We the People empowered the legislature to establish post offices[1], we did not give them the power to abolished the United States Post Office Department, incorporate and sell under the name United States Postal Service[2] but they did and never-the-less they must obey the law. The last lawful legislation that still stands is the 1863 Act of the Thirty-Seventh Congress (*see attached*) whereas the postal rate on all letters are 3¢ per half ounce. 18 USC CHAP 83 §1726[3] declares it fraud to demands any rate of postage other than is provided by law punishable by fine or imprisoned not more than six months, or both [*see attached*]; For history and more information read Postal Monopoly Laws (*see attached*)

EXAMPLE

"***NO ABBREVIATIONS***"

Unified New Jersey Common Law Grand Jury
1 Constitutional Drive; Box# 1776
Monroe, New Jersey [01789]

1st Class Statutory Rate; Non Domestic THIRTY-SEVENTH CONGRESS. SESS. III. CR. 11. SEC. 22. ... and be it further enacted that the rate of postage on all domestic letters transmitted in the mails of the United States, and not exceeding one half ounce in weight, **shall be uniform at three cents**; and for each half ounce, or fraction thereof of additional weight, **there shall be charged an additional rate of three cents**, to be in all cases prepaid by Prepayment, postage stamps plainly affixed to such letter.

18 USC §1726 – Whoever, being a postmaster or other person authorized to receive the postage of mail matter, fraudulently **demands or receives any rate of postage** or gratuity or reward **other than is provided by law for the postage** of such mail matter, **shall be fined** under this title **or imprisoned** not more than six months, or both.

POST-MASTERS WHO DISOBEY THE LAW WILL BE BROUGHT BEFORE THE GRAND JURY FOR PROSECUTION.

John Liberty
1215 Independent Avenue
Bronx, New York [01791]

Cost to mail **3 cents per ½ ounce**, add stamps accordingly.

20# paper weight costs as follows:

1-2 pgs = ½ oz = **3¢**	3-4 pgs = 1 oz = **6¢**	5-7 pgs = 1½ oz = **9¢**
8-10 pgs = 2 oz = **12¢**	11-13 pgs = 2½ oz = **15¢**	14-16 pgs = 3 oz = **18¢**

Up to 12 pages can fit into a #10 Envelope, be sure to press the creases as flat as possible

12-20 pages will require a 6"x9" Catalog Envelope anything larger will not qualify at the 3¢ rate

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[1] **United States Constitution Article I Section 8**. The Congress shall have power to establish post offices

[2] **Postal Reorganization Act of 1970**: United States Postal Regulatory Commission Agency overview Formed 1970; Headquarters 901 New York Avenue NW, NW Washington, D.C. Website - www.prc.gov; The United States Postal Regulatory Commission (or PRC), formerly called the Postal Rate Commission, is an independent regulatory agency created by the Postal Reorganization Act of 1970. Like the Postal Service, it was defined in law as an independent establishment of the executive branch. The Postal Reorganization Act of 1970 was a law passed by the United States Congress that abolished the then United States Post Office Department, which was a part of the cabinet, and created the United States Postal Service, a corporation-like independent agency with an official monopoly on the delivery of mail in the United States. Pub.L. 91–375 was signed into law by President Richard Nixon on August 12, 1970.[1]. The Postal Reorganization Act exempts the USPS from Freedom of Information Act (FOIA) disclosure of "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed".

[3] **18 USC CHAP 83 §1726. Postage collected unlawfully:** Whoever, being a postmaster or other person authorized to receive the postage of mail matter, fraudulently demands or receives any rate of postage or gratuity or reward other than is provided by law for the postage of such mail matter, shall be fined under this title or imprisoned not more than six months, or both. [see attached]

1st Class Statutory Rate; **Non Domestic** **THIRTY-SEVENTH CONGRESS. SESS. III. CR. 11. SEC. 22.** … and be it further enacted that the rate of postage on all domestic letters transmitted in the mails of the United States, and not exceeding one half ounce in weight, **shall be uniform at three cents**; and for each half ounce, or fraction thereof of additional weight, **there shall be charged an additional rate of three cents**, to be in all cases prepaid by Prepayment, postage stamps plainly affixed to such letter.

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vided into three classes, namely: first, letters; second, regular printed matter; third, miscellaneous matter.

First class. SEC. 20. *And be it further enacted*, That the first class embraces all correspondence, wholly or partly in writing, except that mentioned in the third class. Second class. The second class embraces all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark, or sign. Third class. The third class embraces all other matter which is or may hereafter be by law declared mailable; embracing all pamphlets, occasional publications, books, book manuscripts, and proof sheets, whether corrected or not, maps, prints, engravings, blanks, flexible patterns, samples and sample cards, phonographic paper, letter envelopes, postal envelopes, or wrappers, cards, paper, plain or ornamental, photographic representations of different types, seeds, cuttings, bulbs, roots, and scions.

Weight and rate of single letter postage. SEC. 21. *And be it further enacted*, That the maximum standard weight for the single rate of letter postage is one half ounce avoirdupois.

Prepayment. SEC. 22. *And be it further enacted*, That the rate of postage on all domestic letters transmitted in the mails of the United States, and not exceeding one half ounce in weight, shall be uniform at three cents; and for each half ounce, or fraction thereof of additional weight, there shall be charged an additional rate of three cents, to be in all cases prepaid by postage stamps plainly affixed to such letter.

Drop letters. SEC. 23. *And be it further enacted*, That the rate of postage on all letters not transmitted through the mails of the United States, but delivered through the post-office or its carriers, commonly described as local or drop letters, and not exceeding one half ounce in weight, shall be uniform at two cents, and an additional rate for each half ounce or fraction thereof of additional weight, to be in all cases prepaid by postage stamps affixed to the envelope of such letter, but no extra postage or carrier's fee shall hereafter be charged or collected upon letters delivered by carriers, nor upon letters collected by them for mailing or for delivery. No carrier's fee.

Letter postage to include what. SEC. 24. *And be it further enacted*, That the domestic letter rate of postage is established for all mailable matter which is wholly or partly in writing, or is so marked as to convey any other or further intelligence or information than is conveyed by the original print in case of printed matter, or which is sent in violation of law or regulations of the department touching the enclosure of matter which may be sent at less than letter rates, and for all matter introduced into the mails for which no different rate is provided by law: *Provided*, That book manuscripts and corrected proofs passing between authors and publishers may pass at the rate of printed matter: Proofs. *And provided further*, That publishers of newspapers and periodicals may print or write upon their publications sent to regular subscribers the address of subscribers and the date when the subscription expires, and may enclose therewith receipts for payment and bills for subscription thereto. Address of subscribers may be written or printed.

Matter not enumerated to be treated as letter postage. SEC. 25. *And be it further enacted*, That on all matter not enumerated as mailable matter, and to which no specific rates of postage are assigned, and which shall nevertheless be mailed, the rate, if the same shall be forwarded, is established at the rate of letter postage.

Matter not prepaid to be charged double on delivery. SEC. 26. *And be it further enacted*, That if any matter on which by law the postage is required to be prepaid at the mailing office shall reach its destination without such prepayment, double the prepaid rates shall be charged and collected on delivery.

Soldiers' letters, &c. SEC. 27. *And be it further enacted*, That the Postmaster-General is authorized to provide by uniform regulation for transmitting unpaid and duly certified letters of soldiers, sailors, and marines in the service of the United States to destination; and all other letters which from accident or neglect appear to have been deposited for mailing without prepayment of postage, where, in the latter class, the writer is not known, or cannot be promptly advised of his default; but in all cases of letters not prepaid, Letters not prepaid by accident.

"(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

"(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title; Post, p. 738.

"(7) to accept gifts or donations of services or property, real or personal, as it deems, necessary or convenient in the transaction of its business;

"(8) to settle and compromise claims by or against it;

"(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

"(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

"§ 402. Delegation of authority

"Except for those powers, duties, or obligations specifically vested in the Governors, as distinguished from the Board of Governors, the Board may delegate the authority vested in it to the Postmaster General under such terms, conditions, and limitations, including the power of redelegation, as it deems desirable. The Board may establish such committees of the Board, and delegate such powers to any committee, as the Board determines appropriate to carry out its functions and duties. Delegations to the Postmaster General or committees shall be consistent with other provisions of this title, shall not relieve the Board of full responsibility for the carrying out of its duties and functions, and shall be revocable by the Governors in their exclusive judgment.

"§ 403. General duties

"(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. Except as provided in the Canal Zone Code, the Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States. 76A Stat. 1.

"(b) It shall be the responsibility of the Postal Service—

"(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

"(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

"(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

"(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

Study on Universal Postal Service and the Postal Monopoly

Appendix C

Postal Monopoly Laws:
History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes

James I. Campbell Jr.

Contents

Summary

The purpose of this study to provide a comprehensive account of the development and current status of federal laws that today grant the United States Postal Service exclusive rights in the carriage and delivery of mail. The "postal monopoly" gives the Postal Service a monopoly over the *carriage* of *letters*. It is one of the most ancient legal concepts to be found in the statute books of the United States. Current law may be traced directly to an English act of 1660. The "mailbox monopoly" gives the Postal Service an exclusive right to *deposit* mail in private mailboxes. It applies to all types of mail, not only letters covered by the postal monopoly. The mailbox monopoly law is comparatively recent in origin; it dates from the 1930s.

English origins

The British postal monopoly and the British Post Office were born together in the unsettled times of the mid-seventeenth century. The postal monopoly was not established to support the post office so much as the other way around. The government messenger system was opened to the public—creating a public post office—in order sustain a monopoly on transmission of private correspondence. In the early days, the fear was not that independent post offices would "ruin one another" (as Blackstone would later suggest) but undermine the government. Over time, however, the government monopoly became profitable, and the Post Office, a division of the Treasury, became a significant source of general revenue. In effect, postage was a tax on communications, not unlike its fellow revenue source, the stamp tax on legal papers.

British law prohibited both private carriage of letters and packets of letters for hire and establishment of private systems of posts for the transmission of letters and packets of letters. There were five traditional exceptions of the British postal monopoly: for the carriage of cargo letters, letters of the carrier, letters carried by private hands for free, and letters carried by special messenger.

Early American postal laws

Although early American postal laws were derived from English precedents, they soon assumed a more democratic and peculiarly American flavor.

The Post Office was founded by resolution of the Continental Congress on July 26, 1775. The Articles of Confederation, adopted in 1777, gave the federal government a monopoly over the carriage of letters between the states. The first postal act, an ordinance adopted by the Continental Congress in 1782, included a jumbled version of the English postal monopoly laws.

