Some Aspects of Interpretation and Application of the Brokerage Clause of the Robinson-Patman Act

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turbance of the very peace of families which it is alleged to protect, a reference to Mr. Justice Holmes' admonition seems in order:

When we find that in large and important branches of the law the various grounds of policy on which the rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons and—taking a broader view of the field, to decide anew whether those reasons are satisfactory. . . . If truth were not often suggested by error, if old implements could not be adjusted . . . human progress would be slow. But scrutiny and revision are justified. 62


SOME ASPECTS OF INTERPRETATION AND APPLICATION OF THE BROKERAGE CLAUSE OF THE ROBINSON-PATMAN ACT

The Robinson-Patman Act1 was enacted by Congress in 1936 to regulate price discrimination in or affecting interstate commerce. The act amended section 2 of the Clayton Act2 by enlarging it into six subsections numbered 2(a), 2(b), 2(c), 2(d), 2(e) and 2(f). These six subsections embody the core of the federal law on price discrimination. In the twenty-four years since the passage of the Robinson-Patman Act, section 2(c)3 of the act has engaged the attention of the Federal Trade Commission and several courts of appeals to a far greater extent than any other provisions of the Robinson-Patman Act.4 Most of the litigation has taken place over the problem of interpretation and application of this section. Though construed by several courts of appeals, the “Brokerage Clause” (as section 2(c) is popularly known) received for the first time Supreme Court review in 1960. It is the purpose of the writer to examine the legislative history, the early court decisions, and the Supreme Court’s recent pronouncement in Federal Trade Commission v. Henry Broch & Co.,5 in order to acquaint the reader with the more important aspects of interpretation and application of section 2(c) today.

2 38 Stat. 730 (1914).
4 Statistics on the number of violations of each section of the Robinson-Patman Act from 1936 to 1957 show that forty-seven per cent of the cease and desist orders (145 out of 311) were issued by the Federal Trade Commission in brokerage cases. See generally Edwards, The Price Discrimination Law 68–72 (1959).
THE STATUTORY LAW

Section 2(c) of the Robinson-Patman Act prohibits the payment of brokerage, commissions, allowances or discounts by one party of a transaction of sale to the other party. The section provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.6

The ambiguity7 and punctuation8 of this section has been regarded as an excellent example of poor legal drafting. However, the language of section 2(c) represents an attempt to prohibit discriminatory price reductions effected through the guise of brokerage discounts. Payment of such compensation, as well as receipt, is treated as an unfair trade practice.

SOCIO-POLITICAL HISTORY OF SECTION 2(c)

Absent socio-political perspective, it is difficult to understand why there is a need for a federal law regulating wholesale distribution of goods in interstate commerce. However, in the early 1930's, cut throat competition developed in the wholesale grocery business between the large chain stores and the independent wholesalers and brokers. The independent wholesalers and brokers feared that if manufacturers were permitted to continue their practice of paying brokerage to buyers or to agents of buyers, they would be “starved out of existence,” and with them would go the small manufacturers who depended on the independent whole-

7 In Section 2(c), CCH Robinson-Patman Act Symposium, 37-38 (1946), Austern states that “The subsection is undoubtedly the most ambiguous in the Act which as a whole has been universally regarded as a very unhappy example of legal drafting . . . . subsection (c) has also been a source of delight to those lawyers who seek to distill the true intent of a statutory provision by resort to typography. In almost every brief the awkward phrases of the subsection have been thrown into italics, capitals, bold face, colored inks, and every other form of ‘emphasis added.’ . . . To students of legal semantics this winding provision, said to embody agency principles, fiduciary concepts, public policy, good business morals, and elementary economics, offered a wide field for study.”
8 See Webb-Crawford Co. v. Federal Trade Commission, 109 F. 2d 268, 270 (5th Cir. 1940), where the court stated: “The punctuation as published is confusing. . . . Commas are not to be suffered to defeat the legislative meaning.”
salers and brokers as their only sales organization, and the independent retailers whom they supplied.\(^9\)

A congressional investigation was conducted into the merchandising practices of the chain stores by the Federal Trade Commission, and a final report was made on this investigation in 1934.\(^{10}\) The report revealed the coercive effects upon manufacturers of the chains' tremendous buying power, which enabled them to obtain price concessions and to absorb the broker's and commission man's functions by operating buying agencies as subsidiaries. These practices enabled the chain stores to undersell independents and engage in price discrimination in their retail stores.\(^{11}\) Early attempts to correct this situation were made in the Codes of Fair Competition developed by trade organizations in the food industry under the National Industrial Recovery Act.\(^{12}\) Code provisions were established to prohibit brokerage payments to direct purchasers or their buying affiliates.\(^{13}\) Later, when the Supreme Court declared the NIRA unconstitutional,\(^{14}\) the National Food Brokers Association was successful in getting the substance of the code provisions against "dummy brokerage" enacted as section 2(c) of the Robinson-Patman Act.\(^{15}\)

**LEGISLATIVE HISTORY OF SECTION 2(c)**

Legislative history of section 2(c) reveals a general intent of Congress to condemn as illegal, discriminatory prices cloaked as brokerage payments; but fails to reveal definitive answers to many problems that have

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\(^{13}\) Fulda, supra note 9, at 1095.


