October 1981

Determining Federal Instrumentality Immunity under the Robinson-Patman Act

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DETERMINING FEDERAL INSTRUMENTALITY IMMUNITY UNDER THE ROBINSON-PATMAN ACT

Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co., Inc.
632 F.2d 680 (7th Cir. 1980)

Since its enactment in 1936 as an amendment to the Clayton Act, the Robinson-Patman Act has been the subject of controversy. Basically, the Robinson-Patman Act prohibits any person engaged in commerce from charging different prices to two different purchasers for commodities of like grade and quality when this price discrimination has certain adverse effects on commerce. The intended purpose of this antitrust regulation was protection of small businesses from the wholesale purchasing power of large chain store retailers. It was primarily a response to the threat the large grocery chain stores posed to the independent grocers.

Shortly after passage of the Act, the United States Attorney General issued an opinion proclaiming that sales to the federal government were not governed by the Act's proscriptions because the federal government was not a "purchaser" within the meaning of the Act. The legislative history of the Act also indicates that Congress did not intend it to cover the federal government as a "purchaser." In the last forty-five years, only a few courts have discussed this issue, and no

2. 15 U.S.C. §§ 13, 13b, 21a (1976) [hereinafter occasionally referred to as the Act].
4. The Act prohibits price discrimination which may have the following adverse effects on commerce: [1] substantially lessen competition, or [2] tend to create a monopoly in any line of commerce, or [3] 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. These adverse effects on commerce as well as the prohibition against price discrimination are found in section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976).
5. See Rowe, supra note 3, at 19-23.
8. See text accompanying notes 42-45 infra.
9. Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9 (S.D. N.Y.), aff'd per curiam, 234 F.2d 959 (2d Cir. 1955) (doubtful whether the Act applies to whiskey sales to state liquor commis-
court has expressly held that purchases made by federal government agencies or instrumentalities are exempt from the Act.

In Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co., Inc.,¹⁰ the United States Court of Appeals for the Seventh Circuit was faced with the issue of whether the secretaries of the Army and Air Force Exchange Service¹¹ were immune from liability under the Act.¹² However, to resolve this issue, the Seventh Circuit first had to determine whether AAFES was a "purchaser" within the meaning of the Act. The majority found that AAFES was a federal instrumentality entitled to an implied statutory exemption¹³ and held that the secretaries were accordingly immune from liability.

After a brief description of the organization and purpose of AAFES, this comment will summarize briefly the legislative history of the Act and then present two defenses to a cause of action under the Act—sovereign immunity¹⁴ and the Parker v. Brown state action doctrine.¹⁵ The Seventh Circuit's decision in Champaign-Urbana News Agency, Inc., including the dissenting opinion, will then be reviewed and analyzed. It will be shown that the majority properly concluded that AAFES was entitled to an implied statutory exemption from the Act. Finally, the impact of the Champaign-Urbana News Agency, Inc. decision on government purchases in general will be discussed and a legislative solution to the issues raised by the case will be considered.

**AAFES**

The Army and Air Force Exchange Service is an organization

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¹⁰ 632 F.2d 680 (7th Cir. 1980).
¹¹ Hereinafter referred to in text and footnotes as AAFES. AAFES purchases goods from wholesalers and resells these goods primarily to military personnel. The commercial operations of AAFES are somewhat similar to those of a private retail chain store, but there are major differences. For example, sales are restricted to military personnel, profits generated support Army and Air Force welfare programs and prices are set as low as possible. *Id.* at 684.
¹² The Seventh Circuit also addressed the issue of whether the "law of the case" doctrine was applicable. *See* note 98 *infra*.
¹³ *See* text accompanying notes 97-133 *infra*.
¹⁴ Champaign-Urbana News Agency did not sue AAFES directly, but sued the secretaries of AAFES instead. The trial court had found that the secretaries were immune from suit on the basis of sovereign immunity. Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co., 479 F. Supp. 281, 288 (C.D. Ill. 1979).
¹⁵ The dissenting opinion relied on this doctrine to support a finding of liability on the part of the secretaries. *See* text accompanying notes 134-58 *infra*. 

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under the joint command of the Army and Air Force comprising approximately 3,000 retail chain stores and 10,000 other types of facilities found mainly on military bases. These stores are commonly referred to as base gardens or post exchanges (PX). AAFES is an instrumentality of the federal government and its major function is supplying military personnel with food and other amenities at prices lower than those found at non-military retail stores.

As a non-appropriated fund activity, AAFES is entirely self-supporting. Congress does not and need not appropriate tax dollars to support its operation. In fact, of all retail operations in 1969, AAFES ranked third in the nation in total sales (over $3.5 billion) behind only Sears, Roebuck and Co. and J. C. Penney Co. The profits generated from AAFES operations support Army and Air Force welfare and recreational programs.

THE ROBINSON-PATMAN ACT

At the turn of the twentieth century, the conventional American business distribution channel was manufacturer-wholesaler-retailer. In the 1920s, however, large retail chain stores began utilizing their large cash reserves, storage facilities and marketing techniques to purchase greater quantities of goods and bargain for reduced prices from wholesalers. Some of the chains simply bypassed wholesalers altogether and dealt directly with manufacturers. This enabled chain retailers to reduce the prices of their goods and attract a larger share of the consumer market. As a result, wholesalers and small business re-

16. 632 F.2d at 683. These facilities include auto repair, customer service, vending facilities and movie theatres.
17. Both the majority and dissent agreed that AAFES is a federal instrumentality. Id. at 688, 693. See Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942) where the Court concluded that post exchanges are "arms of the government deemed by it essential for the performance of government functions." Id. at 485. Plaintiff, however, argued that AAFES was "in reality a business enterprise" and therefore not entitled to any governmental immunity. 632 F.2d at 687.
18. Id. at 684.
19. Id. at 686.
20. Id. at 683-84. 10 U.S.C. § 4779(c) (1976) provides in pertinent part:
No money appropriated for the support of the Army may be spent for post gardens or Army Exchanges.
21. 632 F.2d at 683.
22. Id. at 685.
23. See Rowe, supra note 3, at 3.
24. Id. at 4-5.
25. Id. at 4.
26. Id. at 4-6.
tailors banded together to pressure Congress into enacting legislation to protect their existence from the chain store threat. Congress responded in 1936 by amending section 2 of the Clayton Act with the Robinson-Patman Act.