After independence from Great Britain was won, a new Constitution was adopted that authorized Congress "to establish post offices and post roads" but did not create a postal monopoly. The postal act of 1794 continued the proscription against establishment of private postal systems for transmission of letters. A postal system was originally a series of relay stations established for the rapid conveyance of letters by foot messengers or mounted riders. By the 1790s, postal systems included other forms of regular, staged transportation, like stagecoaches, packet boats, and even sleighs. After 1794, the early postal laws did not prohibit private carriage of letters by travelers even for compensation. Masters of inbound international vessels, and later domestic steamboats, were required to deliver letters to the post office at the port of entry, although this duty did not apply to passengers. There was no outbound international postal service, and outbound international letters were not subject to a postal monopoly. Although different provisions of different laws at different times variously described the scope of the monopoly as "letters" or "letters and packets" or "any letter or packet, other than newspapers, magazines or pamphlets," a federal court in 1831 was seemingly correct in concluding that the scope of the American monopoly, like the English monopoly, extended only to letters and packets (or small bundles) of letters.

Development of current postal monopoly statutes, 1840s to 1880s

In the 1840s, the postal world was shaken by emergence of the "cheap postage" movement and the simultaneous rise of "private express" companies. A popular outcry for sharply reduced letter rates was set off by the reduction and simplification of letter rates in England in 1840. Private express companies followed from the development of railroad and steamboat lines, which allowed passengers to easily and quickly carry letters from one city to another. Indeed, although not fully appreciated in the 1840s, the threat posed by railroads and steamboats was more fundamental than facilitation of private expresses. The steam-powered transportation revolution would eventually render obsolete the "postal services"—that is, the systems of relay stations—which were the original raison d'être of the Post Office.

Between the 1840s and the 1880s, the United States enlarged and transformed the Post Office. Its main job slowly shifted from management of an intercity transportation network to management of collection and delivery services capable of providing intracity as well as intercity mail delivery. If, for the average citizen, the early Post Office loomed large as the regular source of worldly news, the modern Post Office became even more important as the first practical and inexpensive medium for keeping in touch with distant family and friends and conducting business across the nation. The postal monopoly statutes were reshaped to protect the new missions of the Post Office.

By the 1880s, a legal framework for a modern industrial post office had replaced a legal framework based on the premises and processes of a pre-industrial post office. Cheap letter postage was introduced by the acts of 1845 and 1851. Collection and delivery services were enabled by the act of 1851 and, most importantly, by the free city delivery service introduced by the act of 1863. By 1890, the city delivery system included 9,006 carriers operating from 454 post offices. The postal laws were revised and codified in 1872, for the first time since 1825. The first multilateral agreement on international postal laws was adopted in 1874. The modern classification system of mail was added by the act of 1879. National and local delivery services were substantially merged by the adoption of a uniform two-cent stamp for all intercity and local first class letters in 1885, a rate that would last for five decades.

During this period, the postal monopoly statutes were reshaped into what is essentially their current form. In 1845, the traditional prohibition against establishing private intercity relay or "postal" services was extended to preclude intercity "private express" services as well. In 1861, postal monopoly provisions were extended to prohibit "penny posts," i.e., private intracity collection and delivery services. In each case, Congressional action followed unsuccessful prosecutions under prior law. In the 1860s, the postal monopoly over inbound international mail was reinforced and its prohibitions extended to cover outbound international mail as well. The postal code of 1872 gathered these changes in the postal monopoly statutes into a set of fifteen statutory provisions. The postal code of 1872 was reenacted as part of the Revised Statutes of 1874, a codification of the entire body of U.S. statutes.

The postal code of 1872 also had the effect of strengthening the postal monopoly statutes in several respects. Most significantly, Revised Statutes section 3982 (section 228 of the 1872

code) of the new code combined several strands of prior postal monopoly laws to become an all-purpose postal monopoly provision. R.S. 3982 applied restrictions on intercity private expresses to intracity messenger services and visa-versa, and restrictions on domestic operations were applied to international commerce. Private carriage was prohibited on any "postal route," a term which Congress had previously declared all to include waterways (1823) and all railroads (1838) in addition to pathways actually served by the Post Office. In 1883, the Post Office's monopoly over local intracity collection and delivery was secured by the judicial closure of the last private penny posts. In 1884, Congress declared, "all public roads and highways while kept up and maintained as such are hereby declared to be post routes." In this manner, R.S. 3982 became a general bar against private carriage of letters and packets on any public road, water way, or railroad in the United States.

In the postal code of 1872 the various phrases used to define the scope of the postal monopoly in prior laws were replaced by a single standard phrase: "letters and packets." In the decade and half following enactment of the 1872, official interpretations of the new postal monopoly law by the Attorney General and the Post Office Department reflected an understanding that the revised postal monopoly covered only "letters" since the term *packet* in this context was deemed to refer to a packet of letters. The term *letter*, while not clear in all cases, was interpreted to include personal correspondence (or the idea that common usage attaches to the term *letter*) but not to include certain types of commercial documents subject to first class postage, i.e., documents which were "wholly or partly in writing" which but did not, in the words of international postal agreements, "partake of the nature of personal correspondence."

Growth of the Post Office's interpretation the postal monopoly and its administrative role; adoption of the mailbox monopoly statue, 1890s to 1960s

By the 1960s, the Post Office had grown into a universal national service that delivered letters, periodicals, advertisements, and parcels to every address in the nation, usually five or six days per week. The legal framework for the Post Office had been modified and enlarged but not fundamentally changed. Only in 1960 were the amendments to the postal law since 1872 collected into a new postal code.

Over this period, the fifteen postal monopoly provisions of the postal code of 1872 (incorporated in the Revised Statutes of 1874) were consolidated into thirteen provisions. Seven

were included in the first criminal code, adopted in 1909, and reenacted in the second criminal code, Title 18 of the United States Code, adopted in 1948. Six of the postal monopoly statutes of Revised Statutes were incorporated into the codification of the postal laws in 1960. In the process, these provisions were reworded but not substantively changed. Only three relatively minor substantive changes were made in the postal monopoly statutes between the 1890s and 1960s. First, in 1909, Congress clarified the right of a company to carry letters relating to its "current business" (confirming an interpretation of prior law by the Attorney General). Second, in 1934 Congress limited to twenty-five the number of letters that a special messenger may carry out of the mail. Third, in 1938, Congress widened the exception from the postal monopoly for government stamped envelopes to include envelopes with postage stamps or metered indicia affixed and cancelled.

During this period, the most significant changes in the postal monopoly law were administrative in nature. In broad terms, the administrative position of the Post Office towards the postal monopoly statutes evolved in three phases.

The *first phase* was the development of a more expansive interpretation of the postal monopoly statutes. In 1890s, the Post Office interpreted the postal monopoly statutes broadly to curb the practice of railroads which routinely transported out of the mails large volumes of documents exchanged among different railroads and associated companies. Although the right of the railroads to transport a substantial portion of "railroad mail" was ultimately recognized by Congress and the courts, legal disputes with the railroads provided the initial basis for a broader definition of the crucial term "letter." In the 1910s, Post Office Solicitor William Lamar issued a series of opinions that set out a legal rationale for interpreting the "letter" monopoly to include transmission of all "live, current communications," an approach that he argued included all of first class mail and at least some third class mail. Opinions by later Solicitors applied Lamar's analysis to classify various types of items as in or out of the postal monopoly, usually without identifying any specific legal basis for doing so.

The *second phase* was the assumption by Solicitor Karl Crowley, during the Great Depression of the 1930s, of a capacity to expound upon the scope of the postal monopoly authoritatively. Previous Solicitors had taken the position that the Post Office could not interpret the postal monopoly statutes authoritatively since they were penal in nature and therefore

administered by the Attorney General. In this view, the proper role of the Solicitor was to advise officers of the Post Office but not the general public. Faced with large declines in mail volume and rising competition, Solicitor Crowley published a pamphlet for the general public, *The Private Express Statutes*, that normatively described a broad interpretation of the postal monopoly statutes. He also claimed a broad monopoly for the Post Office in numerous legal opinions addressed directly to mailers, another innovation. Bolstering the authoritativeness of the Post Office's administration of the law, Solicitor Crowley began the practice of citing earlier Solicitors' opinions as legal authority for rulings on the scope of the postal monopoly.

During this second phase, the *mailbox monopoly statute* was also adopted in this period. During the height of the Depression, in 1932, Congress raised the postage rate for letters by 50 percent, from 2¢ to 3¢. Utilities and department stores began to use their own employees or private messenger companies to deliver statements of account, circulars, bills, etc. To counter this trend, Congress reduced the postage rate for *local* letters back to 2¢ in 1933. When this did not appear sufficient to protect Post Office revenues, Congress, in 1934, adopted the mailbox monopoly statute prohibiting messenger services from depositing mailable matter in private mailboxes.

The *third phase* in the evolution of the Post Office's approach towards administering the postal monopoly was the transcription into federal regulations of the broad view of the postal monopoly statutes espoused in the postal monopoly pamphlets and selected Solicitors' opinions. Since early in the nineteenth century, Post Office regulations had provided little guidance on the postal monopoly beyond a repetition of Congressional statutes. However, in 1952 Solicitor Roy Frank gave the postal monopoly pamphlet a more formal style, added legal citations, and retitled the pamphlet, *Restrictions on the Transportation of Letters*. This revised pamphlet then served as the basis for regulations on the postal monopoly issued in 1954 as part of a general revision of Post Office regulations. A revision of the rulemaking authority of the Postmaster General in the postal code of 1960 apparently strengthened, seemingly inadvertently, the Post Office's claim to legal authority to adopt substantive regulations defining the scope of the postal monopoly.

Thus, by the 1960s, the Post Office had assumed the authority to issue legally binding interpretations of the postal monopoly statutes by means of regulations and legal opinions. The Post Office's interpretation of the postal monopoly statutes was based on the premise that the

term *letter* as used in the postal monopoly statutes included anything conveying live, current information between sender and the addressee. At the same time, the Post Office also interpreted the "letter" monopoly to exclude several types of items which conveyed live, current information including contracts, bonds and some other commercial papers, legal papers, governmental documents like birth certificates, catalogs, newspapers, books, drawings and maps, unaddressed circulars, and data used for the preparation of bills.