arisen under the section either because no explanation can be found for the version finally adopted by the Congress or because conflicting views and expressions of opinion permeate the legislative records. Nevertheless, since the legislative history has been utilized by the courts to support their construction of this section, a cursory exploration of congressional thinking, as embodied in the various committee reports, is necessary for a complete appreciation of the court decisions construing section 2(c). The House Committee explained the absolute prohibition of section 2(c) (it was then section (b)) by saying:

Section (b) permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; Likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer: and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.\(^{16}\)

A similar explanation was made in the Conference Committee Report,\(^ {17}\) but neither the House nor the Senate Committee Reports shed any light on the meaning to be given the words “except for services rendered”\(^ {18}\) and the phrase “or any allowance or discount in lieu thereof.”\(^ {19}\) These phrases, which are the source of much controversy, were also retained in the bill reported by the Conference Committee without any explanatory comment.\(^ {20}\)

Reports of the Judiciary Committees of the House and Senate set forth in similar terms the broad objectives of section 2(c). In the language of the Senate Report:

Among the prevalent modes of discrimination at which this bill is directed, is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they demand that sales to them be made. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a “broker”, so labeled, enters the picture at all, it is one whom the

\(^{16}\) H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936).

\(^{17}\) H.R. REP. No. 2951, 74th Cong., 2d Sess. 7 (1936).

\(^{18}\) H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936). This phrase was added by the House Committee without explanatory comment and is not contained in the Senate Committee Report.

\(^{19}\) S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936). The Senate Committee added this phrase without explanatory comment.

\(^{20}\) H.R. REP. No. 2951, 74th Cong., 2d Sess. 7 (1936).
buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function to the purposes of competitive discrimination.21

In addition, both the Senate and House Reports emphasized the relationship between broker and client as a fiduciary one and that to permit a broker "to collect for services rendered in the interest of a party adverse to him is a violation of that relationship."22 Further, the reports stated that it is desirable to protect those who deal in the streams of commerce against breaches of faith in order to foster confidence in its processes and promote its wholesomeness and volume.

Numerous statements concerning this section can be found in the congressional hearings23 and debates,24 but since statements can be found to support almost any plausible argument advanced to explain the ambiguous and controversial aspects of section 2(c), these statements are not illuminating upon congressional intent and therefore no useful purpose can be served by their detailed examination. However, it is noteworthy to point out that statements from the hearings and the debates have been relied upon by some courts as evidence of legislative intent.25

EARLY COURT INTERPRETATION OF THE BROKERAGE CLAUSE

The Robinson-Patman Act went into effect on June 19, 1936 and the Federal Trade Commission first moved under the brokerage section. Eight of the orders of the Federal Trade Commission under this section were appealed to the courts and within a few years judicial decision had resolved the major problems in which the section bristled.26

Section 2(a)27 of the Robinson-Patman Act prohibits price discrimina-

21 S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

22 Ibid.

23 Hearings Before the House Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st & 2d Sess., ser. 10, pts. 1, 2 (1935-1936); Hearings on S. 4171 Before a Subcommittee of the Senate Judiciary Committee, 74th Cong., 2d Sess. (1936).

24 80 CONG. REC. 3114-16, 3118, 5728, 6281-82, 6285, 7324, 7759-60, 7886, 7980, 8111-12, 9414-15, 9417-18 (1936).

25 E.g., Henry Broch & Co. v. Federal Trade Commission, 261 F. 2d 725, 728 n.4 (7th Cir. 1958), where the court relied on statements made in congressional hearings and debates but overlooked the best evidence of legislative intent, the congressional committee reports.

26 See Austerm, supra note 7, at 37.

27 Section 2(a), 15 U.S.C.A. § 13(a) (Supp. 1959), provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any
tion which injures competition but permits price differentials based on savings in selling costs resulting from differing methods of distribution. In the first cases to reach the courts it was urged by respondents that section 2(a) and section 2(c) were intended to be read together, and that the affirmative defenses permitted by the cost differential provisos of section 2(a) were equally available to a defendant accused of violation of section 2(c); hence the payment or receipt of brokerage is illegal only when it is injurious to competition and the respondent cannot establish a cost justification for the discrimination. One of the first cases to give insight as to the direction the courts would take was *Biddle Purchasing Co. v. Federal Trade Commission.* In deciding the *Biddle* case the Court of Appeals for the Second Circuit rejected the argument that the limitations of section 2(a) should be read into section 2(c), concluding that "the complaint here is under the provisions of section 2(c) and not section 2(a) of the statute. The validity of the order entered is dependent entirely upon the legality of section 2 (c)."

When a similar contention was made in *Oliver Bros., Inc. v. Federal Trade Commission,* the Court of Appeals for the Fourth Circuit said that the practice of granting a commission or brokerage, or any allowance in lieu thereof, to the other party to the transaction or his agent was forbidden because of its tendency to lessen competition and create a monopoly, without regard to its effect in a particular insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: 

*Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: 

*Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: 

*And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: 

*And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

28 96 F. 2d 687 (2d Cir. 1938), *cert. denied,* 305 U.S. 634 (1938).

29 96 F. 2d at 690.