Section 2(a) of the Robinson-Patman Act specifically prohibits any person engaged in commerce from charging different prices to two different purchasers for commodities of like grade and quality when this price discrimination has certain adverse effects on commerce. Section 2(c) forbids receipt of, payment of or price discounts for brokerage commission when no brokerage services were rendered. Section 2(f) prohibits conscious inducement or receipt of a discriminatory price.

The Act, however, was not intended to curb all price differentials for it provides certain statutory defenses including a "meeting competition" defense. If a wholesaler's largest customer requests that the wholesaler meet a tempting lower price offered by one of the wholesaler's competitors, the wholesaler, in good faith, can meet the lower price without also having to lower his price to his other customers.

27. Id. at 8-11.
30. 15 U.S.C. § 13(a) (1976) provides in relevant part:
   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 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.
31. 15 U.S.C. § 13(c) (1976) 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.
32. 15 U.S.C. § 13(f) (1976). This section provides:
   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.
34. Standard Oil Co. v. FTC, 340 U.S. 231, 249-51 (1951). The court acknowledged this could be "a matter of business survival." Id. at 249.
Section 2(b)\(^35\) of the Act provides a complete defense to a charge of price discrimination when a price differential is made in good faith to meet a lawful and equally low price of a competitor. The Act also allows price differentials to certain institutions through an express exemption for "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit."\(^36\)

Although there is no express exemption in the Act for federal government purchases, there are indications in the legislative history that the Act may not be applicable to the federal government. The congressional purpose behind passage of the Act was to protect small business retailers and wholesalers from the power of competing larger chain stores.\(^37\) Since federal government agencies would rarely compete with private concerns in the market place, small retailer/wholesaler protection under the Act from federal government agencies would appear to be unnecessary.

Adding further support to the notion that the Act does not apply to the federal government, the Attorney General proclaimed, in a 1936 opinion,\(^38\) that federal government purchases are exempt from the Act, because the federal government is not considered a "purchaser" within the meaning of the Act.\(^39\) The Attorney General relied upon the principle that government rights are not restricted by a statute unless the statute expressly so provides.\(^40\) A few district courts have relied on the Attorney General's opinion and have indicated that government procurement is outside the scope of the Act.\(^41\)

In 1951\(^42\) and 1953\(^43\) legislation was introduced that sought to bring sales to the federal government within the scope of the Act. Two

\(^{35}\) 15 U.S.C. § 13(b) (1976) provides in pertinent part:

Upon proof being made . . . that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case . . . shall be upon the person charged with a violation of this section . . . . Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.


\(^{37}\) See Rowe, supra note 3, at 19-23.


\(^{39}\) See generally Rowe, supra note 3, at 83-84.


\(^{41}\) See note 9 supra.


similar bills were again introduced in 1959 and 1961 that would have brought purchases by federal non-appropriated fund activities within the Act's coverage. However, none of these bills was ever reported out of committee. Thus, there is strong evidence in the legislative history of the Act that it was not intended to apply to government purchases.

Government Defenses To An Action Brought Under The Robinson-Patman Act

Sovereign Immunity

Sovereign immunity is a long recognized common law doctrine which precludes suits against the United States government without its statutory consent. In essence, sovereign immunity bars a court from exercising jurisdiction over the government. However, when a suit names government officials or agents as defendants, the court must first determine if the suit is against the defendant individually or is, in reality, against the sovereign.

The Supreme Court enunciated a test to make this determination in *Dugan v. Rank*. In *Dugan*, the Court reasoned that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting or compel it to act. *Dugan* involved an action brought by riparian owners to enjoin officials of the United States Bureau of Reclamation from storing and impeding the natural flow of water at a federal dam. Under the circumstances of this case, an injunction would have interfered with the public administration of the reclamation project by requiring the United States to dispose of valuable irrigation water. This would have required the expenditure of public funds and also

46. For a review of the historical origins of the sovereign immunity doctrine, see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 197-231 (1965); Borchard, Government Responsibility in Tort, 36 YALE L.J. 1, 17-41 (1926).
50. In formulating this rule, the Court had combined principles from its previous sovereign immunity cases, specifically *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Land v. Dollar*, 330 U.S. 731 (1947).
51. 372 U.S. at 610.
52. Id. at 621.
would have deprived the United States of its full use and control of the reclamation facilities. From these facts, the Court concluded that since the United States had not consented to the suit, the suit was barred by the doctrine of sovereign immunity.

Sovereign immunity is not a jurisdictional bar, however, when the official’s actions are beyond his statutory powers. In addition, even if the actions are within the scope of the official’s authority, sovereign immunity is inoperative if the powers themselves or the manner in which they are exercised are unconstitutional.

**PARKER v. BROWN:**
**The State Action Exemption**

The second possible defense to a cause of action under the Act is the *Parker v. Brown* state action exemption. In *Parker*, the State of California had adopted, under the California Agricultural Prorate Act, a raisin marketing program which restricted competition among raisin growers in order to maintain and stabilize market price levels and raisin supplies. The plaintiff, a raisin grower and packer, brought an action to enjoin the state-appointed officials from enforcing the program. He claimed, *inter alia*, that the state’s program violated the Sherman Act.

53. Id
54. Id. The Court found that even though the suit was brought against the Bureau of Reclamation officials, the relief granted actually operated against the United States.
57. 317 U.S. 341 (1943).
58. Although generally known as the *Parker v. Brown* state action doctrine, the phrase *Parker* state action exemption will sometimes be used to refer to the effect that the *Parker* decision has had on the antitrust laws.
59. See 317 U.S. at 344 n.1.
60. The plaintiff also claimed that the raisin marketing program adopted under the California Agricultural Prorate Act was invalid under the Agricultural Marketing Agreement Act of 1937 because the federal statute preempted the California Act, *id.* at 352-58. The plaintiff further claimed that the program was invalid under the commerce clause of the Constitution because it illegally regulated interstate commerce. *Id.* at 359-68.
61. The plaintiff claimed the defendant violated section 1 of the Sherman Act, 15 U.S.C. § 1
The Court in *Parker* reviewed the legislative history of the Sherman Act and found that Congress, in enacting the Sherman Act, did not intend "to restrain a state or its officers or agents from activities directed by its legislature." The Court then concluded that an unexpressed congressional intent to restrain state activity could not be inferred from the Sherman Act since the states are sovereign and only Congress can constitutionally subtract from their authority. In essence, the Court, as a matter of comity and based upon notions of federalism, concluded that the Sherman Act does not preempt state-directed anticompetitive activity.