In retrospect, it appears possible for reasonable persons to question the soundness of the Post Office's elaboration of the postal monopoly statutes during this period. Solicitors' opinions grounded in questionable legal analysis were prepared with little transparency and then cited as legal authority years—often decades—after they were written, long after the possibility of meaningful judicial or congressional scrutiny. In this process, inconsistent Solicitors' opinions were largely ignored. Pamphlets that presented a simplified view of the postal monopoly to discourage competition in a time of economic emergency were ultimately promulgated as federal regulations. Although initially reluctant to rule authoritatively on the postal monopoly statutes because of their penal nature, Post Office lawyers gradually adopted a more activist view of their role.

Postal Service administration of the monopoly laws, 1970 to 2006

Between 1970 and 2006, the Postal Service became a more business-like, commercial organization as envisioned in the Postal Reorganization Act. Mail volume increased substantially and advertisements became an increasingly important component of the mail.

In this period the nature and scope of the postal monopoly law changed significantly by virtue of the adoption of new postal monopoly regulations in 1974. The 1974 regulations effectively extended the scope of the postal monopoly statute to include all types of correspondence, commercial papers, newspapers and magazines, addressed advertisements, books, and other tangible objects bearing textual information except for items or mailers or types of carriage excluded from the monopoly by administrative regulation. The legal keystone to these regulations was the Postal Service's questionable interpretation of a statutory provision originating the nineteenth century that authorized the Postmaster General to suspend the stamped envelope exception to the postal monopoly. The Postal Service's interpretation of this provision was not reviewed by the courts. In the only substantial judicial review of the legitimacy of the

1974 postal monopoly regulations, the 1979 *ATCMU* case, a federal appellate court—armed with a less than complete history of the evolution of the postal monopoly law—sustained the regulations as a valid exercise of the Postal Service's rulemaking authority insofar as they included advertisements in the definition of "letter."

After the *ATCMU* decision, the Postal Service extended its administrative suspensions of the postal monopoly in several instances, the most important of which were the suspension for urgent letters in 1979 and for international remail in 1986. These suspensions paved the way for development of private express document services and, ultimately, for postal reform in Europe. Although there were several postal monopoly court cases after *ATCMU*, none touched on the fundamental foundations of the postal monopoly statute or regulations.

The mailbox monopoly became more economically significant because the Postal Service increasingly shifted from door delivery to mailbox and clusterbox delivery. In the 1973 *Rockville Reminder* case, a federal appellate court gave brought support for the authority of the Postal Service to regulate the uses to which private mailboxes may be put. This case was not dependent on the mailbox monopoly statute and contemplates Postal Service authority over the mailbox that exceeds the particular rights granted by the mailbox monopoly statute. In the 1981 *Council of Greenburg Civic Associations* case, the Supreme Court upheld the constitutionality of the mailbox monopoly statute. In this case, multiple opinions offer diverse philosophical perspectives on the concept of a mailbox monopoly.

In 1994, Congress substantially increased the fines for sending a letter by private express in violation of the postal monopoly and for illegally depositing mailable matter in a private mailbox by 30 to 200 fold. These increased penalties were the result of a general modernization of the criminal code and may have been inadvertent insofar as the postal monopoly and mailbox monopoly are concerned. Inexplicably, the penalty for operating an illegal private express was unchanged.

Postal Accountability and Enhancement Act of 2006 and current status of the monopoly laws

On December 21, 2006, the Postal Accountability and Enhancement Act (PAEA) modified the postal monopoly law in significant respects. It created new statutory exceptions to the postal monopoly statutes: for letters charged more than six times the stamp price, for letters

weighing more than 12.5 ounces, and for a grandfather exception that includes situations in Postal Service regulations purported to "suspend" the postal monopoly. The PAEA also apparently repealed the authority of the Postal Service to adopt substantive regulations implementing the monopoly statutes. Nonetheless, the Postal Service has continued to maintain both its postal monopoly and mailbox monopoly regulations. The PAEA vested the Commission with new authority to administer elements of the postal monopoly statutes and to police the Postal Service's use of its rulemaking authority. A review of the interaction between the PAEA and the complex legacy of the monopoly laws suggests several legal issues for which answers are not self-evident. Since the Commission has not yet adopted regulations or otherwise addressed implemented these new powers, this study presents what is necessarily a preliminary evaluation of the effects of the PAEA on the monopoly laws and the current status of those laws.

1 Introduction

The purpose of this study to provide a comprehensive account of the development and current status of federal laws that today grant the United States Postal Service exclusive rights in the carriage and delivery of mail.[1] The "postal monopoly" gives the Postal Service a monopoly over the *carriage* of *letters*. It is one of the most ancient legal concepts to be found in the statute books of the United States. Current law may be traced directly to an English act of 1660. The "mailbox monopoly" gives the Postal Service an exclusive right to *deposit* mail in private mailboxes. It applies to all types of mail, not only letters covered by the postal monopoly. The mailbox monopoly law is comparatively recent in origin; it dates from the 1930s.

1.1 Objectives and Organization

This paper has been prepared for the Postal Regulatory Commission (the Commission) pursuant to requirements set out in the Postal Accountability and Enhancement Act (PAEA) enacted by Congress in 2006.[2] Section 702 of the PAEA requires the Commission to prepare a report for Congress and the President on "universal postal service and the postal monopoly in the United States . . . including the monopoly on the delivery of mail and on access to mailboxes." The report must include "a comprehensive review of the history and development of universal service and the postal monopoly, including how the scope and standards of universal service and the postal monopoly have evolved over time for the Nation and its urban and rural areas." It must also delineate "the scope and standards of universal service and the postal monopoly provided

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[2] Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006) (PAEA). The PAEA substantially revised Title 39 of the United States Code (U.S.C.). The United States Code is prepared by the Office of the Law Revision Counsel of the House of Representatives. A complete edition is published every six years with annual supplements. References to the pre-PAEA version of Title 39 will be by citation to the 2005 edition of the U.S.C., e.g., 39 U.S.C. § 601 (2000 & Supp. V). References to Title 39 as amended by the PAEA will be to the 2006 edition of the U.S.C., e.g., 39 U.S.C. § 601 (2006).

under current law (including sections 101 and 403 of title 39, United States Code), and current rules, regulations, policy statements, and practices of the Postal Service."

This paper is divided into eleven chapters. The remainder of this chapter describes the scope of this study. Chapter 2 recounts the origins of the postal monopoly in English law in the seventeenth and eighteenth centuries. Chapter 3 explains how the early American government adapted English law to fit the needs of the new democracy. Chapters 4 to 6 describes how, under the pressure of changes induced by improvements in technology, the postal monopoly statutes were reshaped and extended between the 1840s and 1880s until they assumed more or less their present form. Chapters 7 and 8 describe the evolution of administrative interpretation of the postal monopoly law by the Post Office Department from the 1890s to the 1960s, a period during which the national post office expanded its services to near universal availability. Chapter 8 also describes the introduction of the mailbox monopoly in 1934 and other, relatively minor amendments to the postal monopoly statutes. Chapters 9 and 10 continues the story of the evolution of the postal monopoly law after the establishment of the Postal Service in 1971, focusing, in particular, on the Postal Service's issuance of comprehensive postal monopoly regulations in 1974. Finally, Chapter 11 looks at the current status of the postal monopoly laws in the wake of amendments by the Postal Accountability and Enhancement Act of 2006.

1.2 Elements of the Postal Monopoly Law

As noted, this study deals with two interrelated legal concepts, the "postal monopoly" and the "mailbox monopoly." Collectively, the federal statutes creating these two monopolies will be termed the "monopoly statutes." Postal laws are exclusively the province of federal government; there are no state postal statutes.

In this study, the term *postal monopoly statutes* refers to a set of statutes—i.e., acts of Congress—that now appear as thirteen sections of the United States Code. These statutes do not use the word "monopoly," but they grant the Postal Service an effective monopoly by prohibiting all persons except the Postal Service from providing certain types of collection and delivery services. Prohibitions against providing, using, or assisting would-be competitors of the Postal Service are found in sections 1693 through 1699 of the criminal code, i.e., Title 18 of the United States Code. In addition, the scope of the postal monopoly is modified by exceptions set out in the section 601 of the postal code, i.e., Title 39 of the United States Code. Sections 602 through

606 of Title 39 pertain primarily to the authority of postal inspectors to search for and seize letters carried in violation of the postal monopoly. The Postal Service, like the Post Office Department before it, refers to these criminal and civil statutes collectively as the "private express statutes." This study will instead use the phrase "postal monopoly statutes" to refer to these laws collectively because, technically, the statutory prohibitions against operations by private express companies, enacted in 1845, comprise only a subset of a broader set of statutes prohibiting private carriage of letters and packets.

In summary, the statutes which create the postal monopoly prohibit any person from establishing a service for:

- the transportation of letters and packets
- by regular trips or at stated periods
- over any post route (which under current law includes all public roads, waterways, railroads, and letter carrier routes) or "from any city, town, or place to any other city, town, or place, between which the mail is regularly carried."

It is now well settled that the word "packet" as used in the postal monopoly statutes refers to a letter of several pages (as this study will describe, in the past some persons have argued that the word "packet" should be interpreted more broadly). Hence, the scope of the postal monopoly cover only the carriage of "letters."

There are six traditional statutory exceptions to the postal monopoly. They are listed below in the order in which they were adopted into U.S. law together with commonly used shorthand labels:

(1) *cargo letter*: letters which "relate to some part of the cargo";

(2) *special messenger*: letters conveyed by "private hands without compensation, or by special messenger employed for the particular occasion only;

(3) *private hands*: letters conveyed by "private hands without compensation";

(4) *stamped envelope*: letters enclosed in envelopes with postage affixed;

(5) *prior to posting*: "delivering to the nearest post office, postal car, or other authorized depository for mail matter any mail matter properly stamped";

(6) *letters of the carrier*: letters which relate to the "current business of the carrier."

In addition, in 2006, the PAEA added three new statutory exceptions. These, with shorthand labels, are as folllows:

(1) *Price limit*: letters carried for at least 6 times the stamp price;

(2) *Weight limit*: letters weighing at least 12.5 oz.;

(3) *Grandfather rule*: letters within scope of services described by certain Postal Service regulations as they existed on December 21, 2006.