30 102 F. 2d 763 (4th Cir. 1939).
ticular case. Therefore, the court held that there was no reason to read into section 2(c) the limitations contained in section 2(a).31 Finally, in *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*,32 the Court of Appeals for the Third Circuit held that "paragraphs (a) and (c) possess separate significance and are independent of each other,"33 and that "paragraph (c) constitutes a specific prohibition of a specific act... To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent."34 These three cases established the complete independence of section 2(a) and section 2(c). None of the affirmative defenses of section 2(a) are now available to respondents accused of violating section 2(c), and proof of discrimination resulting in injury to competition is not an element of the brokerage offense.35

Section 2(c) provides that it shall be unlawful to pay or receive brokerage *except for services rendered* in connection with the sale or purchase of goods.36 Inclusion of this phrase created an ambiguity which the courts had to resolve without any illuminating help from legislative history.37 It could be construed as either (1) having no effect at all; (2) as suppressing clearly abusive demands for brokerage and permitting brokerage to buyers under some circumstances; or (3) as limiting payment to independent brokers and preventing payment to buyer's agents.38 Respondents in the A & P case interpreted this language to mean that if a buyer or a buyer's agent rendered services to the seller, a payment of

31 Id. at 766-767.
32 106 F.2d 667 (3d Cir. 1939), affirming 26 F.T.C. 486 (1938), cert. denied, 308 U.S. 625 (1940), rehearing denied, 309 U.S. 694 (1940). (This case shall hereafter be referred to as the A & P case.)
33 106 F.2d at 675.
34 Id. at 677.
35 See Webb-Crawford Co. v. Federal Trade Commission, 109 F. 2d 268, 269 (5th Cir. 1940), where the court pointed out: "The Congress considered the effect on commerce of the things named in subsection (c), and absolutely prohibited them. The Trade Commission is not to enter on any enquiry about their evil effect, nor whether a proceeding would be in the public interest. Its duty is to enforce the prohibition." To the same effect see Southgate Brokerage Co. v. Federal Trade Commission, 150 F. 2d 607, 609 (4th Cir. 1945), cert. denied, 326 U.S. 774 (1945), where the court said: "The answer is that price discrimination... is not necessary to a violation of section 2(c), quoted above, which specifically forbids the payment of brokerage by the seller to the buyer or the buyer's agent."
37 See note 18 supra.
38 For discussion see Legislation, 36 Colum. L. Rev. 1285, 1313 (1936). See also Thorp and George, Check List of Possible Effects of the Robinson-Patman Act, Dunn and Bradstreet Monthly Review, August, 1936, p. 16, where the authors comment: "Imaginations are enjoying a free rein on the problem of what services a buyer's agent may render to a seller to earn exemption from the otherwise flat prohibition against payment of brokerage to him by the seller."
brokerage for these services was legal. Accordingly, A & P sought to prove that it had effected savings in distribution costs for manufacturers by services performed by its purchasing organization, and offered voluminous evidence showing that its field buyers furnished manufacturers market information, advice on methods whereby the quality of commodities could be improved, advice on packaging, traffic information on routing of shipments, and when manufacturers were threatened with a glut of commodities which could break the market, they endeavored to relieve the glut by buying commodities. In taking the position that neither a buyer nor a buyer's agent can avail himself of the "services rendered" exception of 2 (c), the court said:

We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. For this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. The phrase "except for services rendered" is employed by Congress to indicate that if there be compensation to an agent it must be for bona fide brokerage, viz., for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase, "for services rendered", does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. . . . The record clearly requires the conclusion that the field buying agents of the petitioner were the agents of the petitioner and that such services as were rendered by them to sellers were purely incidental to such representative capacity. For such incidental services, the petitioner may not be compensated.40

Although the court utilized the legislative history of section 2(c) to support its interpretation of the "services rendered" exception,40 it has been vigorously criticized as reading the "services rendered" exception out of the statute.41 The net result is that the "services rendered" clause

39 106 F. 2d at 674-75.

40 In the Att'y. Gen. Nat'l Comm. Antitrust Rep. 187-193 (1955), the committee at 190, notes that prevailing "interpretations of the 'brokerage' clause [are] at odds with broader antitrust objectives. Goods are sped to the consumer through marketing functions, whether performed by independent 'brokers' or other . . . 'middle[men]' . . . . A legal disqualification of all but the 'pure' broker's distributive services is thus at variance with business realities . . . . [T]he 'brokerage' clause as presently interpreted enacts a preferred position for the 'independent' broker, thus discriminating against competing firms in distribution who are arbitrarily denied compensation for genuine marketing functions which they perform. . . . In our opinion, the virtual legal monopoly conferred by [S 2 (c)] on one type of middleman clogs competition in the channels of distribution, and exacts tribute from the consumer for the benefit of a special class." The committee
of 2(c) has no application to buyers, their agents, or controlled intermediaries, and does not set up a condition upon which brokerage may be paid to any of them. The exception of “services rendered” refers solely to services rendered in fact for the party paying the brokerage fee. Hence, when brokerage is paid by the seller, the clause relates to selling services rendered to the seller by his agent or broker. In such a case any

recommended that the Brokerage Clause be amended to revitalize the “except for services rendered” clause.

Professor Oppenheim observed that “the ‘soft competition’ fostered by the act is strikingly illustrated by the island of immunity created for independent brokers as a result of the Commission’s construction of 2(c) on the basis of a mistaken analogy to the fiduciary obligation of an agent to his principal. The courts have sustained the Commission’s position that it is unlawful per se for the buyer or anyone acting for or controlled by the buyer to pay or receive brokerage, even where services of value are actually rendered to the seller. The result has been virtually to read out of the section the phrase ‘except for services rendered.’ The presence of these words in subsection (c) affords evidence, however, that Congress recognized that the standard of reason might be applied to certain situations where bona fide and actual services of value were rendered by the buyer’s agent. There is no justifiable reason why independent brokers should be given a monopoly in their distribution function at the expense of established or new methods of distribution that compete with such brokers in rendering services of unquestioned value. The Commission’s strained construction of 2(c) has actually worked hardship to small business faced with the necessity of resorting to cooperative buying arrangements to compete on equal terms with chain stores and other mass buyers.” Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 MICH. L. REV. 1139, 1207, n.178 (1952).