Since *Parker*, the lower federal courts have frequently utilized the *Parker* state action doctrine in scrutinizing state anticompetitive activity under the federal antitrust laws. Recent Supreme Court deci-
sions, though, have refused to exempt certain state participation in anticompetitive activity. The Court has announced that the anticompetitive activity must be "required," "compelled," or "affirmatively expressed and supervised" by the state, or "pursuant to state policy to displace competition with regulation or monopoly public service," before the state action exemption will confer immunity.

The first case rejecting the Parker exemption was Goldfarb v. Virginia State Bar. In Goldfarb, the plaintiff sought monetary and injunctive relief under the Sherman Act for a price fixing scheme (minimum fee schedule) established by a private county bar association. Every lawyer in the county adhered to this minimum fee schedule because of the prompting of the state bar. The Court, citing Parker, stated that the threshold inquiry in determining federal antitrust law exemption for state anticompetitive activity was whether the activity was required by the state acting as sovereign. Since the State of Virginia had not required or compelled the establishment of minimum fee schedules, the Court rejected the county bar's argument that its anticompetitive conduct had been prompted by state action. The Court also rejected the Virginia bar's argument that it was a state agency entitled to sovereign immunity by indicating that the Virginia bar had exceeded its authority by joining in what was essentially private anticompetitive activity. Goldfarb thus established that a state instrumentality's anticompetitive activity must represent a legitimate state interest to be shielded by the Parker state action exemption.

The second rejection of the Parker state action exemption came in Cantor v. Detroit Edison Co. In Cantor, a drugstore owner brought a Sherman Act antitrust action against an electric utility for the utility's illegal tie-in program (exchanging free light bulbs for burnt-out ones as part of its electric service). The light bulb program was optional, but once chosen it was subject to the approval of the state regulatory commission. However, since the state had not required the program, the

67. Id. at 791.
70. 421 U.S. 773 (1975).
71. Id. at 790.
72. Id. at 791.
73. Id. at 791-92.
Court indicated that it was fair to extend antitrust liability to the private party defendant who initiated it. The Court also concluded that imposition of liability under these circumstances would not frustrate any state regulatory interest. Under Cantor, therefore, not only is a legitimate state interest required for Parker exemption, but the activity also must be carried out by an instrumentality closely identified with the state.

The Court further restricted use of the Parker exemption in City of Lafayette v. Louisiana Power & Light Co. In City of Lafayette, two cities which owned and operated electric utility systems brought a Sherman Act antitrust action against a privately-owned utility claiming that the defendant conspired to restrain trade and monopolize electric power. The private company defendant counterclaimed that the cities conspired to restrain trade by engaging in sham litigation against the company to prevent construction of its nuclear generating power plant. The Court refused to extend the Parker state action exemption to the cities, concluding that the Parker state action doctrine exempted anticompetitive conduct engaged in as an act of government by the state as sovereign or by its subdivisions only when it was “pursuant to state policy to displace competition with regulation or monopoly public service.” The Court concluded that when the anticompetitive activity is not directed or authorized by the state itself, the state subdivisions must obey the antitrust laws. City of Lafayette, therefore, requires the state, acting as sovereign, to impose or command the anticompetitive activity before it will be shielded by a Parker state action exemption.

The most recent Supreme Court pronouncement on Parker state action is found in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., where a wholesale wine distributor sought an injunction against California’s wine pricing program, claiming it constituted resale price maintenance in violation of the Sherman Act. In determining whether the Parker state action doctrine immunized the state’s program, the Court indicated that Parker and its progeny have established two standards for antitrust exemption: “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the state it-

75. Id. at 594-95.
76. Id. at 596.
78. Id. at 413.
79. Id. at 416.
self." Since the resale price levels in *California Retail Liquor Dealers Association* were established by private wholesalers and the state's role was merely enforcement, the program failed to meet the second requirement for *Parker* exemption. Without adequate state supervision, this program was essentially a private price-fixing arrangement and the defendant was, therefore, subject to liability under the Sherman Act.  

Although one commentator has said that the *Parker* progeny have left "both the bench and the bar awash in uncharted waters without even a buoy, much less a beacon, to guide them," one can still glean from these cases that the likelihood of invocation of the *Parker* state action exemption from antitrust liability is enhanced when the anticompetitive activity is imposed or affirmatively commanded by the state as sovereign; is subject to state review or enforcement; represents a significant state interest; and is carried out by the state or by an instrumentality closely identified with the state.

**CHAMPAIGN-URBANA NEWS AGENCY, INC. v. J. L. CUMMINS NEWS CO., INC.**

**Facts and Procedural History**

Champaign-Urbana News Agency, Inc. held the AAFES wholesale account for books and magazines at the Chanute Air Force Base in Illinois from 1953 until 1975. Then, in 1976, AAFES switched wholesalers and awarded the contract to J. L. Cummins News Co., Inc. after soliciting bids for that year. Cummins had underbid CU by offering AAFES a five percent prompt payment discount which had not been offered to any other Cummins customers.