The postal monopoly statutes have a long history. Key provisions date from the postal act of 1872. The 1872 act was, in turn, a codification of earlier statutes, some based on English laws going back to the seventeenth century. The last significant Congressional debate leading to revision in the postal monopoly law took place in the Senate in 1845. Interpretation of the postal monopoly statutes is complicated by their age as well as by the fact that the current versions of the statutes have been altered from their original form by several reenactments. These reenactments have "modernized" and standardized the style and organization of the provisions but obscured their original meaning. This study seeks to present clearly the sequence of legislative acts leading to the current postal monopoly statutes and the documentary evidence that sheds light on what Congress had in mind in adopting these statutes, to the extent such documents are available. Much of this history is obscure. Reasonable persons can and do interpret this legislative story differently and come to different conclusions about how these statutes should apply to current circumstances.

In addition to the statutes, the law of the postal monopoly includes administrative regulations adopted by the Postal Service, currently set out in Parts 310, 320, and 959 of the Code of Federal Regulations (2007 edition). These regulations have a long history as well. They were derived from administrative interpretations of the postal monopoly statutes issued by the Post Office Department and Attorney General in the last half of the nineteenth century and the first half of the twentieth century.

Finally, from time to time, although relatively infrequently, the postal monopoly statutes and regulations have been reviewed and interpreted by the courts. These judicial decisions also form part of the law of the postal monopoly.

1.3 Elements of the Mailbox Monopoly

The "mailbox monopoly statute" refers to section 1725 of Title 18, a criminal statute adopted in 1934 that forbids any person but the Postal Service from placing "mailable matter" in a private mailbox, i.e., the mailbox or cluster box from where most Americans receive their mail. This provision provides in full:

> § 1725. Postage unpaid on deposited mail matter
>
> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined under this title.[3]

Since the mailbox monopoly includes all mailable matter, its scope is broader than the postal monopoly, which covers only "letters and packets." The history and interpretation of the mailbox monopoly is relatively straightforward compared to that of the postal monopoly.

The "mailbox monopoly law" also includes Postal Service regulations. Regulations defining a mailbox monopoly are found in the *Domestic Mail Manual*, an official set of rules for domestic postal services issued by the Postal Service.[4] In part, these regulations implement the mailbox monopoly statute. In part, however, they also appear to establish a mailbox monopoly by regulation that is independent of the mailbox monopoly statute.

Only a handful of judicial cases have reviewed the mailbox monopoly law.

1.4 Prior Studies

There are relatively few studies on the development of the monopoly laws. The best known study of the postal monopoly is a 1975 article by George L. Priest, a professor of law and economics at Yale University. Priest's article focuses on motivations underlying monopoly legislation rather than on the specific elements of the law or the evolution of administrative

[3] 18 U.S.C. § 1725 (2006).

[4] Postal Service, *Domestic Mail Manual* § 508.3 (May 12, 2008 ed) ("Recipient Services: Customer Mail Receptacles").

implementation after 1872. Perhaps the best historical review of the legal elements of the monopoly is a 1968 monograph by Joseph F. Johnston Jr. Both articles are necessarily dated by the passage of time. Neither seeks to provide the comprehensive historical analysis required by the PAEA.[5]

[5] See the bibliography at the end of this paper for works of these authors.

2 English Precedents: Origin of the Postal Monopoly

The history of American postal monopoly begins with seventeenth century English postal laws which were adopted so that the government could spy on its enemies and raise general revenues.[6] The English postal monopoly of 1660 served as the template for early colonial laws and, after 1710, applied directly in the American colonies. The English law established the conceptual framework from which the American post office was created. To understand the postal monopoly law in America, therefore, it is necessary to review briefly the nature of postal service in pre-industrial times and the origins of the public post office in Stuart England.

2.1 Pre-industrial Postal Systems

The earliest postal monopoly laws were grounded in a pre-industrial concept of a "postal" system. In England and America the nature of a postal system changed little from the seventeenth century until the early nineteenth century, when the new transportation technologies changed the nature of postal activities and ultimately induced the legal reforms that led to modern universal postal service. Before about 1840, a "postal" system was literally a series of posts, or relay stations, located every ten to fifteen miles along a "post road." In a "horse post," the postal stations kept horses for riders carrying letters between towns. Letters were conveyed either by "through post", i.e., by means of a single rider who obtained fresh horses at each station, or by "standing post", i.e., by a series of riders each of whom handed the *mail* (or pouch) to a subsequent rider at the next station. A "foot post" was similar in concept but relied on walking messengers.

By its nature, a postal system was a rapid, scheduled intercity communications system. The function of early postal systems was to provide a means for transporting letters and other valuable documents that was faster and more reliable than the transportation services available for freight and persons generally. To "send post" was synonymous with to send "with speed." The hoped-for rate of travel was about seven miles an hour in the summer and five in the winter. In an age when most means of conveyance awaited enough cargo or passengers to justify the journey, only regularly scheduled postriders and "packet boats"—boats whose primary task was

[6] *See generally* Robinson, *British Post Office* 48-55, 119-125.

to convey letters—afforded a means of reliable and predictable communications. Letters were transported from a public place such as an inn, coffeehouse, or dedicated post office in one town to a similar site in another town. There was no collection or delivery of letters and thus no intra-city service. Postage was paid by the addressee upon collection at the destination post office.[7]

The term *letter* originally referred to a message recorded on paper by hand, usually using a quill pen. Paper was expensive, and as a result, the size of the paper was cut to fit the message. As one historian has explained,

> by the end of the Middle Ages a letter usually consisted of a sheet of paper only large enough to contain the message. The needed paper was cut from a sheet that was originally about twelve inches wide by eighteen inches long. The paper used for a letter was then folded into an oblong packet about three inches by four, and an address was written on the face of the folded and sealed sheet. The letter was not enclosed in an envelope: this would have been a waste of valuable paper.[8]

A correspondence extending over two sheets of paper came to called a *double letter* and, over three sheets of paper, a *triple letter*. This seventeenth century terminology was used to specify postage rates in the United States until 1863.

Multiple letters and letters with enclosures (such as a deed or certificate), would be tied together in a small bundle or *packet*, also spelled *pacquet* or *pacquette*. According to the Oxford English Dictionary, the first meaning of the word *packet* was "A small pack, package, or parcel: in earliest use applied to a parcel of letters or dispatches, and esp. to the State parcel or 'mail' of dispatches to and from foreign countries."[9] The first use of *packet* in this sense noted by the dictionary is 1530.[10] To this day, American postal monopoly law refers to the carriage of "letters and packets" even though the words "letter" and "packet" are used in substantially different senses.

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[7] Robinson, *British Post Office* 7-8, 22-23. The phrase "post haste," now meaning "as fast as possible," used to be a direction inscribed on the outside of a letter urging the rider to carry the letter as quickly as possible.

[8] Robinson, *British Post Office* 6.

[9] *Compact Oxford English Dictionary*, 2nd ed., s.v. "packet."

[10] To illustrate early meanings, the lexicographers also quote, inter alia, a 1693 Massachusetts postal law ("A pacquet shall be accounted 3 letters at the least.") and personal letter from a lady written in 1716 ("I foresee I shall swell my letter to the size of a pacquet."). Ibid. As the terms *double letter* and *triple letter* came into use, the term *packet* came to be reserved for a bundle of four or more sheets of paper.

Until the early nineteen century, a *newspaper* was a single sheet of paper, printed on both sides by means of a manual press.[11] The first newspaper in America appeared in 1704. As one postal historian has explained, "The earliest newspapers in the American colonies were, with some notable exceptions, offspring of the postal system."[12] In many, if not most, cases, the postmaster was also the publisher, or "printer," of the leading newspaper in town. Not only did the job of postmaster give a printer access to the latest news—printers would send each other news clips in the mail—but a printer could often prevail upon a postrider to carry his newspapers out of the mails for free or reduced rates. Rival printers would negotiate directly with the postrider for transportation of their newspapers, although they lacked the postmaster's bargaining leverage and were sometimes excluded.[13]

Distribution of newspapers to readers was a secondary concern of the post office until after the American Revolution. Usually postmasters did not charge postage for transmission of newspapers (the only rate was the very high letter rate), although the printer may have found it necessary to give the postrider something for his trouble. In any case, printers had no easy means of collecting subscription fees from distant readers. In 1753, Benjamin Franklin and William Hunter, Deputy Postmasters of the British Post Office in North America, sought to regularize postal distribution of newspapers and recoup some expenses by decreeing that postmasters should no longer distribute newspapers unless the recipient paid the postmaster a fee "for the use of the rider" and the price of subscription, to be remitted to the printer. A single copy of a newspaper could be exchanged between printers for free, so that newspapers could share news stories with each other.[14] After newspapers were admitted to the U.S. mail, they were kept apart from letters because they were often tendered damp from the press, posing a threat to the integrity of letters.[15] In 1788, Ebenezer Hazard, Postmaster General under the Articles of

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[11] A power press was first used by *The Times* of London in 1814. Chappell, *A Short History of the Printed Word* 174.

[12] Kielbowicz, *News in the Mail* 13.

[13] Rich, *History of the Post Office* 115; Kielbowicz, *News in the Mail* 14-16.

[14] Kielbowicz, *News in the Mail* 16-19. Postmasters received a 20 percent commission on fees collected for riders. Newspapers transported in this manner were not considered "in the mail," and the Post Office itself received no remuneration for their transport. Moreover, some printers continued to negotiate directly with postriders for distribution of their newspapers.

[15] Rich, *History of the Post Office* 143.

Confederation, described a postman's disdain for newspapers as follows, "Newspapers have never been considered as part of the mail nor (until a very few years) admitted into the same portmanteau with it; but were carried in saddlebags for that purpose, by the riders, at their own expense."[16] Nonetheless, in later decades, postal lawyers would look back on the early days of the Post Office and suggest that carriage of newspapers was always considered part of the postal monopoly but for an explicit exemption during the period from 1792 to 1825. This contention would become one of the main intellectual bases for the broad interpretation of the postal monopoly laws promulgated by the Postal Service after 1973.

2.2 Origin of the Government Post Office and the Postal Monopoly

Governments have operated postal systems for official messages since early in civilized times. Herodotus was so impressed by a government postal system established by the Persians in the fifth century BCE that his description of that service lives on in the famous inscription over the entrance to the main post office in New York City: "Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."[17] The Romans, too, operated a vast postal system, but only for government documents. In England, Edward I established a temporary government post in 1481. A permanent government post was organized by Henry VIII in about 1516. These government postal operations, however , were not open to the public and did not preclude private postal systems.

From the middle ages onward, merchants, universities, and monasteries organized their own private postal systems stretching across Europe. Private postal systems were sometimes restricted for reasons of security. In 1591, three years after the Spanish Armada threatened England with invasion, Queen Elizabeth I suppressed an international merchants post to prevent private communications with foreigners. After Elizabeth's death in 1603, however, commerce

[16] Kielbowicz, *News in the Mail* 23-24.