See Rowe, Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, 60 YALE L.J. 929, 957-958 (1951). “[R]eceipt or payment of compensation by either party to a transaction is illegal except when services are rendered. Judicial interpretation, however, quickly read the exception out of the statute. Obviously direct buyers relieve a seller from paying intermediaries to find market outlets. But these are not legal services—the buyer is ‘doing his own work.’ The market effects of the brokerage clause are, therefore, simple. Because a direct buyer is denied functional compensation, an unneeded broker picks up business or a seller pockets the value of the function. The clause thus grants a legal tollgate to the broker or a windfall to the seller. Ironically, small wholesalers’ cooperative buying agencies are conspicuous victims of strict FTC ‘brokerage clause’ enforcement.”

See also Levi, The Robinson-Patman Act—Is It in the Public Interest?, in A.B.A. SECTION OF ANTITRUST LAW PROCEEDINGS, 60 (1952). The author concludes an acid criticism with the following comment: “When stripped of its protective covering, however, the brokerage section, with its flat prohibition, is an ugly example of class legislation.”

For general discussion of this point, consult Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 110-114 (2d rev. ed. 1959), and Oppenheim, Administration of the Brokerage Provision of the Robinson-Patman Act, 8 Geo. Wash. L. Rev. 511 (1940).

However, the court’s interpretation has been supported by several courts of appeals. Independent Grocers Alliance Distributing Co. v. Federal Trade Commission, 203 F. 2d 941 (7th Cir. 1953); Southgate Brokerage Co. v. Federal Trade Commission, 150 F. 2d 607 (4th Cir. 1945); Modern Marketing Service, Inc. v. Federal Trade Commission, 149 F. 2d 970 (7th Cir. 1945); Quality Bakers of America v. Federal Trade Commission, 114 F. 2d 393 (1st Cir. 1940); Webb-Crawford Co. v. Federal Trade Commission, 109 F. 2d 268 (5th Cir. 1940).
services rendered to the seller by the buyer or his alter ego are incidental and gratuitous. Finally, the application of the ban of section 2(c) on any allowance or discount in lieu of brokerage has not been fully settled. The problem posed by this provision is whether a seller who ordinarily utilizes brokers in selling a product may not reflect the non-use of brokers in his sales to customers who buy direct. The court in the A & P case held that such a price reduction was an allowance in lieu of brokerage within the meaning of section 2(c).

Since the A & P case the FTC has modified its position. It no longer contends that one who ordinarily sells through brokers automatically violates the "any allowance or discount in lieu" phrase of Section 2(c) if he grants a lower price or special discount in approximately the same amount of brokerage to certain customers buying direct. In Main Fish Co., Inc., a complaint charged a seller in Seattle, Washington, who purchased fresh fish in boat-load quantities, filleted, and resold to retailers, restaurants, and wholesalers, with violating section 2(c) of the Robinson-Patman Act by favoring one direct buyer with prices lower than those charged all other


43 106 F. 2d at 672, 675. The reason for this decision, and in fact for Congress's inserting the proviso in section 2(c), is illuminated by the history of the A & P case. Prior to the Robinson-Patman amendments, A & P had obtained brokerage commissions from sellers through its field buying agents in the same amounts as was paid by the sellers to brokers acting as agents for such seller. 26 F.T.C. 486, 495 (1938). After June 19, 1936, the effective date of the Robinson-Patman Act, A & P instructed its field buying agents to accept no further brokerage and make all future purchases on one of three bases: (1) to buy for "net prices" reflecting deductions in the amount of the former brokerage commissions; (2) to execute "quantity discount agreements" with the seller providing for payments to A & P monthly in an amount equal to brokerage paid by sellers prior to June 19, 1936, or (3) to have the brokerage paid into escrow until the legality of making such payments could be determined. The Federal Trade Commission found that each of these practices was actually used by A & P (Id. at 495-96) and outlawed them because they represented "an amount equal to the brokerage which, but for the Robinson-Patman Act, these sellers would have paid" to A & P's field buying agents. The FTC further stated that they were "passed on by the sellers and accepted by the respondent to take the place of, and in substitution for, brokerage paid to the respondent's field buying agents prior to that date," and accordingly "were allowances and discounts in lieu of brokerage and were affirmatively intended as such by both sellers and the respondent." 106 F. 2d at 672, 675.

It is obvious that the congressional intent to stop the payment of brokerage commissions to large chains like A & P would have been frustrated if the prohibition of the statute had turned on the question of whether the payments made were described as broker's commissions or "net prices" and "quantity discounts." See Zorn & Feldman, Business Under the New Price Laws 219 (1937), where the authors state that the "in lieu" phrase must have been added by the Senate Judiciary Committee (note 19 supra) to "prevent evasion of the restriction through a mere modification of the form of the sale contract. It was assumed that large buyers would seek to convert the brokerage which they had hitherto received into an outright price reduction."

