Rahl, *Does Section 5 of the Federal Trade Commission Extend the Clayton Act?* 5 ANTI-TRUST BULL. 533, 547-48 (1960).

69. See, Handler, *Recent Anti-Trust Developments*, 71 YALE L.J. 75, 93 (1961).

70. *Supra* note 47, at 851.

71. *Supra* note 47, at 851.