CU brought suit against Cummins and the secretaries of the Army and Air Force in their representative capacities, alleging price discrimination, a violation of section 2(a) of the Robinson-Patman Act. This section prohibits any person engaged in commerce from charging different prices to two different purchasers for commodities of like grade

81. *Id.* at 105.
82. *Id.* at 105-06.
88. Hereinafter referred to in the text and footnotes as CU.
89. Hereinafter referred to in the text and footnotes as Cummins.
90. 15 U.S.C. § 13(a) (1976). This section is set forth in relevant part in note 30 *supra.*
and quality when this price discrimination has certain adverse effects on commerce. In Count I of its complaint, CU sought treble damages of $90,000, costs and injunctive relief against Cummins.\textsuperscript{91} Count II sought a declaratory judgment pursuant to 28 U.S.C. § 2201\textsuperscript{92} to determine whether the Act applied to sales to AAFES. Count III sought injunctive relief and damages against the secretaries for knowingly inducing and accepting from Cummins a discriminatory price, a violation of section 2(f)\textsuperscript{93} of the Robinson-Patman Act. The defendants subsequently moved to dismiss the action, claiming that the Robinson-Patman Act does not restrict the sovereign federal government.

The district court in granting the motions to dismiss, concluded that AAFES, as an arm of the United States government, enjoys sovereign immunity from the Act;\textsuperscript{94} this sovereign immunity extends to the secretaries.\textsuperscript{95} The court also found that, since the Act was not intended to apply to government purchases, a seller to the government such as Cummins could not be liable.\textsuperscript{96} CU then appealed.

\textit{The Majority Opinion}

On appeal, the primary issue was whether the secretaries could be held liable for AAFES purchases which violated the Act. The Seventh Circuit also had to decide whether a private vendor who discriminates on the basis of price in favor of a federal instrumentality was liable under the Act.

To establish that AAFES is a part of the government, the majority began\textsuperscript{97} by reviewing the governmental organization, the purposes and

\textsuperscript{91} 632 F.2d at 681-82.
\textsuperscript{92} 28 U.S.C. § 2201 (1976) provides:
In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
\textsuperscript{93} 15 U.S.C. § 13(f) (1976) provides:
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.
\textsuperscript{95} \textit{Id.} at 288.
\textsuperscript{96} \textit{Id.} at 291.
\textsuperscript{97} The court first addressed the initial issue involving the "law of the case." The first trial judge, Judge Wise, had rejected the defendants' motions to dismiss; he subsequently went on senior status. CU meanwhile had amended its complaint, adding a third count, and the defendants renewed their motions to dismiss before a second trial judge, Judge Baker, who granted the motions. The Seventh Circuit first stated that the "law of the case" was not entitled to the same deference as \textit{stare decisis}, and then concluded that the restraint on a second judge was one of
the congressional recognition of AAFES. The court then set out some fundamental principles of sovereign immunity: that the United States cannot be sued without its specific statutory consent; that no government officer by his action can confer jurisdiction otherwise lacking; and that waiver of sovereign immunity of the United States must be unequivocally expressed by Congress. The court emphasized that a court may not waive sovereign immunity.

Utilizing these principles, the majority stated that only Congress could create a cause of action against AAFES if it is a part of the executive branch of government and that neither the secretaries nor any other AAFES officers could, by their own internal regulations, subject AAFES to antitrust liability. The court then pointed out that Congress had considered the issue but had not specifically made AAFES subject to the antitrust laws.

The Seventh Circuit then addressed the parties' conflicting interpretations of AAFES' purchasing policy. CU had argued that AAFES regulations required AAFES' contracting officers to adhere to the antitrust laws. In rebuttal, the secretaries argued that Army and Air Force regulations required AAFES to purchase at the lowest possible price. The majority, in attempting to reconcile these conflicting policy interpretations, looked to the fact that the antitrust laws themselves are not in perfect harmony and then concluded that if AAFES is immune from the antitrust laws, AAFES officials cannot waive this immunity through internal regulations.
The majority then presented its two major premises supporting its conclusion that AAFES is entitled to immunity from the Act. The first premise was based on the reasoning of *Standard Oil of California v. Johnson*. The Supreme Court in *Johnson* pointed out that Congress had frequently recognized post exchange activity as governmental in that the object of the exchanges was to provide convenient and reliable sources where military personnel could obtain their ordinary needs at the lowest possible prices. The Court concluded that post exchanges are "integral parts of the War Department, [which] share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes."

The Seventh Circuit found *Johnson*’s broad language indicating that post exchanges perform governmental functions and partake of governmental immunities persuasive in establishing that AAFES activities were governmental. This interpretation of *Johnson* has been followed by a large number of courts.

The majority’s second major premise establishing that AAFES is entitled to immunity was based on House and Senate bills which had sought to amend the Act to include sales to non-appropriated fund activities. These bills, under heavy opposition, were never reported out of committee. The majority reasoned from this and the *Johnson* decision that Congress had never intended to subject AAFES to liability under the Act.

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108. *Id.* at 484-85.
109. *Id.* at 485.
111. *See* text accompanying notes 42-45 supra.
112. 632 F.2d at 688-89. The court listed numerous individuals within the executive branch who had strongly opposed passage of amendments to the Act seeking to include AAFES as a purchaser. Among those listed were United States Attorney General Rodgers who interpreted a 1955 bill as being aimed primarily at AAFES; the administrator of the Small Business Administration who opposed enactment of the 1955 bill, noting in a letter the importance of AAFES to military morale; the Secretary of the Air Force who set forth in a letter the purpose of AAFES, indicating that extension of the Act to AAFES would, in itself, be discriminatory because the exchanges do not substantially compete with private business; in a letter to the House Judiciary Committee the Secretary of Commerce opposed similar legislation, stating that the basic purpose of the Act was to eliminate unfair competition among private entrepreneurs and that inclusion of the federal government was inappropriate. Similar legislation was opposed by the Federal Trade Commission in 1959. *Id.*
113. *Id.* at 689.
The majority also pointed out that AAFES was not the type of price discriminator which the Act was meant to deter.\textsuperscript{114} The purpose of the Act was to protect small businesses from the power of the larger competing chain stores. AAFES, however, does not compete in the market place and, therefore, does not present the same concerns of unfair competition and price discrimination that exist between private merchants.