[17] Herodotus wrote, "No mortal thing travels faster than these Persian couriers. The whole idea is a Persian invention, and works like this: riders are stationed along the road, equal in number to the number of days the journey takes—a man and a horse for each day. Nothing stops these couriers from covering their allotted stage in the quickest possible time—neither snow, rain, heat, nor darkness." Herodotus, *The Histories*, Book VIII (trans. A. De Sélincourt).

continued to develop and the need for domestic and international postal communications increased. Both royal and private posts flourished.[18]

Elizabeth's successors, the Stuart kings James I and Charles I, struggled against a Parliament that demanded restrictions on royal prerogatives and a sharing of governmental authority. Faced with such demands, Charles I refused to convene Parliament after 1629. To obtain money for the government, Charles resorted to creative financing—forced loans, taxes unauthorized by Parliament, and a revival of commercial monopolies banned by Parliament during his father's reign.

The postal monopoly was one such monopoly.[19] During the early 1630s, there were several proposals to improve the government post and open it to private letters. In a proclamation issued on July 31, 1635, Charles I ordered the master of the posts, Thomas Witherings, to establish an improved postal system between London and Scotland. The government post was opened to private correspondence and competing private posts forbidden. The prohibitory provision stated:

> And his Majesties further will and pleasure is that from the begyning of this service or imployment noe other messenger or messengers foote post or foot posts shall take upp carry receive or deliver any lre or lres [letter or letters] whatsoever other then the messengers appoynted by the saide Thomas Witherings to any such place or places as the saide Thomas Witherings shall settle the conveyance aforesaide Except comon knowne carriers or a pticuler messenger to be sent of purpose with a lre by any man for his owne occasions or a lre by a freind . . . .[20]

The British Post Office considers this royal decree, which may be termed the English Postal Act of 1635, as its birth.[21]

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[18] *See* Robinson, *British Post Office* 1-22. On early European posts, *see generally* Codding, *Universal Postal Union*; Scheele, *Short History of the Mail Service*; Smith, *Development of Rates of Postage*.

[19] Muir, *Postal Reform and the Penny Black* 1. Muir considers need for revenue to be the primary motive for the postal monopoly provision in the 1635 proclamation. Robinson notes that establishment of a public post followed various proposals, but does speculate on the motives of Charles I for finally approving a scheme. *See* Robinson, *British Post Office* 23-32.

[20] Proclamation of July 31, 1635, Patent Roll (Chancery) 11 Car 1, Pt 30, No. 11.

[21] United Kingdom, The Post Office, *Birth of the Postal Service*. This pamphlet includes a facsimile of the original decree and transcription into modern English characters.

The English Postal Act of 1635 prohibited private carriage of any "letter or letters." It also used the term *packet* in setting out postage rates based on distance: "if twoe three fower or five lres in one packett or more then to pay according to the bignes of the saide packett."[22] Thus, the term *letter* thus referred to a single sheet of paper and a *packet* to a bundle of *letters*. The public postal system of Charles I lasted only two years. In 1637, as troubles in Scotland increased, the royal post was again closed to private letters.

In 1649 Charles I was beheaded by a rebellious Parliament, and a group led by Oliver Cromwell took over the government. In 1654, Cromwell reestablished the postal monopoly and prohibited continuation of private posts. A primary reason for the monopoly was to permit surveillance of the citizenry. As historian Howard Robinson puts it, "Cromwell and his Council found eternal vigilance the price they had to pay for continuance in power."[23] The first act of Parliament to establish a post office was adopted in 1657. Emphasizing the close connection between the postal monopoly and surveillance, the act declared that the Post Office would not only benefit the people but also "discover and prevent many dangerous and wicked designs, which have been, and are daily contrived against the Peace and Welfare of this Commonwealth, and the intelligence whereof cannot be well Communicated but by letter."[24] After collapse of the Parliamentary revolt and restoration of the monarchy in 1660, one of the first acts of Parliament, the English Postal Act of 1660, reenacted the postal act of 1657.[25]

The postal monopoly was thus introduced into English law as a tool of autocratic rule. Private carriage of letters was prohibited to allow the government to maintain surveillance of the citizenry and exact monopoly rents. One could say that the public post office was created to serve the monopoly prohibition and not vice versa. Liberal opening of private correspondence to obtain information of interest to the government continued in England until after the American

[22] Id.

[23] Robinson, *British Post Office* 44.

[24] Ibid. at 46-48.

[25] A Post-Office Erected and Established, 12 Car 2, ch. 35 (English Postal Act of 1660). Although 1660 was the first year after the restoration of Charles II, the numbering of statutes adopted in 1660 reflected the constitutional fiction that his reign began in 1649, the year in which his father, Charles I, was beheaded by Parliament.

Revolution, perhaps well after.[26] Use of high postage rates to generate general revenues did not end until the English postal reform of 1840.

2.3 English Postal Act of 1660

The English Postal Act of 1660 gave the British Post Office its permanent charter. The act began with a statement that took note of the rise of private post offices but declared that "well ordering" of the posts necessitated establishment of a government post:

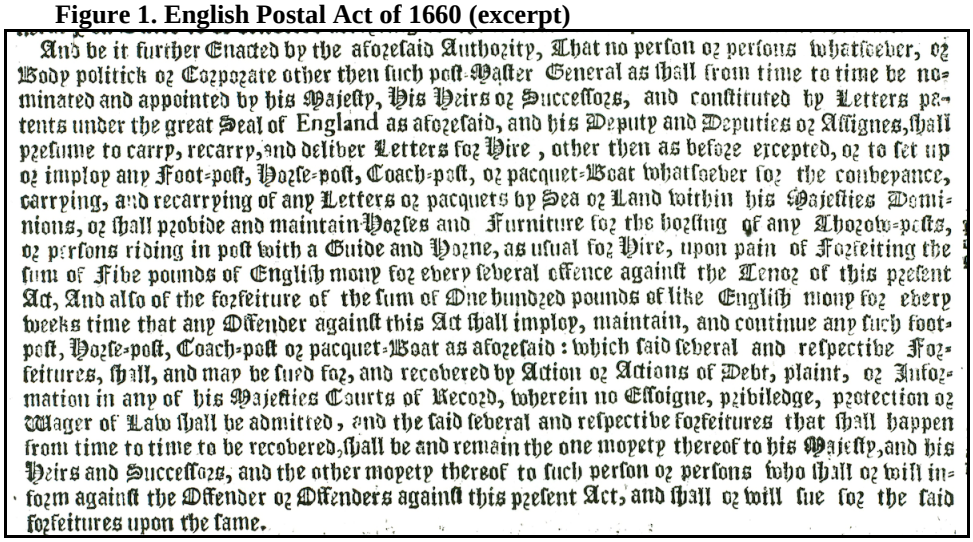
> Whereas for the maintenance of mutual Correspondencies, and prevention of many Inconveniences happening by private Posts, several publick Post-Offices have been heretofore erected for carrying, and recarrying of Letters by Posts, to, and from all parts and places within England, Scotland, and Ireland, and several parts beyond the Seas; the well Ordering whereof is a matter of general concernment, and of great advantage, as well for preservation of Trade and Commerce, as otherwise: To the end therefore that the same way be managed so, that speedy and safe dispatches may be had, which is most likely to be effected, by erecting one general Post-Office for that purpose.

In the 1660 act, three provisions established a postal monopoly throughout his Majesty's Dominions wherever "he shall settle, or cause to be settled, posts." First, the second paragraph authorized the Master of the Posts, and no other person, to receive, dispatch, and deliver "letters and pacquets" with several exceptions discussed below. A second provision in the sixth paragraph obliged masters of ships to deliver all letters and packets to the post office promptly after arriving in port:

> That all Letters and Pacquets that by any Master of any Ship or Vessel, or any of his Company, or any Passengers therein, shall or may be brought to any Post-Town within his Majesties Dominions, or any of the Members thereof, other then such Letters as are before excepted, or may be sent by common known Carriers in manner aforesaid, or by a friend as aforesaid; shall by such Master, Passenger, or other person be forthwith delivered unto the Deputy or Deputies only of the said Post-Master General . . . .

[26] Robinson, *British Post Office* 119-25.

Figure 1. English Postal Act of 1660 (excerpt)



And be it further Enacted by the aforesaid Authority, That no person or persons whatsoever, or Body politick or Corporate other then such post-Master General as shall from time to time be nominated and appointed by his Majesty, His Heirs or Successors, and constituted by Letters patents under the great Seal of England as aforesaid, and his Deputy and Deputies or Assignes, shall presume to carry, recarry, and deliver Letters for Hire, other then as before excepted, or to set up or imploy any Foot-post, Horse-post, Coach-post, or pacquet-Boat whatsoever for the conveyance, carrying, and recarrying of any Letters or pacquets by Sea or Land within his Majesties Dominions, or shall provide and maintain Horses and Furniture for the horsting of any Thorow-posts, or persons riding in post with a Guide and Horne, as usual for Hire, upon pain of Forfeiting the sum of Five pounds of English mony for every several offence against the Tenor of this present Act, And also of the forfeiture of the sum of One hundred pounds of like English mony for every weeks time that any Offender against this Act shall imploy, maintain, and continue any such foot-post, Horse-post, Coach-post or pacquet-Boat as aforesaid: which said several and respective Forfeitures, shall, and may be sued for, and recovered by Action or Actions of Debt, plaint, or Information in any of his Majesties Courts of Record, wherein no Essoigne, priviledge, protection or Wager of Law shall be admitted, and the said several and respective forfeitures that shall happen from time to time to be recovered, shall be and remain the one moyety thereof to his Majesty, and his Heirs and Successors, and the other moyety thereof to such person or persons who shall or will inform against the Offender or Offenders against this present Act, and shall or will sue for the said forfeitures upon the same.

The third and most important monopoly provision was the seventh paragraph, which explicitly prohibited private persons from engaging in: (i) carriage of "letters" for hire; (ii) establishment of postal systems for the conveyance of "letters or pacquets"; or (iii) provision of horses or equipment to postriders.

> That no person or persons whatsoever, or Body politick or Corporate other then such post-Master General as shall from time to time be nominated and appointed by his Majesty . . . shall presume *to carry, recarry, and deliver Letters for Hire,* other then as before excepted, *or to set up or imploy any Foot-post, Horse-post, Coach-post, or pacquet-Boat whatsoever for the conveyance, carrying, and recarrying of any Letters or pacquets* by Sea or Land within his Majesties Dominions, or shall provide and maintain Horses and Furniture for the horstng of any Thorow-posts, or persons riding in post with a Guide and Horne, as usual for Hire . . . . [emphasis added].