44 53 F.T.C. 88 (1956).
purchasers by the same amount as the five per cent brokerage which respondent paid brokers for effecting sales to its indirect customers. The opinion of the FTC states:

In rejecting the contention that price concessions by respondent to its direct purchaser were payments in lieu of brokerage because others had to buy from respondent through brokers who collected a fee of 5%, we do not exclude the possibility of inferring the payment of brokerage monies or sums in lieu thereof from surrounding circumstances, even though the parties to the sales do not openly employ the terminology of brokers' dealings. We only hold that on facts of this record such an inference does not appear warranted.45

In 1959 the Court of Appeals of the First Circuit, in *Robinson v Stanley Home Products, Inc.*,46 affirmed a district court ruling47 which rejected the contention that a seller's price reduction made possible by elimination of services of a broker entirely, and conversion to direct selling, was an illegal allowance "in lieu" of brokerage to the buyer. Rejecting this contention, the court said:

To say that a manufacturer who makes a price reduction when he converts to direct selling has, without more, made an allowance in lieu of brokerage would either be to say that he cannot so convert, or that, if he does, the act forbids his passing on any saving to the customer. We do not so construe it.48

With this judicial precedent, it is clear that whether there has been a repayment of brokerage when the seller couples a lower price with a reduction or complete elimination of brokerage depends upon all the facts in the particular case.

SUPREME COURT INTERPRETATION OF SECTION 2(c)—THE BROCH CASE49

Henry Broch and Oscar Adler are copartners trading as Henry Broch & Co.,50 with their main office and place of business in Chicago, Illinois. Broch functions as an independent sales representative or broker by negotiating the sale of frozen foods, frozen fruits, fruit juices, and

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45 *Id.* at 97.
46 272 F. 2d 601 (1st Cir. 1959).
48 272 F. 2d at 604.
50 Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., shall hereafter be referred to as respondent, or Broch.
other food products for about twenty-five seller principals. Respondent negotiates an annual volume of sales approximating $4,000,000 to $5,000,000. One of the seller principals represented by Broch is Canada Foods, Ltd., of Kentville, Nova Scotia, a processor of apple concentrate and similar products. Canada Foods Ltd. is also represented in the United States by several other brokerage firms, including Tenser & Phipps, Poole & Company, and Cuylar.

After negotiations in April and May of 1954, respondent agreed to act as exclusive agent for the Mid-Western sales territory for Canada Ltd., and the contract specified a five per cent rate of commission. Other brokers working for the same principal were appointed with the understanding that their rate of commission would be four per cent. Respondents received a higher rate of commission because they stocked merchandise in advance of sales. On October 11, 1954, Canada Foods Ltd. established its price on its 1954 pack of apple concentrate at one dollar and thirty cents per gallon in fifty gallon steel drums, and it authorized its various brokers, including respondents, to negotiate sales at that price.

The present controversy originated in a sale of apple concentrate negotiated by respondent with J. M. Smucker Company, Orville, Ohio (hereinafter referred to as Smucker), a manufacturer of apple butter and preserves. In negotiations carried on independently with both respondent and Tenser & Phipps, the Smucker Company, a prospective buyer, expressly offered to buy five hundred drums at the lower price of one dollar and twenty-five cents. Canada Foods Ltd. was thereafter advised of Smucker’s tender by both Tenser & Phipps and by respondent. In the ensuing discussions with Tenser & Phipps and Broch, Canada Foods Ltd. took the position that the only way it could afford to reduce its price below one dollar and thirty cents would be through some downward adjustment of the broker’s commission. Tenser & Phipps declined to adjust its commission and relayed this information to Smucker, explaining that the order could not be confirmed at one dollar and twenty-five cents since Tenser & Phipps was afraid that this would violate the Robinson-Patman Act. On October 27, 1954, the very day that Canada Foods Ltd. told Tenser & Phipps that the price could be reduced below one dollar and thirty cents only if brokerage were cut, Canada Foods Ltd. telephoned Broch and advised that it would make the sale at one dollar and twenty-five cents per gallon provided Broch would agree to reduce its brokerage commission from five per cent to three per cent. Broch agreed, and advised Smucker that Canada Foods Ltd. would sell to it at one dollar and twenty-five cents per gallon. The sale of five hundred steel drums of apple concentrate at one dollar and twenty-five cents per gallon was consummated, delivery made, and Broch received three per cent broker-
The reduced price of one dollar and twenty-five cents was thereafter accorded Smucker on all subsequent sales consummated through Broch in December 1954, in 1955, and up to the time that the hearings in this matter were closed in October 1956. On sales to all other customers, whether made through Broch or other brokers, the price continued to be one dollar and thirty cents per gallon, and in each instance the broker, including Broch, received its full agreed-upon commission.

The Federal Trade Commission on January 11, 1956, issued a complaint charging respondent with violations of section 2(c) of the Robinson-Patman Act. Following hearings before an examiner and the filing of his initial decision, and a cease and desist order, respondent appealed to the FTC, which adopted the findings, conclusion and order of the examiner. Respondent petitioned the United States Court of Appeals for the Seventh Circuit to review and set aside the order of the FTC. The Court of Appeals for the Seventh Circuit did not question the findings of fact of the FTC (which were not in dispute) but unanimously set aside the order against Broch. The court's decision discussed four distinct, but related grounds for so holding: (1) neither the language of section 2(c) nor its legislative history covered an independent seller's broker; (2) the proceeding against the respondent was not in the public interest but related to a private grievance between rival brokers; (3) the acceptance of a lower commission by a broker in order to enable his seller-principal to quote a lower price to a particular buyer does not amount in substance to the payment of brokerage, directly or indirectly, by the broker to the buyer; and (4) the FTC's interpretation of section 2(c) would actually promote price rigidity and uniformity contrary to the national antitrust policy.