The majority then summarily reviewed, distinguished and found inapposite the cases relied on by CU. In the first of these cases, \textit{Paul v. United States},\textsuperscript{115} the United States had brought an action to determine if California's minimum wholesale price regulation of milk could be enforced against both consumption on military installations and resale at commissaries and exchanges (AAFES). The Court in \textit{Paul} made a distinction between purchases of milk with funds appropriated to the military by Congress and purchases made with non-appropriated funds (profits from AAFES). The Court found that Congress, through the Armed Services Procurement Act,\textsuperscript{116} had preempted\textsuperscript{117} state economic regulation of purchases by the military with appropriated funds, but found no conflicting federal policy restricting non-appropriated fund purchases.\textsuperscript{118} The Supreme Court concluded that state economic regulations would be applicable to the non-appropriated fund purchases (AAFES) if the state regulations were already in effect when the government acquired the land.\textsuperscript{119} The Seventh Circuit, however, distinguished \textit{Paul} by pointing out that in \textit{Champaign-Urbana News Agency, Inc.} there was no issue as to whether the United States acquired military land from a state encumbered with state regulations.\textsuperscript{120}

The majority next distinguished the \textit{Parker} state action cases\textsuperscript{121} by indicating that they all involved different issues and government bodies other than the federal government.\textsuperscript{122} The court also distinguished

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} 371 U.S. 245 (1963).
  \item \textsuperscript{116} 10 U.S.C. § 2305 (1976).
  \item \textsuperscript{117} The Court in \textit{Paul} used the term "exclusive jurisdiction" to indicate that Congress had intended (through the Armed Services Procurement Act) to occupy the entire field of purchases by the military when appropriated funds were used. 371 U.S. at 269.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id. at 269-70. The Court remanded the case on this issue.
  \item \textsuperscript{120} 632 F.2d at 691.
  \item \textsuperscript{122} 632 F.2d at 691.
\end{itemize}
Hecht v. Pro-Football, Inc., in which three entrepreneurs who attempted to start a football franchise in Washington, D.C. brought suit against the District of Columbia Armory Board, a federal instrumentality, alleging that the board entered into a contract in restraint of trade in violation of sections 1, 2 and 3 of the Sherman Act. The facts showed that Congress had created the armory board to construct, maintain and operate a sports stadium for the enjoyment of the people of the District of Columbia. The armory board subsequently entered into a thirty-year exclusive lease of the stadium with the Washington Redskins football team. The United States Court of Appeals for the District of Columbia held that, notwithstanding the governmental status of the armory board, the anticompetitive activity engaged in was not sanctioned by Congress and was therefore subject to federal antitrust scrutiny. The Seventh Circuit, however, found Hecht to be too factually remote to be controlling.

The court also distinguished cases relied on by CU for the proposition that implied antitrust immunity is disfavored. These cases all involved industries subject to federal regulatory commissions and raised issues of implied exemption from antitrust liability based on congressional regulatory statutes. Since there was no congressional regulatory statute or federal regulatory commission governing AAFES, the court found these cases inapposite.

Finally, the congressional enactments cited by CU to indicate a congressional awareness that AAFES was not synonymous with government were interpreted otherwise by the majority. These enact-

124. Id. at 947.
125. 632 F.2d at 691.
127. 632 F.2d at 692.
128. 5 U.S.C. § 8171 (1976) (special statutory treatment of civilian employees of non-appropriated fund instrumentalities disabled in the course of employment); 4 U.S.C. §§ 104-110 (state authorized to tax gasoline sold at exchanges); 31 U.S.C. § 724a (AAFES, not the United States, must pay any damages arising out of its contracts); 10 U.S.C. §§ 4779(c), 9779(c) (1976) (no money appropriated by Congress for the Army and Air Force shall be spent for exchanges).
129. 632 F.2d at 692.
ments, the court stated, merely indicated that Congress had the power to make special provisions applicable to AAFES operations and exercised that power as it deemed necessary. Thus, the Seventh Circuit concluded from its consideration of AAFES' purposes and operations, the legislative history of the Act, including the rejected amendments, and Standard Oil v. Johnson that AAFES was a government instrumentality entitled to immunity from the Act. This conclusion led to the holding that the secretaries also were immune. Since the secretaries were not held liable under the Act, the majority inferred that Cummins likewise could not be liable for antitrust violations. They reasoned that to hold otherwise would permit a collateral attack upon the grant of governmental immunity for the secretaries. In essence, if a private wholesaler could be held liable for sales to AAFES, then no wholesaler would price discriminate in favor of AAFES. Therefore, if Cummins were held liable, the recognition of government immunity for AAFES officials would be illusory.

The Dissenting Opinion

In his dissenting opinion, Judge Swygert agreed with the majority that AAFES is an instrumentality of the United States. However, he disagreed with both the district court's conclusion that AAFES enjoys sovereign immunity from the antitrust laws and the majority's conclusion that AAFES is entitled to immunity from the Robinson-Patman Act. He pointed out that the Parker v. Brown state action doctrine and its progeny have made it clear that "it is not every governmental

130. Id.
131. At the outset of its opinion, the majority said that it was necessary to examine the purposes and operations of AAFES because Judge Baker had premised his dismissal of the suit against the secretaries on the finding that AAFES was a part of the government. Id. at 683. The majority inferred here that if AAFES was found to be a part of the government then the secretaries were immune. Id. at 692.
132. Id. at 692-93.
133. The majority relied on Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212 (9th Cir.), cert. denied, 389 U.S. 898 (1967), which established the principle that if the purchaser were immune, then the seller also would be immune. In Logan Lanes, the owner of a private bowling alley brought an action for price discrimination against a bowling equipment manufacturer for selling equipment to a state university at a reduced price. The university could not be named as a defendant because the Act specifically exempts purchases of supplies for their own use by certain non-profit institutions such as universities. 15 U.S.C. § 13c (1976). The Logan court concluded that the manufacturer was also exempt from liability under the Act because the benefits of lower prices to exempt purchasers would be illusory if sellers were not free to offer lower prices under the Act. 378 F.2d at 215-16.
134. The district court's finding that AAFES enjoyed sovereign immunity would imply that AAFES is immune from the Sherman and Clayton Acts as well. See text accompanying notes 162-68 infra.
Judge Swygert first discussed *City of Lafayette v. Louisiana Power & Light Co.*, in which the Supreme Court refused to extend the *Parker* state action doctrine to the plaintiff cities which owned and operated electric utility systems on the basis that they performed a business rather than a governmental function. Judge Swygert pointed out that the Court had rejected the cities' contention that because their purpose was public service, not private profit, they should be granted a *Parker* state action exemption. In so doing, the Court had reasoned that every business enterprise, public or private, when operating its business in furtherance of its own goals, will undoubtedly have an impact upon other individuals and business enterprises and will sometimes interrelate with these other entities as competitors.