In sum, the English postal act of 1660 created a postal monopoly by means of two main proscriptions. First, it forbade private persons to carry *letters* for compensation, i.e., "to carry, recarry, and deliver Letters for Hire."[27] Second, it forbade persons from establishing systems of

[27] The fourth paragraph specified postage rates and offered further indications of what was meant by the terms letter and pacquet: "For the Port [carriage] of every Letter not exceeding one sheet, to or from any place not exceeding fourscore English miles distant from the place where such Letter shall be received, Two pence; And for the like port of every Letter not exceeding two sheets, Four pence; And for the like port of every pacquet of Letters proportionally unto the said Rates; And for the like port of every pacquet of Writs, Deeds, and other things, after the Rate of Eight pence for every ounce weight. [emphasis added]" Later in this paragraph, the term double letter is

posts capable of carrying *letters* or *pacquets*, i.e., "to set up or imploy any Foot-post, Horse-post, Coach-post, or pacquet-Boat whatsoever for the conveyance, carrying, and recarrying of any Letters or pacquets by Sea or Land within his Majesties Dominions."

Paragraph 2 of the 1660 act provided five exceptions to the monopoly. Two of these are direct ancestors of exceptions to the monopoly still found in American law. They were, to use modern terminology, exceptions for *cargo letters* (letters carried with and related freight)[28] and letters carried by *special messenger*.[29] Two exceptions were generally similar to exceptions in current American law, but the provenance of the American rules is unrelated to the English precedents: an exception for letters carried by *private hands*, that is by a friend without compensation[30] and an exception for *letters of the carrier*.[31] The fifth exception from the postal monopoly found in the 1660 act has no parallel in American postal monopoly statutes: an exception for messengers carrying judicial documents.[32]

Although English Postal Act of 1660 does not appear to prohibit private carriage of nonletter items, it might be argued that there is some ambiguity. In some places points in the 1660 act, the term *pacquet* is used to refers to a bundle of letters or similar items (e.g., "pacquet of Writs, Deeds, and other things"). Could the prohibition against establishment of foot posts and horse posts be interpreted to include foot posts and horse posts for the carriage of packets of nonletters? Because of the multiple meanings of *pacquet*, the answer is not entirely clear, although the question is almost certainly of no practical import. It seems doubtful that it would make commercial sense to establish a postal system that conveyed *only* packets of nonletters, and

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employed in place of "letter not exceeding two sheets." It thus appears that in 1660 act the term letter was beginning to include a correspondence of more than one sheet.

[28] "Such letters as shall be sent by Coaches, common known Carryers of Goods by Carts, Waggons, or Packhorses, and shall be carried along with their Carts, Waggons, and Packhorses respectively."

[29] "Letters to be sent . . . by any messenger or messengers sent on purpose, for or concerning the private affairs of any person or Persons."

[30] "Letters to be sent by any private friend or Friends in their wayes of journey or travel."

[31] "Letters of Merchants and Masters which shall be sent by any Masters of any Ships, Barques, or other Vessel of Merchandize, or by any other person imployed by them for the carriage of such Letters aforesaid, according to the respective direction."

[32] "Messengers who carry and recarry Commissions or the Return thereof, Affidavits, Writs, Process or Proceedings, or the Returnes thereof, issuing out of any Court." Although American postal monopoly laws have never provided a statutory exception for judicial papers, the Post Office has never claimed a monopoly over their carriage. *See, e.g.*, 39 C.F.R. § 310.1(a)(7)(iii) (2006).

a postal system that carried both letters and nonletters was clearly prohibited. The prohibition against carriage of "letters for hire" by individuals does not prohibit the carriage of packets, so individuals could convey packets of nonletters. Moreover, the exceptions to these prohibitions refer only to *letters*, and the exceptions were presumably coterminous with the monopoly. The implication is the monopoly included only letters and packets containing letters.

The English postal monopoly was first transplanted to American soil in 1692 by a grant of a patent (i.e., an exclusive right) to one Thomas Neale to establish postal systems in the American colonies. Neale applied to the colonial legislature in New York for legislation confirming his exclusive privilege. The New York legislature accommodated Neale by copying the monopoly provisions from the English postal law of 1660.[33] Pennsylvania, Connecticut, and New Hampshire agreed as well. Massachusetts confirmed Neale's monopoly but only on condition that the service was efficient. Thus, the first postal monopoly laws in America were echoes of the English postal monopoly of 1660. Maryland and Virginia refused to recognize Neale's patent, and the Neale post office was limited to the northeastern colonies.[34] The Neale post office was a commercial failure, probably due to lack of support from colonial governments and inadequate roads. In 1707, the British government purchased Neale's patent and turned over its management to the British Post Office.

2.4 English Postal Act of 1710

In 1710, during the reign of Queen Anne, Parliament enacted a new postal law, replacing the postal act of 1660.[35] The English Postal Act of 1710 extended the Post Office's operations to Scotland and the American colonies. Like paragraph 2 of the 1660 act, paragraph 2 of the 1710 act authorized the Post Office and no other person to have "the receiving, taking up, ordering, dispatching, sending Post or with speed, and delivering of all Letters and Pacquets." Like paragraph 6 of the 1660 act, paragraph 15 of the 1710 act required masters and passengers on vessels arriving from abroad to deliver all "letters and packets" to the post office. Like paragraph

[33] Woolsey, *Early History of the Colonial Post-Office* 9.

[34] Fuller, *American Mail* 18-19.

[35] An Act for Establishing a General Post Office, 9 Anne, ch. 10 (1710).

7 of the 1660 act, paragraph 17 of the 1710 act explicitly proscribed certain activities that competed with the post office. It read as follows:

> That no Person or Persons whatsoever . . . other than such Postmaster General . . . shall presume to receive, take up, order, dispatch, convey, carry, recarry or deliver any *Letter or Letters, Packet or Packets of Letters* (other than as before excepted) or make any Collection of Letters, or set up or employ any Foot Post, Horse Post or Packet Boat, or other Vessel or Boat or other Person or Persons, Conveyance or Conveyances whatsoever, for the receiving, taking up, ordering, dispatching, conveying, carrying, recarrying or delivering any *Letter or Letters, Packet or Packets of Letters*, by Sea or by Land or on any River, within her Majesty's Dominions or by Means whereof any Letter or Letters, Packet or Packets of Letters, shall be collected, received, taken up, ordered, dispatched, conveyed, carried, recarried or delivered, by Sea or Land, or on any River, within her Majesty's Dominions (other than as before excepted) . . . . on Pain of forfeiting the Sum of five Pounds of British Money for every several Offence against the Tenor of this present Act, and also of the Sum of one hundred Pounds of like British Money for every Week that any Offender against this Act shall collect, receive, take up, order, dispatch, convey, carry, recarry or deliver any Letter or Letters, Packet or Packets of Letters.[36]

The postal act of 1710 thus clarified the scope of the English postal monopoly. Both the proscription against private carriage for hire and the proscription against establishment of private postal systems refer to same class of objects: "letter or letters, packet or packets of letters."[37] The act also repeated, in more carefully drawn terms, the five exceptions for the postal monopoly found the 1660 act.[38] The duty of a shipboard master or passenger to deliver all "letters or

[36] Ibid. § 17 (emphasis added).

[37] In Queen Anne's postal act, rates of postage were specified for every "single letter or piece of paper," for every "double letter," and "proportionably unto the said rates for the post of every packet of letters." Postage rates were also specified separately for the posting of "packets of writs, deeds and other things." 9 Anne, ch. 10, § 6 (1710).

[38] The five exemptions were, using modern terminology, for (1) *cargo letters* ("Letters as shall respectively concern Goods sent by common known Carriers of Goods by Carts, Waggons, or Pack Horses, and shall be respectively delivered with the Goods such Letters do concern, without Hire, or Reward, or other Profit or Advantage for receiving or delivering such Letters"); (2) *letters of the carrier* ("Letters of Merchants, and Masters, Owners of any Ships, Barques, or Vessels of Merchandize, or any the Cargo or Loading therein, sent on board such Ships, Barques, or Vessels of Merchandize, whereof such Merchants or Masters are Owners as aforesaid, and delivered by any Masters of any such Ships, Barques, or Vessels of Merchandize, or by any other Person employed by them for the Carriage of such Letters aforesaid, according to their respective Directions, so as such Letters be delivered to the respective Persons to whom they shall be directed without paying or receiving any Hire or Reward,

packets" to the post office upon landing was retained, but it was manifest that this obligation referred only to packets of letters.[39] The English Postal Act of 1710 remained the basic postal law of England until after the American revolution.

On the eve of the American Revolution, William Blackstone's famous treatise, *Commentaries on the Laws of England*, described the English concept of the "post-office, or duty for the carriage of letters." The post office was listed as one of the ten primary sources of the king's revenues; others included the stamp duty; customs duties; excise taxes; and taxes on land, malt, salt, houses, coaches, and offices. Compared to other duties and taxes, Blackstone noted that the post office "is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advantage to the public." With respect to the postal monopoly, Blackstone comments, "penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision, which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another."[40]

2.5 Summary of English Precedents

The British postal monopoly and the British Post Office were born together in the unsettled times of the mid-seventeenth century. The postal monopoly was not established to support the post office so much as the other way around. The government messenger system was opened to the public—creating a public post office—in order sustain a monopoly on transmission of private correspondence. In the early days, the fear was not that independent post offices would "ruin one another" (as Blackstone would later suggest) but undermine the government. Over time, however, the government monopoly became profitable, and the Post Office, a division of the Treasury, became a significant source of general revenue. In effect,

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Advantage, or Profit for the same in any wise"); (3) *judicial papers* ("Commissions, or the Return thereof, Affidavits, Writs, Process, or Proceedings or Returns thereof, issuing out of any Court); (4) letters carried by *private hands* ("any Letter or Letters to be sent by any private Friend or Friends, in their Way of Journey or Travel"); and (5) letters carried by *special messenger* ("any Letter or Letters to be sent . . . by any Messenger or Messengers sent on Purpose for or concerning the private Affair of any Person or Persons"). 9 Anne, ch. 10, § 2 (1710).

[39] Paragraph 16 provides that, for the "encouragement" of masters and passengers to comply with the obligation to deliver "letters and packets," the deputy of the Post Office shall pay one pence upon delivery of "every Letter or Packet of Letters."