On certiorari, the Supreme Court of the United States, divided five to four, reversed the Court of Appeals for the Seventh Circuit and held that section 2(c) "clearly applies to payments or allowances by a seller's broker to the buyer, whether made directly to the buyer, or indirectly,

51 The customary brokerage fee of 5% to respondent would have been $2,036.84. The actual brokerage of 3% received by respondent was $1,222.11. The reduction of brokerage was $814.73 which is 50% of the total price reduction of $1,629.47 granted by Canada Foods Ltd. to Smucker.

52 Henry Broch & Co. v. Federal Trade Commission, 261 F. 2d 725 (7th Cir. 1958).

53 One of the jurisdictional elements under Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45 (Supp. 1959), is public interest. The Federal Trade Commission does not view this act as a limitation to proceedings under the Robinson-Patman Act. See Brief for the FTC (S.Ct.) p. 28. The Supreme Court did not discuss this point. See also note 35 supra.

54 360 U.S. 908 (June 15, 1959).
through the seller." The four dissenters were Justices Whittaker, Frankfurter, Harlan, and Stewart. They agreed that section 2(c)'s phrase "any person" includes even a truly independent seller's broker. But the question in this case, as they saw it, was whether the broker's agreement to reduce his commission charged to the seller can amount to the paying or the granting by the broker of an allowance to the buyer. They contended that if the conduct involved in this case constituted such an allowance, "then all legitimate commission rates are frozen in destruction of competition and in actual violation of the antitrust laws."

This litigation is the first one directly involving the question of the accountability of a seller's broker under section 2(c) of the Robinson-Patman Act. And the decision is important not only because it is the first Supreme Court interpretation of section 2(c), but also because it is applicable to all industries operating in interstate commerce that traditionally employ brokers or sales representatives to negotiate the sale of goods, wares or merchandise. Mr. Justice Douglas, speaking for the majority, construed the phrase "any person" in section 2(c) to include an independent seller's broker. After stating that section 2(c) is independent of section 2(a), the court reasoned:

Congress enacted the Robinson-Patman Act to prevent sellers and seller's brokers from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale of goods. The form in which the buyer pressure is exerted is immaterial and proof of its existence is not required. It is rare that the motive in yielding to a buyer's demands is not the "necessity" for making the sale. An "independent" broker is not likely to be independent of the buyer's coercive bargaining power. He, like the seller, is constrained to favor the buyers with the most purchasing power. If the respondent merely paid over part of his commission to the buyer, he clearly would have violated the Act. We see no distinction of substance between the two transactions. In each case the seller and his broker make a concession to the buyer as a consequence of his economic power. In both cases the result is that the buyer has received a discriminatory price. In both cases the seller's broker reduces his usual brokerage fee to get a particular contract. There is no difference in economic effect between the seller's broker splitting his brokerage commission with the buyer and in his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price.

55 363 U.S. at 175.
56 Id. at 180.
57 The FTC has applied § 2(c) to seller's brokers. See Custom House Packing Corp., 43 F.T.C. 164 (1946); Ramsdell Packing Co., 32 F.T.C. 1187 (1941); W. E. Robinson & Co., 32 F.T.C. 370 (1941); C. F. Unruh Brokerage Co., 31 F.T.C. 1557 (1940), Albert W. Sisk & Son, 31 F.T.C. 1543 (1940). But cf. D. J. Easterlin, FTC Dkt. 4587. A complaint charging a seller's broker with violating § 2(c) was issued 9/8/41 and dismissed 9/25/41 by the FTC without any reasons being specified.
58 363 U.S. at 174–75.
The Court added that not every price reduction coupled with a reduction in brokerage automatically compels the conclusion that an allowance in lieu of brokerage has been granted:

[W]hether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case. . . . A price reduction based upon alleged savings in brokerage expenses is an "allowance in lieu of brokerage" when given only to favored customers. . . . Here . . . the reduction in brokerage was made to obtain this particular order . . . only and therefore was clearly discriminatory.\(^5\)

Although the majority specifically stated that section 2(c) to be independent of section 2(a), the Court, by way of dictum, fused the provisions of section 2(a), which permits the defense of cost justification, with those of section 2(c), which does not. Until this decision it seems to have been generally understood that discrimination was not an element in the FTC's application of section 2(c).\(^6\) But according to the majority opinion, the reduction or elimination of a broker's fee would give rise to a Brokerage Clause violation "when given only to favored customers."\(^7\)

The Court pointed out that "the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory."\(^8\)

This injection by the majority of the element of discrimination into the brokerage clause upsets the position taken by the FTC for more than twenty years. A host of Federal Trade Commission orders bar payments under section 2(c) in the absence of discrimination among buyers.\(^9\) Reviewing courts have consistently supported this interpretation of section 2(c). As one court of appeals recently confirmed:

The fact that the granting of a purported brokerage fee to a buyer may in a particular case result in discriminatory prices is immaterial. The gist of the violation under section 2(c) is not that discriminatory prices have been charged, but that the parties have engaged in a practice designed to deceive others as to the price charged and paid, whether or not discriminatory.\(^10\)

\(^5\) Id. at 176.

\(^6\) The importance of the element of discrimination in the majority's reasoning is reflected by at least eight separate references to it in its opinion. 363 U.S. at 173, 174, 175, 176, 177 n.19.

\(^7\) 363 U.S. at 176.

\(^8\) Ibid.