Judge Swygert found many similarities between *Champaign-Urbana News Agency, Inc.* and *City of Lafayette*. He noted that both AAFES and the cities were instrumentalities of government, but not themselves the sovereign; both were engaged in proprietary rather than governmental activities; and both of their operations had impact on other individuals and businesses. In addition, AAFES, like the cities, was not violating the antitrust laws "pursuant to a government policy to displace competition with regulation or monopoly public service." In fact, the AAFES procurement manual emphasized compliance with the antitrust laws.

Judge Swygert's response to the contradicting interpretations of AAFES' purchasing policies held by CU and the secretaries differed from that of the majority. He indicated that the more logical interpre-

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137. Plaintiffs were various cities that were organized under the laws of Louisiana. These laws granted them the power to own and operate electric utility systems both within and beyond their city limits. 435 U.S. at 391.

138. *Id.* at 393.

139. *Id.* at 403.

140. 632 F.2d at 693. A persuasive argument could be made that even though AAFES activities appear to be proprietary, its main purpose is to provide inexpensive supplies to military personnel and thereby enable the government to keep military salaries low. Keeping military salaries low would appear to be a purely governmental function and would certainly have an effect on the public treasury.

141. *Id.* at 694. It could be argued, however, that the goal of AAFES to provide inexpensive goods to military personnel is a federal mandate which conflicts with the Act. See text accompanying notes 172-77 infra.

142. 632 F.2d at 694.
tation was that the regulations required the lowest price contracting consistent with the antitrust laws. For this proposition, he relied on *Penn Dairies v. Milk Control Commission*, where the Court indicated that unless there was congressional policy to the contrary, immunity from state regulation was not to be inferred even though the government was required to contract with the lowest responsible bidder.

Judge Swygert then reviewed *Hecht v. Pro-Football, Inc.*, where the United States Court of Appeals for the District of Columbia had analyzed cases involving claims of state and federal government antitrust activity. The *Hecht* court found that the antitrust laws do not restrict anticompetitive activity directed by the United States government since the antitrust laws are not constitutional charters. The court in *Hecht* indicated, however, that the federal antitrust policies have been so firmly established that the proper inquiry is not which valid governmental action is immune from the antitrust laws, but rather to what extent Congress has adopted a policy contrary to, or inconsistent with, the antitrust laws. Since Judge Swygert found no federal policy displacing competition with regulation or monopoly public service, he concluded that AAFES should not enjoy immunity from antitrust liability, for to hold all valid government action immune would be "a much too talismanic approach where scrupulous distinctions are called for."

The court in *Hecht* further found that Congress had not intended to exempt the armory board from the antitrust laws because it was "in the nature of a private venture," and because some of its contracts required competitive bidding. Judge Swygert found similarity

143. Id.
144. 318 U.S. 261 (1943). *Penn Dairies* involved an action brought by the Pennsylvania Milk Control Commission to determine if the minimum state price regulation of milk could be applied to a dealer selling milk to the United States.
145. Id. at 275.
146. 444 F.2d 931 (D.C. Cir. 1971).
147. Id. at 935.
148. Id. The *Hecht* court laid out relevant criteria which would help determine whether Congress had adopted a policy contrary to or inconsistent with the antitrust laws: Relevant criteria would include the specific language of the congressional statute involved, any legislative history which would throw light on the congressional intent, the relative importance of the governmental action which is asserted to override antitrust policy, whether the governmental agency is required to take into consideration the possible anticompetitive effect of its actions, whether the agency is required to adhere to a clearly defined and restricted statutory directive, and to what extent the agency's actions are subject to judicial review.
149. Id. at 934.
150. Id. at 946.
151. Id. at 945.
between *Hecht* and *Champaign-Urbana News Agency, Inc.* and inferred from *Hecht*’s analysis of state and federal antitrust cases that the *Parker* state action doctrine was applicable to the federal government and its instrumentalities.\(^{152}\)

Rather than accept the majority’s distinction between *Paul v. United States*\(^ {153}\) and *Champaign-Urbana News Agency, Inc.*\(^ {154}\) Judge Swygert emphasized the significance of what the Supreme Court had determined in *Paul*—that no federal policy immunized a post exchange in its retail operations from compliance with state economic regulations.\(^ {155}\) Since the Court had not immunized AAFES from state economic regulations in *Paul*, Judge Swygert found it anomalous that the majority could immunize AAFES from federal economic regulations.\(^ {156}\) In sum, Judge Swygert relied on the *Parker* state action doctrine, *Hecht v. Pro-Football, Inc.*\(^ {157}\) and *Paul v. United States*\(^ {158}\) to conclude that not every governmental act is sheltered from the antitrust laws. Judge Swygert concluded that AAFES could engage in anticompetitive activity without antitrust liability only when Congress or a federal policy has expressly exempted its actions.

**ANALYSIS**

*Majority Opinion*

The district court had reasoned that AAFES, as an arm of the United States government, enjoys sovereign immunity from the Act. The Seventh Circuit, on the other hand, after a consideration of AAFES’ purposes and operations, concluded that AAFES is a government instrumentality entitled to immunity from the Act. Rather than finding that AAFES enjoys sovereign immunity, the Seventh Circuit’s language indicates another result.

The crucial distinction is that the majority indicated that AAFES was entitled to immunity rather than it enjoyed sovereign immunity. Immunity is defined as an exemption,\(^ {159}\) while sovereign immunity precludes a litigant from suing a sovereign or a party with sovereign attrib-

\(^{152}\) 632 F.2d at 694. It could be inferred from this conclusion that only anticompetitive activity directed and supervised by the federal government would be exempt from antitrust liability.