[40] Blackstone, 1 *Commentaries* 311-12.

postage was a tax on communications, not unlike its fellow revenue source, the stamp tax on legal papers.

British law prohibited both private carriage of letters and packets of letters for hire and establishment of private systems of posts for the transmission of letters and packets of letters. There were five traditional exceptions of the British postal monopoly: for the carriage of cargo letters, letters of the carrier, letters carried by private hands for free, and letters carried by special messenger.

3 Early Postal Monopoly Laws, 1780s to 1830s

Although early American postal laws were derived from English precedents, they soon assumed a more democratic and peculiarly American flavor. In the new Republic, facilitating distribution of newspapers became the primary goal of the national post office while surveillance of the citizenry was of little concern. Congress did not use the Post Office to raise general government revenues (except in times of war), but it did maintain high postage rates on letters to pay for low newspaper rates and, later, for a national system of mail stagecoach services. The English prohibition against carriage of mail by individuals was dropped, but the proscription against establishment of private postal systems was retained and extended to other forms of staged transportation, like stagecoaches and packet boats. A substantial portion of letters were carried outside the mails, and merchants and newspapers organized private expresses for the transmission of urgent news.

3.1 Confederation and the Postal Ordinance of 1782

Although legally applicable in the American colonies, the English postal monopoly was apparently widely evaded by the colonists.[41] In the late eighteenth century, trust in the British Post Office broke down entirely. On July 26, 1775, the Second Continental Congress founded the American post office by adopting a simple motion:

> That a postmaster General be appointed for the United Colonies, who shall hold his office at Philad[a], and shall be allowed a salary of 1000 dollars per an: for himself, and 340 dollars per an: for a secretary and Comptroller, with power to appoint such, and so many deputies as to him may seem proper and necessary.
>
> That a line of posts be appointed under the direction of the Postmaster general, from Falmouth in New England to Savannah in Georgia, with as many cross posts as he shall think fit.
>
> That the allowance to the deputies in lieu of salary and all contingent expences, shall be 20 per cent. on the sums they collect and pay into the General post office annually, when the whole is under or not exceeding 1000 Dollars, and ten per cent for all sums above 1000 dollars a year.

[41] Rich, *History of the Post Office* 26, 43-44. Five of the thirteen colonies established delivery systems to supplement the British post. Priest, "History of the Postal Monopoly" 18.

> That the rates of postage shall be 20 p^{r} cent less than those appointed by act of Parliament.[42]

Benjamin Franklin was chosen to be the first Postmaster General.

On July 4, 1776, Congress declared independence from England and immediately began work on a legal framework for the new government. Agreement proved difficult. Articles of Confederation were not approved by Congress until November 15, 1777. The Articles did not come effective until ratification by Maryland in March 1781.

Under the Articles of Confederation, the federal government was granted *exclusive* authority to establish an *interstate* post office. Article IX provided as follows:

> The United States in Congress assembled shall also have *the sole and exclusive right* and power of . . . establishing or regulating post offices *from one State to another,* throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office. [emphasis added]

Pursuant to the Articles, Congress formally established and organized the post office in the ordinance of October 18, 1782. The ordinance was a poorly drafted jumble drawn from the British postal law of 1710. It consisted of eighteen unnumbered paragraphs.[43] Since Congress had exclusive authority to establish interstate postal services, the ordinance included a postal monopoly. The sixth paragraph of the 1782 ordinance authorized the Postmaster General and "no other person" to establish postal systems.

> [T]hat the Postmaster General of these United States . . . , and no other person whatsoever, shall have the receiving, taking up, ordering, despatching, sending post or with speed, carrying and delivering of any *letters, packets or other despatches* from any place within these United States for hire, reward, or other profit or advantage for receiving, carrying or delivering such *letters or packets* respectively; *and any other person or persons presuming so to do shall forfeit and pay for every such offence, twenty dollars*. . . . Provided nevertheless, that nothing herein contained shall be

[42] 2 *J. Cont. Cong*. 208.

[43] Ordinance of Oct. 18, 1782, 23 *J. Cont. Cong*. 670 (emphasis added). In the *Journals of the Continental Congress, 1774-1789*, compiled and edited by the Library of Congress in the early twentieth century, the ordinance adopted by Congress is recorded with subsequent deletions and revisions made by a committee appointed to revise resolutions before publication.

> construed to extend to any messenger purposely sent on any private affair, and carrying *letters or packets* relating to such affair only; or to persons sent officially on public service.[44]

In this paragraph, however, the drafter awkwardly joined two topics—authorizing the Postmaster General to provide the service and penalizing private carriers for violating the monopoly—which are treated separately in the 1710 British act (paragraphs 2 and 17). Exceptions to the postal monopoly found in paragraph 2 of the 1710 British act —for cargo letters, letters of the carrier, and carriage by private hands—were included in the ordinance and then inexplicably struck out. Two exceptions found in the English law at this point, the exceptions for a special messenger and official letters, were retained in the ordinance in modified form.

The main postal monopoly provision is found in paragraph 7 of the 1782 ordinance. This paragraph repeats the prohibition against private carriage found in paragraph 17 of the British act, even though this provision effectively duplicated the penalty in the previous paragraph. At this point, the drafter also included the requirement, found in a separate paragraph in English law, that persons on incoming vessels must tender letters in their possession to the post office at the port of entry. The seventh paragraph of the 1782 ordinance read in pertinent part as follows:

> [T]hat if any person, not being a post or express rider, in the service of the general Post Office, shall carry any *letters, packets, or other despatches*, from one place to another, within these United States, on any of the post roads, to any place within these United States, for hire or reward, except in cases as is herein before excepted, or shall not, when bringing letters from beyond sea [sic], for hire or reward, deliver the same at the Post Office, if any there be at the place of his or her arrival, he or she shall, in each of the before mentioned cases, forfeit and pay for every such offence twenty dollars. . . .

The style of this paragraph is quite different from the more formal prose of English statutes. Instead of a straightforward command that "no person shall" undertake certain activities, this paragraph rephrases the command as a subjunctive condition, stating that if any person does certain activities, then he shall pay a penalty. In proscribing private carriage for hire, instead of the legalistic string of verbs included in the English proscription—in the 1710 act, "receive, take up, order, dispatch, convey, carry, recarry or deliver"—the ordinance uses the single verb

[44] *Id*. at 672-73 (emphasis added).

"carry." The separate proscription against establishment of private postal systems found in English law is omitted. The obligation placed on persons arriving by sea is simplified to the point of obscurity. Unlike English reliance on the generalized use of "he", the drafter refers to private carriers with the more informal "he or she."

Under the ordinance of 1782, the postal monopoly pertains only to private carriage of "letters, packets, or other despatches." This is no repetition of the phrase "letter or letters, packet or packets of letters" found in the 1710 British law. Addition of the term "despatches," letters of an official or military nature, appears to signify nothing more than lingering effects from the recent war.

Certainly the ordinance did not prohibit private carriage of newspapers because newspapers were not admitted to the mail. Whether or not newspapers should be admitted to the mail was an issue of considerable debate at the time, but during its existence the Continental Congress never opened the national post to newspapers.[45] The thirteenth paragraph of the 1782 ordinance did, however, grant the Postmaster General discretion to continue the historic practice of allowing postriders to carry newspapers *out of* the mails.[46]

> [T]hat it shall and may be lawful for the Postmaster General, or any of his deputies, to license every post-rider to carry any newspapers to and from any place or places within these United States, at such moderate rates as the Postmaster General may establish, he rendering the post-riders accountable to the Postmaster General, or the respective deputy postmasters by whom they shall severally be employed, for such proportion of the moneys arising therefrom as the Postmaster General shall think right and proper, to be by him credited to these United States in his general account.[47]

The purpose of this provision would be become the subject of controversy in the 1840s. Postmasters General would claim that the right to allow postriders to carry newspapers along with the mail implied the authority to prohibit postriders—and by extension stagecoaches and

[45] John, *Spreading the News* 31-33.

[46] For the history of this practice, see Kielbowicz, *News in the Mail* 22-24.

[47] Ordinance of October 18, 1782, 23 *J. Cont. Cong. 670*, 677.

steamboats—from carrying any mailable matter out of the mail when they were transporting mail under contract with the Post Office.

3.2 Postal Act of 1792

In March 1789, a new Congress organized under the Constitution superseded the Continental Congress of the confederation. The Constitution authorized Congress "to establish Post Offices and post Roads,"[48] but unlike the Articles of Confederation did not grant Congress the sole and exclusive power to do so nor limit the national government to interstate postal systems. In its first three sessions, Congress continued in effect the post office established by the ordinance of 1782 while it considered how to implement its new authority.[49]

The first substantive postal law enacted by the new government was adopted in 1792.[50] After much debate, newspapers were admitted to the mails for the first time, and postage rates for newspapers and government documents were set well below cost, especially when conveyed long distances.[51] From the early days of the republic, both the Federalists led by President George Washington and the Republicans led by James Madison and Thomas Jefferson considered that a primary function of the Post Office was to spread news about the current events and to generate a sense of national community. In the American experiment in democracy, the Post Office quickly became the first national broadcast network.

The basic organization of the Post Office was established by the 1792 act as follows. In the first section of the act, Congress listed post roads to be established, thus declaring that it, not the Postmaster General, would determine the routing of postal systems—still thought of as lines of posts.[52] Following the English practice, the office of the Postmaster General was established

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[48] U.S. Const., art. I, § 8.

[49] Act of Sep. 22, 1789, ch. 16, 1 Stat. 70; Act of Aug. 4, 1790, ch. 36, 1 Stat. 173; Act of Mar. 3, 1791, ch. 23, 1 Stat. 218.

[50] Act of Feb. 20, 1792, ch. 7, 1 Stat. 232.

[51] John, *Spreading the News* 33-37, 59-63, 110.

