

MEMORANDUM

To: Free University of Tbilisi, Constitutional Law Clinic
Professor Giorgi Chitidze

From: Alex Sheppard, Brock Baxter, Isaac LeBlanc, and Prof. Jeffrey Jackson,
Washburn University School of Law

Re: Power of Government-owned Monopolies and Free Enterprise

Date: March 9, 2017

QUESTION PRESENTED

Under the United States Constitution, what rules govern the ability of the United States Government to impose a monopoly on industries such as courier delivery?

INTRODUCTION

This memo addresses the nature and extent to which government monopolies are allowed by the United States Constitution. It examines the Constitution's commitment to free enterprise, allowable government monopolies, and restrictions on those monopolies. The short answer is that the Constitution allows the Federal Government to establish monopolies as necessary and proper to advance its enumerated powers, and where the object of the monopoly is a proper one for the government, and the establishment of a monopoly is necessary or helpful to achieve that object, the monopoly will be upheld against challenges that it interferes with free enterprise.

1. Commitment of the Constitution to Free Enterprise

Unlike the Constitution of Georgia, the United States Constitution does not explicitly contain a commitment to free enterprise. Nevertheless, many of the Framers were concerned with the dangers of monopolistic activity, and six states argued during ratification for the inclusion of a provision outlawing monopolies in the Constitution. *See, e.g.* Proposal of Massachusetts, February 6, 1788, in 2 *The Debates in the Several State Conventions of the*

Adoption of the Federal Constitution 177 (Jonathan Elliott ed., 1827), available at [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ed0024\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0024))). This anti-monopolistic tendency arose because of colonial discontent with monopolies granted by the English Crown. See Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution*, 36 Harv. J.L. & Pub. Pol’y 983, 989-1008 (2013) (chronicling the discontent with monopolistic practices in England and the early colonies).

2. Allowable Government Monopolies

Notwithstanding this bias against monopolies, the Federal Government has a recognized power to create monopolies in limited situations where the activity is a proper matter for Federal regulation and such regulation is necessary to meet the government’s aims and objectives. Although the Federal Government is one of limited powers, it has the powers enumerated, as well as the ability to enact laws “necessary and proper” to the exercise of those powers. U.S. Const. art. I, § 8, cl. 18. Where the Government passes such laws, the test is whether the law constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. *United States v. Comstock*, 560 U.S. 126, 134 (2010). If this is true, and the law does not otherwise violate the Constitution, it will be upheld. *Id.*

An example of an allowable monopoly is the United States Postal Service’s monopoly over letter mail delivery. The United States Constitution gives Congress the power “to establish post offices and post roads.” U.S. Const. art. I, § 8, cl. 7. This enumerated power serves as the base authority for the establishment of a monopolized national courier delivery system in the United States. *Ex Parte Jackson*, 96 U.S. 727, 732 (1878). The United States Post Office’s monopoly in the delivery of letter mail is justified by its need to deliver mail on a national scale

under uniform rates, even to remote areas where delivery carries a higher cost. Without the revenue protection afforded by a monopoly, the fear is that private competitors will offer cheaper delivery prices on routes where the delivery cost is lower and delivery is profitable, thus leaving the United States Postal Service with only the higher-cost deliveries and unprofitable routes. *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 519 (1991). This in turn would impair the ability of the United States Post Office to meet its nation-wide obligations and result in greater taxpayer expense.

To date, Congress has exercised this monopoly right through the creation of the Private Express Statutes. 18 U.S.C. §§ 1693-1699; 39 U.S.C. §§ 601-606. Although the United States Supreme Court has not spoken on the issue, every lower court to consider it has upheld these statutes against constitutional challenges, including challenges arguing that the monopoly unconstitutionally burdens the right of free enterprise. *See Blackham v. Gresham*, 16 F. 609, 612 (S.D.N.Y. 1883); *Williams v. Wells Fargo & Co. Express*, 177 F. 352, 358 (8th Cir. 1910); *Nat'l Ass'n of Letter Carriers v. Indep. Postal Sys.*, 470 F.2d 265, 270 (10th Cir. 1972); *United States v. Black*, 569 F.2d 1111, 1112 (10th Cir. 1978); *United States Postal Serv. v. Brennan*, 574 F.2d 712, 714-15 (2nd Cir. 1978). In rejecting the argument that the monopoly violated free enterprise, the *Blackham* court stated that the monopoly was necessary because:

If private agencies can be established, the income of the government may be so reduced that economy might demand a discontinuance of the system; and thus the business which it is the right and duty of the government to conduct for the interest of all, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for their profits to exclude localities and classes from the benefit of the service.

16 F. at 612.

Thus, the United States Constitution allows government monopolies in situations where the monopoly is necessary to meet a proper object of the government, such as the establishment and maintenance of the mail system for the public good, and where allowing competition would compromise that system.

3. Limitations on Government Monopoly

There do not appear to be limits on government-owned monopolies, except that the monopoly must be thought to be necessary to the purpose and the purpose is a proper object for the government. The United States Postal Service's monopoly extends only to letter mail and packets, and does not extend to other packages. There is at least some authority for the proposition that the monopoly *could not* extend beyond letter mail. In *Jackson*, the United States Supreme Court noted that “[t]o give efficiency to its regulations and prevent rival postal systems, [the Government] may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend.” 96 U.S. at 735. However, this seems to be a commentary on the extent of the grant of power to the Federal Government under Article I. § 8 of the Constitution rather than a limitation on the extent of government monopolies in general.

CONCLUSION

While government-created monopolies are not favored under the United States Constitution, they are allowed where they further proper governmental objectives. Where the

creation of a government monopoly is necessary and proper to further a legitimate aim of government, it will be upheld against a challenge that it burdens free enterprise.