\(^{154}\) *See* text accompanying notes 115-19 *supra*.

\(^{155}\) Id 632 F.2d at 695.

\(^{156}\) Id. Judge Swygert then indicated that he would have remanded the case for trial on the AAFES immunity issue.

\(^{157}\) 444 F.2d 931 (D.C. Cir. 1971).


\(^{159}\) BLACK’S LAW DICTIONARY 676 (5th ed. 1979).
utes unless the sovereign consents to suit.160

To determine whether a party has sovereign attributes the *Dugan v. Rank*161 test is applied. Under the *Dugan* test, a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting or compel it to act.162

*Champaign-Urbana News Agency, Inc.* involved AAFES, which is a non-appropriated fund activity; therefore, judgments against it are not paid out of the public treasury, but are paid from AAFES' own profits.163 Moreover, a suit against AAFES does not involve interference with public administration because AAFES' sales are exclusively to military personnel and AAFES' purchases are from private vendors. Finally, although this suit might restrain AAFES from entering into future contracts which violate the antitrust laws, it realistically would not restrain AAFES from contracting164 for its supplies nor specifically compel it to act. Thus, the majority properly concluded that this suit was not against a party with sovereign attributes as those attributes are measured under the *Dugan* test.

Rather than analyzing this suit under the sovereign immunity doctrine, the Seventh Circuit resolved the issue of AAFES' liability by looking at the Act's legislative history and the purposes and operations of AAFES. The legislative history of the Act indicated that purchases by the government were not subject to its restrictions. The court's review of the purposes, operations and organization of AAFES enabled the court to classify AAFES as a federal government purchaser. From these two premises, the majority then inferred that AAFES as a government purchaser was entitled to an implied statutory exemption from the Act.

The court correctly concluded that AAFES was entitled to an implied statutory exemption rather than to sovereign immunity. First, a

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160. See text accompanying notes 46-56 *supra*.
162. See note 55 *supra*.
163. Although not addressed by either the Court or the parties, an argument could be made that AAFES' liability under the Act would expend itself, at least indirectly, on the public treasury. It could be advanced that in order to provide funds for possible antitrust litigation, AAFES would need to increase prices. These increased prices would, in effect, diminish the purchasing power of military personnel. In consequence, military salaries would have to be increased in order to restore to the military the same level of AAFES benefits and services. Since military salaries come from appropriated funds, the public treasury would be affected.
164. AAFES had contracted for supplies with CU for twenty-two years without violating or, at least, without being accused of violating the antitrust laws and could have continued to do so.
finding of an implied statutory exemption avoids the need to determine whether lower and more diverse governmental agencies (such as AAFES) enjoy sovereign immunity. Second, this implied exemption is limited to the Robinson-Patman Act, a single statute, whereas a finding that AAFES enjoys sovereign immunity would have had a wide-reaching effect. If sovereign, AAFES would then be immune from all governmental enactments including the Sherman and Clayton Acts unless Congress were to specify otherwise. By limiting its holding to an exemption from the Robinson-Patman Act, the court was able to avoid a determination of AAFES' sovereign immunity. Third, since there was already some legislative history indicating that government procurement was exempt, the court needed to show only that AAFES was a government operation rather than a private enterprise to conclude that AAFES is entitled to the exemption.

The majority's opinion, however, did not provide limits or guidelines for determining whether all government agencies or instrumentalities or only particular ones are immune from the Act. Whether other federal, state or municipal instrumentalities are subject to the Act's restrictions remains uncertain. At best, the majority developed a test to determine whether AAFES was exempt. The court's test indicates that before a government instrumentality is entitled to immunity or exemption from the Act, consideration must be given to the instrumentality's purposes and operations.

This test is similar to the test the Seventh Circuit previously utilized to determine whether a municipal park district was immune under the Parker state action doctrine. In Kurek v. Pleasure Driveway and Park District of Peoria, the city park district terminated the pro shop concessions of five professional golfers when the golfers refused to raise concession fees pursuant to the park district's conspiracy to fix retail prices. The Seventh Circuit found no state mandate for the city park district's anticompetitive activity and refused to extend Parker.

166. The Seventh Circuit determined that this case involved an issue of statutory interpretation rather than sovereign immunity. In so doing, the court did not have to apply the Dugan test.
167. The court scrutinized AAFES' purposes and operations before concluding that AAFES was entitled to immunity from the Act:

AAFES is obviously not just a big cut rate store operated by the government to make life difficult for civilian merchants. To try to separate AAFES from our military forces is to wholly ignore all its unique features distinguishing it from private enterprise . . . . AAFES is a very important and integral part of our military structure providing a much needed service to military personnel around the world.

632 F.2d 680, 692.
state action immunity.\textsuperscript{169} The court concluded that the park district was merely a subordinate unit of government \textit{not entitled to} all the deference accorded to the state itself.\textsuperscript{170} The court reasoned that "an adequate state mandate for anticompetitive activities of subordinate governmental units 'may be demonstrated by explicit language in state statutes, or \textit{may be inferred from the nature of the powers and duties given to a particular government entity}.’"\textsuperscript{171} Thus, in Kurek, the city park district was not entitled to immunity because an adequate state mandate allowing anticompetitive activity could not be inferred from the nature of the powers and duties given to it. The city park district had not been given the power to conspire to fix the concession prices.\textsuperscript{172}

Under a similar analysis applied to the federal government, AAFES would be \textit{entitled to immunity} because an adequate federal mandate allowing anticompetitive activity could be inferred from the nature of the purposes, operations, powers and duties given to AAFES by the federal government. The majority indicated that obtaining the lowest-priced goods furthered AAFES' purpose and duty of providing the military with low-priced merchandise and services.\textsuperscript{173}

Notwithstanding that Kurek involved the Parker state action doctrine, the majority in \textit{Champaign-Urbana News Agency, Inc.} apparently followed the same reasoning before extending immunity to AAFES. The majority correctly found a federal mandate permitting anticompetitive activity in its assessment of the purpose, organization, operation and importance of AAFES and in the treatment accorded AAFES by the legislative and executive branches.