This key misconception in the majority opinion’s rationale of established administrative practice under section 2(c), “could constitute a Pyrrhic victory for the FTC by destroying a key premise of its administration of the Brokerage Clause.” This is not to say that the Broch case was incorrectly decided. By ruling that a seller’s broker is “any person” within the meaning of section 2(c), the Supreme Court has abolished an “island of monopoly immunity” giving a seller’s broker a preferred status of exemption from the section’s proscriptions. The majority’s view is supported by the authorities, and to rule otherwise would be to sanction the granting of preferential discounts to buyers through the medium of the protected independent broker. There is precedent in a FTC decision and a circuit court decision for the majority’s position that a reduction in price coupled with a reduction in brokerage may on the facts of the case constitute an allowance or discount in lieu thereof, to the buyer.

The net result of the Supreme Court’s adoption of this flexible standard is to weaken materially the per se violation thrust that the FTC and the courts have previously given section 2(c). By so doing it has brought interpretation of section 2(c) somewhat in line with the national antitrust policy of promotion competition. However, in any transaction utilizing an independent seller’s broker where the broker lowers his commission to make a deal, the FTC could take the position that the brokerage clause has

(4th Cir.), cert. denied, 326 U.S. 774 (1945); Fitch v. Kentucky-Tennessee Light & Power Co., 136 F. 2d 12, 15 (6th Cir. 1943). See also Baysoy v. Jessop Steel Co., 90 F. Supp. 303, 306 (W.D. Pa. 1950); and Note, 68 YALE L. J. 808, 824 n.87 (1959), which states “§ 2 (c) is the only substantive section which does not deal with the discriminatory treatment of two or more competitors. Since no question of discrimination exists, and since the offense does not even require the presence of competitors, competitive injury can have no relevance in a § 2(c) case.”
been violated and proceed against the seller or the buyer. In this event, the FTC is not compelled to sustain the burden of proving either price discrimination and injury to competition under section 2(a) or, the knowing inducement or receipt of an illegal price discrimination under section 2(f). The seller and the buyer are stripped of the defenses which would be available to them if the proceedings were brought under section 2(a) or section 2(f).

Mr. Justice Whittaker, in his dissenting opinion, expresses the view that this transaction should be actionable only in a section 2(a) proceeding, subject to any valid "cost justification" defense. This would permit brokers to freely cooperate with sellers in passing true cost savings on to the buyer and eventually to the consumer. But the minority view, i.e., that section 2(c) is applicable in all cases where a price reduction is coupled with a reduction in brokerage or it is not applicable to any such case, does not take into consideration that the FTC must show in each case that the pricing variations are arithmetically commensurate with the pattern of brokerage to establish that an allowance in lieu of brokerage has taken place. There are numerous other factors which may cause price differences and make it difficult for the FTC to mathematically prove by the greater weight of the evidence that these differences constitute payments or allowances in lieu of brokerage.

IMPACT OF THE BROCH CASE

The major impact of the Broch case is that the Supreme Court closed a large loophole in section 2(c) against price discriminations by exposing seller's brokers to accountability for their agreements with their principals to manipulate brokerage, particularly in the field of food distribution. Unquestionably, the objective of the Robinson-Patman Act, and of section 2(c) in particular, was to eliminate this type of preferential treatment. A mass buyer desiring an unwarranted price concession is solely interested in obtaining a preferential price and is not concerned with whether brokerage is passed on to him by the seller or by the seller's broker. Conceivably a buyer's dealings could be solely with the broker, and he might not know that the lower price which he receives represents

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71 This of course assumes that the F.T.C. will not follow the dictum of the Broch case.
72 15 U.S.C.A. § 13 (f) (Supp. 1959) states: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."
73 363 U.S. at 187.
74 See Main Fish Co., Inc., 53 F.T.C. 88 (1956).
75 See F.T.C. Petition for Cert. (St. Ct.) pp. 6-7.
a passing on to him of part of the commission of the seller's broker. If the broker is not within the section, the enforcement of the section's mandate against the buyer only would be, on such facts, an entirely ineffectual method of administering the Brokerage Clause. In addition, the critical importance of this decision in the administration of section 2(c) is shown by the number of cease and desist orders issued in proceedings instituted after the instant case in which seller's brokers have been charged with violating the section.

While industry often absorbs the impact of a court decision on business regulation in ways not quite foreseen, it would appear that the flexible standard adopted by the court places brokers, sellers, and buyers in a position where they must reduce brokerage charges at their own risk. "Caveat actor," might be the only advice that legal counsel can give brokers desirous of reducing their contracted commission rate in order to make a sale. If the parties to the particular transaction guess wrong and the FTC can show the reduction was uninfluenced by any other factors, the parties are exposed to a cease and desist order. But assuming no other factors, it might be necessary for a broker to reduce his brokerage in order to compete successfully with fellow brokers.

If the buyer is aware of the fact that the seller is cutting his commission, then it appears that § 2(f) would be applicable. See note 72 supra.

Representative cases include Puget Sound Brokerage Co., CCH TRADE REG. REP. 27,842 (Dkt. 7151, 1959); Parks Canning Co., CCH TRADE REG. REP. 27,825 (Dkt. 7200, 1959); Independent Salmon Canneries, Inc., CCH TRADE REG. REP. 27,907 (Dkt. 7201, 1959) and (Dkts. 7202, 7204, 7208 and 7249, 1959). For a discussion of these developments see Oppenheim, Selected Antitrust Developments in the Courts and the Federal Trade Commission During the Past Year, 15 A.B.A. ANTITRUST SECTION PROCEEDINGS 37, 128 (1959).