Under the Parker state action doctrine, the presence of an adequate state mandate entitles the instrumentality, agency or program to an exemption from antitrust liability. Similarly, under \textit{Champaign-Urbana News Agency, Inc.}, finding an adequate federal mandate through a consideration of the government instrumentality's purposes and operations entitles the instrumentality to immunity from the Act.

\textbf{Dissenting Opinion}

The majority affirmed the district court's result, but for a different reason. This prompted Judge Swygert, in his partial dissent, to indicate specifically that he disagreed with the trial judge's conclusion that

\begin{itemize}
  \item \textsuperscript{169} \textit{557 F.2d} at 590.
  \item \textsuperscript{170} \textit{Id.} at 589.
  \item \textsuperscript{171} \textit{Id.} at 590 (citation omitted) (emphasis added).
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{632 F.2d} at 684.
\end{itemize}
AAFES enjoys sovereign immunity from the antitrust laws. In addition, Judge Swygert also disagreed with the result reached by the majority.

Judge Swygert's argument relied heavily on the Parker progeny and Hecht v. Pro-Football, Inc. These cases, however, involved violations of the Sherman Act, which restricts activities different from those governed by the Robinson-Patman Act. The basic purpose of the Sherman Act is to protect free competition by preventing incipient monopolization and preserving competition in the market place. The purpose of the Robinson-Patman Act, on the other hand, is to protect small merchants from the power of the larger chain retailers. Judge Swygert's dissent failed to discuss and establish the validity of using Sherman Act cases with respect to an issue of immunity from the Robinson-Patman Act. In fact, commentators have stressed the divergence of these two regulatory enactments. Judge Swygert's argument that AAFES is more like a private venture than a governmental instrumentality entitled to sovereign immunity would have been more persuasive had the majority concluded that AAFES enjoyed sovereign immunity, because AAFES' sovereign immunity would have also implied that AAFES was not subject to the Sherman Act. Indeed, a future action similar to Champaign-Urbana News Agency, Inc. claiming Sherman Act violations might circumvent the immunity bar by raising Judge Swygert's argument.

However, the majority concluded that AAFES is only entitled to an exemption from the Robinson-Patman Act. Thus, Champaign-Urbana News Agency, Inc. is not an attempt to shelter all government activity from the antitrust laws. Instead, it is merely a determination that AAFES, a unique and specialized federal instrumentality, is entitled to exemption from an antitrust law amendment which was intended to restrict the power of larger private chain retailers rather than AAFES-like government instrumentalities. It appears to be a logical conclusion, since AAFES is neither attempting to monopolize the retail market nor accepting price discrimination in order to lower its prices to drive smaller merchants out of business. The goal of AAFES is simply to purchase goods as cheaply as possible and pass this savings on to the

174. Id. at 693.
175. 444 F.2d 931 (D.C. Cir. 1971).
177. See text accompanying notes 137-52 supra.
government military personnel in the form of lower prices or increased welfare and recreational activities. Judge Swygert's dissent was misguided in its attempt to analogize AAFES' liability under the Robinson-Patman Act to that of other governmental agencies under the Sherman Act.

A Legislative Solution

The majority's test for government instrumentality exemption from the Act requires a case-by-case analysis to determine which instrumentalities are entitled to exemption. This unfortunately leaves other federal, state and municipal instrumentalities in a precarious position. If the purposes and operations of these instrumentalities are not sufficiently governmental to entitle them to exemption from the Act, they could be subject to treble damages actions. Before making purchases on behalf of their instrumentalities, government officials will be required either to flatly refuse vendor bids which offer tempting price discriminations or risk an antitrust action based on price discrimination brought by disappointed vendors.

A case-by-case determination of instrumentality liability or exemption not only places government procurement officials in a precarious position, but will also result in excessive litigation costs. Since the courts can rule only on the fact situations of cases brought before them, it would seem more prudent and expedient for the legislative branch to reexamine this area of the law and properly establish general limits to the Act's restrictions upon government instrumentalities.

One possible legislative solution would be a statutory exemption for government purchases similar to section 13c of the Act which exempts "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit." The legislature could commission a study to determine whether government instrumentality exemption would thwart the purposes of the Act. Those instrumentalities which would present price discrimination concerns similar to those found in the private competitive market could be specifically subjected to the Act's restrictions.

However, since it does not appear that government instrumentalities engage in price discrimination in order to threaten the existence of

179. Id.
small businesses, a general statutory exemption for government instrumentality purchases should be enacted. Not only would such an exemption relieve government procurement officials, the bench and the bar from the necessity of determining each instrumentality's purposes and operations, it would also enable the legislature to clarify whether government instrumentalities are immune only from the Act or whether they enjoy sovereign immunity from all federal antitrust laws.

CONCLUSION

In *Champaign-Urbana News Agency, Inc.*, the Seventh Circuit concluded that an Army and Air Force Exchange Service is entitled to immunity from the Robinson-Patman Act. The majority based its decision on *Standard Oil of California v. Johnson*, which indicated that post exchanges were government instrumentalities entitled to governmental immunities, and on the legislative history of the Act which indicated it was not applicable to government purchases.

In contrast, Judge Swygert's dissent found support for possible AAFES antitrust liability in the *Parker v. Brown* state action progeny, *Hecht v. Pro-Football, Inc.*, and *Paul v. United States*. From these cases, Judge Swygert found that not every governmental act would lead to antitrust immunity. He concluded that whether the commercial and proprietary activities of AAFES were entitled to any immunity from the Act was a determination best made at trial rather than as a matter of law.

The Seventh Circuit modified the district court's finding of sovereign immunity from the Robinson-Patman Act to an implied statutory exemption from the Act. In its analysis of the Act, the court found that Congress had expressly exempted purchases by certain non-profit institutions. It would appear that government purchases should also be expressly exempted since the government, like the exempt non-profit institutions, is not the type of price discriminator the Act was meant to restrict. Through an express exemption for government purchases, Congress could clarify the appropriate limits of antitrust liability of government instrumentalities and thereby relieve the courts from piece-meal, costly and possibly inconsistent holdings.

**Fred A. Smith**

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