The following examples based on the facts of the principal case will illustrate why this is true: (1) Any other broker, who had never represented the seller before could have made the same sale as the one in the Broch case, for the seller in question, to the same buyer, at the same price, at a 3% or less commission, without being in violation of the Robinson-Patman Act's section 2(c); (2) Assuming the same facts as we have in the Broch case except that the respondent had agreed to and received 4% brokerage, instead of 3%, this would still be a violation on the part of respondent. Yet, just as obviously, it would not be a violation on the part of respondent's competitor, Tenser and Phipps, if they had made the same sale, for the same seller, to the same purchaser, for the same price, at the same 4% brokerage, because Tenser and Phipps had never received more than 4% brokerage.

It is doubtful whether a broker who has contracted for a high rate of commission can legally make a sale at all if the competitor broker has the same offer from the same buyer. If the broker with the high rate of commission cannot legally accept any brokerage less than what he has contracted for, without other market factors being present, then, all other factors being equal, a seller would naturally accept the order through a competitor broker because it contracted to pay the competitor broker a lower rate, which the broker with the high rate of commission refuses to accept for fear of violating section 2(c) of the Robinson-Patman Act. This would definitely inter-
Finally, no discussion of the impact of the Broch case would be complete without mention of the perplexing problem of reconciling the Court's decision with the "national antitrust policy" of removing artificial restraints upon free price competition. In *Automatic Canteen v. Federal Trade Commission*, the Supreme Court set aside a Robinson-Patman Act interpretation by the FTC which fostered "a price uniformity and a rigidity in open conflict with the purposes of other antitrust legislation." This problem troubled the dissenting justices in the Broch case and they concluded that if the conduct involved in this case constituted allowance in lieu of brokerage, "[T]hen all legitimate commission rates are frozen in destruction of competition and in actual violation of the antitrust laws." The Justices, in the majority opinion, reasoned that their decision did not establish an irrevocable floor under commission rates because the respondent was free to reduce his rates to all his buyers without violating section 2(c). This is not a very satisfactory answer to the policy problem or solution to the practical problem. Perhaps the best resolution of this conflict is the realization that the Supreme Court enforces a "hard competition" policy with respect to the Sherman Antitrust Act and has a "soft competition" philosophy with respect to the Robinson-Patman Act. The Court uses both these policies to curb the price machinations of manufacturers.

Professor Oppenheim, a leading authority, has expressed the opinion in several articles that Congress, in enacting the Robinson-Patman Act, gave birth to a statute which has a duality of objectives, only some of which 

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80 Id. at 63.
81 363 U.S. at 180. This was the dicta of the Seventh Circuit, 261 F.2d at 729. In argument before the Supreme Court, respondent emphasized this conflict (Brief for Respondent, pp. 1, 46-51) and interestingly the F.T.C. admitted (Brief for F.T.C., p. 26) that "the short-run effect of prohibiting Broch from passing on part of its brokerage to the buyer may be viewed as tending toward some 'price rigidity and uniformity.'" A noteworthy caveat on this point is contained in the F.T.C.'s petition (Petition for Cert. (S. Ct.) p. 12, n. 7). The Solicitor General advises that "in appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved."
82 363 U.S. at 176.
83 Compare United States v. Parke, Davis & Co., 362 U.S. 29 (1960), (a Sherman Act case) with Federal Trade Commission v. Anheuser-Busch, Inc., 361 U.S. 880 (1960) and the Broch case which are Robinson-Patman Act cases. These cases were all decided in the last term.
are susceptible to reconciliation with "the broader antitrust policies." He concludes that:

Despite its classification as one of the antitrust laws, Robinson-Patman is a mixture of a few antitrust standards with other standards designed predominantly to regulate the level of competition among individual competitors without proof of substantial impairment of market competition.84

CONCLUSION

Few will disagree that the Federal Trade Commission won an important victory when the Supreme Court approved the application of the Robinson-Patman Act's Brokerage Clause to seller's brokers. It remains to be seen, however, whether the FTC will be as diligent in policing seller's brokers as it has been in policing buyers and buyer's brokers.85 Viewing the enforcement of the Brokerage Clause as a whole, critics of the Robinson-Patman Act will no doubt point out that Henry Broch is but another small businessman to suffer from rigid brokerage clause enforcement, and that the Supreme Court's decision is another illustration that the Robinson-Patman Act's Brokerage Clause, which was designed to aid small businessmen and to hamper chain stores, is ironically being used as an instrument to destroy small businessmen.86


85 See Edwards, Twenty Years of the Robinson-Patman Act, 29 J. Bus. U. of Chi. 149, 151 (1956) where the former Chief Economist of the F.T.C. says: "The predominance of brokerage cases is probably due partly to the zeal of the National Association of Food Brokers in bringing violations of this section of the act to the commission's attention and partly to the comparative simplicity of a proceeding under this section of the statute."


TAX-FREE GIFTS VS. TAXABLE INCOME

The income tax is imposed on income which is derived essentially either from the labor and efforts of the taxpayer or from the use or disposition by him of capital.1 As used in the sixteenth amendment,2 the term "income" does not necessarily refer to all increases to one's wealth from any source derived. The statutes promulgated since the sixteenth amend-

1 Noel v. Parrott, 15 F.2d 669 (4th Cir. 1926).
2 U.S. CONST. amend. XVI.