[52] Historian Richard R. John has commented, "Of all the changes that Congress set in motion with the Post Office of 1792, by far the most radical was its assumption of the power to designate the routes over which the government would carry the mail. . . . it had major implications for the pattern of everyday life, since it virtually guaranteed that the postal network would expand rapidly into the transappalachian West well in advance of commercial demand." John, *Spreading the News* 44-45.

within the Department of the Treasury.[53] Nonetheless, Congress rejected the British policy of setting postage rates high enough to generate a substantial net income for the Treasury.[54] The salaried staff of the Post Office consisted of only the Postmaster General and a handful of assistants. The major function of the central staff was negotiating contracts for the transportation of mail. Contract transportation accounted for almost 60 percent of total expenses.[55] Postmasters were akin to franchisees. They were appointed and directed by the Postmaster General and compensated from commissions on the postage they collected.[56]

The primary monopoly provision of the 1792 act was section 14. This provision read:

> Sec. 14. *And be it further enacted*, That if any person, other than the Postmaster General, or his deputies, or persons by them employed, shall take up, receive, order, dispatch, convey, carry or deliver any *letter or letters, packet or packets, other than newspapers*, for hire or reward, or shall be concerned in setting up any foot or horse post, wagon or other carriage, by or in which any *letter or packet* shall be carried for hire, on any established post-road, or any packet, or other vessel or boat, or any conveyance whatsoever, whereby the revenue of the general post-office may be injured, every person shall forfeit, for every such offence, the sum of two hundred dollars: *Provided*, That it shall and may be lawful for any person to send letters or packets by special messenger.[57]

Section 14 represents a synthesis of the sixth and seventh paragraphs of the postal ordinance of 1782, seemingly improved by more careful study of English precedents. As in prior English law, the proscription against private carriage was two-pronged, referring to carriage of postal items by individuals, on the one hand, and the establishment of private postal systems for carriage of letters, on the other. Private postal systems are described as "any foot or horse post, wagon or other carriage." Like the seventh paragraph of the ordinance, section 14 uses the subjunctive mood. Like the sixth paragraph of the ordinance, section 14 includes the special messenger exception and omits the traditional English exceptions for cargo letters, letters of the

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[53] Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 232, 234.

[54] John, *Spreading the News* 45-46; Rich, *History of the Post Office* at 58, 91-92.

[55] Act of Feb. 20, 1792, ch. 7, § 6, 1 Stat. 232, 234. Rich, *History of the Post Office* App. C, Table VIII.

[56] Act of Feb. 20, 1792, ch. 7,§§ 3, 7, 23, 1 Stat. 232, 234, 238. Rich, *History of the Post Office* 123, 127-31.

[57] Act of Feb. 20, 1792, ch. 7,§ 14, 1 Stat. 232, 236 (emphasis added).

carrier, and carriage by private hands. In addition, the exception for official messengers, found in the ordinance and in prior English law, is omitted.[58]

The 1792 act also adopted the English practice, not reflected in the 1782 ordinance, of establishing a monopoly over inbound international mail in a separate section. Section 12 obliged the master of each ship arriving in an American port to deliver immediately all "letters" to the nearest post office.

> Sec. 12. *And be it further enacted*, That no ship or vessel, arriving at any port within the United States, where a post-office is established, shall be permitted to report, make entry or break bulk, till the master or commander shall have delivered to the postmaster, all *letters* directed to any person or persons within the United States, which, under his care or within his power, shall be brought in such ship or vessel, other than such as are directed to the owner or consignee; but when a vessel shall be bound to another port, than that, at which she may enter, the letters belonging to, or to be delivered at the said port of delivery, shall not be delivered to the postmaster at the port of entry. And it shall be the duty of the collector or other officer of the port, empowered to receive entries of ships or vessels, to require from every master or commander of such ship or vessel, an oath or affirmation, purporting that he has delivered all such letters, except as aforesaid.[59]

American postal law modified the English law by omitting passengers on arriving vessels from the obligation to deliver letters to the nearest post office.[60] Section 13 provides that postmasters shall pay the ship's master at the rate of "two cents for each letter or packet" for "such letters."

The 1792 act did not provide for a monopoly over outbound international letters. In a report written in 1841, an eloquent First Assistant Postmaster General (and former congressman from New York) Selah Hobbie wrote,

> From a time whereof the memory of man runneth not to the contrary, there have existed in Boston, New York, and probably

[58] The 1792 act dropped the term *despatches* used in the 1782 ordinance, presumably reflecting the end of wartime conditions.

[59] Act of Feb. 20, 1792, ch. 7,§ 12, 1 Stat. 232, 235 (emphasis added).

[60] *Compare* Act of Feb. 20, 1792, ch. 7, §12, 1 Stat. 232, 235 and Act of Mar. 8, 1794, ch. 23, § 12, 1 Stat. 354, 359 *with* 9 Ann. ch. 10, § 15 ("That all Letters and Packets, that by any Master of any Ship or Vessel or any of his Company *or any Passengers therein*, shall or may be brought to any Port Town . . ."[emphasis added]).

> other maritime cities, what have usually been called *foreign letter offices*, generally kept by the keepers of the news rooms in the respective cities, who assumed the business of receiving letters to be forwarded to foreign countries by sea. . . . This is the system which has always been practised, from which no detriment to the revenues of the Department has ever arisen." [61]

In later decades, one of the most troublesome elements of the postal monopoly established by the 1792 act would be the phrase "other than newspapers" found in the first sentence of section 14. Section 14 prohibits individual persons from carrying any "letter or letters, packet or packets, *other than newspapers*." This issue looms so large in later history that it deserves careful consideration at this point.

The spare legislative history of the 1792 postal act sheds little light on the intent behind inclusion of the phrase "other than newspapers." The 1792 postal act was drafted by the House of Representatives. The phrase "other than newspapers" was added by the Senate on January 30, 1791.[62] The *Annals of Congress*, compiled long after the events, include no record of Senate debates from this period.[63] In recording the House disposition of the Senate-amended version of the bill, the *Annals* implies that addition of the phrase "other than newspapers" created a new exception from the postal monopoly as a boon for newspapers:

> One of the amendments, proposed by the Senate and agreed by the House, is in favor of the newspapers; inasmuch as it permits any person whatever; without authority from the Postmaster General, to 'take up, receive, order, despatch, convey, carry, and deliver' newspapers, for hire, on the established post roads.[64]

The Senate amendment was approved by the House without debate.

On the other hand, discussion of the postal bill in the House *prior to* the amendment by the Senate suggests that original House bill would have permitted private carriage of newspapers

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[61] 1841 *Postmaster General Ann. Rept*., in H.R. Doc. No. 2, 27th Cong., 2d Sess. 435, 453 (1842) (emphasis original).

[62] *S. Journal*, 2d Cong., 1st Sess., 383 (1792).

[63] The only authoritative record of Congressional deliberations until the second session of the 18th Congress (beginning December 1824) is the *Annals of Congress*. The *Annals* were not published contemporaneously but were compiled between 1834 and 1856, using the best records available, primarily newspaper accounts. Because Senate sessions were closed to the public until 1795, the *Annals* give no description of Senate deliberations. There exists a *Senate Journal* from that period, but it is only a record of decisions without an account of debates.

[64] 2 *Annals of Cong*. 355 (1792).

in any case. Debates in the House include no mention of expanding the postal monopoly beyond the traditional bounds set out in the English act of 1710 and the confederation ordinance of 1782. The postal monopoly provisions in the House bill refer only the carriage of "letters" and "packets," terms which did not, in prior laws, include newspapers since newspapers were not admitted to the mails in the first place.[65] In debate House members seemed to take for granted that the original bill would have permitted private carriage of newspapers. In proposing an amendment to set rates and conditions for carriage of newspapers in the mail, Representative Hugh Williamson of North Carolina expressed concern that low postage rates for newspapers "will operate to discourage the private stages, and all communication on the roads supported by private subscriptions, will be cut off." Representative Thomas Hartley of Pennsylvania replied that "the rates demanded by the private posts was [sic] so high, as to amount to an interdiction of the papers almost entirely."

Examination of the 1792 act as a whole suggests that transmission of newspapers was originally viewed as a supplement to what was essentially a law for the conveyance of letters and packets. Section 9 of the act sets out rates of postage for letters and packets carried over post roads. Section 10 sets out rates of postage for domestic and international letters and packets transmitted by sea. Sections 11 through 17 prescribe penalties for obstructing the transmission of letters and packets in one way or another, including by private carriage or establishment of alternative postal systems. Section 18 obliges postmasters periodically to publish in the local newspaper a list of letters uncalled for at the post office. Sections 19 and 20 grant to certain officials the right to have letters and packets conveyed without payment of postage.

It is not until sections 21 to 23 that the postal act of 1792 deals with carriage of newspapers. Section 22, in particular, provided as follows:

> Sec. 22. *And be it further enacted*, That all newspapers, conveyed in the mail, shall be under a cover open at one end, *carried in separate bags from the letters*, and charged with the payment of one cent, for any distance not more than one hundred miles, and one cent and a half for any greater distance: And it shall be the duty of the Postmaster General and his deputy, to keep a separate account for the newspapers, and the deputy postmasters

[65] *S. Journal*, 2d Cong., 1st Sess., 367 (1792) (section 14).

> shall receive fifty per cent. on the postage of all newspapers: *And if any other matter or thing be enclosed in such papers, the whole packet shall be charged*, agreeably to the rates established by this act, for letters and packets. And if any of the persons employed in any department of the post-office, shall unlawfully detain, delay, embezzle or destroy any newspaper, with which he shall be entrusted, such offenders, for every such offense, shall forfeit a sum, not exceeding thirty dollars: *Provided*, That the Postmaster General, in any contract, he may enter into, for the conveyance of the mail, may authorize the person, with whom such contract is made, to carry newspapers, other than those conveyed in the mail.[66]

In explaining the new rules for admitting newspapers to the post, section 22 uses the word *packet* more broadly than in the earlier, more traditional parts of the act. This section implies that, while *newspapers* were understood to be distinct from *letters*, the term *packet* could embrace a bundle of newspapers as well as bundle of letters. In contrast, in prescribing postage rates for letters and packets, section 9 uses the word *packet* more traditionally. For a "single letter," the postage rate was prescribed according to distance, and the section continues, "and every double letter shall pay double the said rates; every triple letter, triple; and for every *packet* weighing one ounce avoirdupois, at the rate of four single letters; and in that proportion for any greater weight." In section 9, *packet* clearly refers to a bundle of letters weighing one ounce or more. Similarly, section 16 deals with penalties for embezzling or destroying "any letter, packet, bag, or mail of letters . . . containing any bank note, . . . or any letter of credit, or note for, or relating to the payment of money, or other bond or warrant, draft, bill, or promissory note."[67] In this passage a *letter* or a *packet* could "contain" a bank note or similar financial instrument, but such instruments were not, standing alone, considered letters or packets. Indeed, in an age before postal money orders (introduced in 1864), the postal system was the most secure means of sending money across the country and vital to the conduct of business.[68]

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[66] Act of Feb. 20, 1792, ch. 7,§ 22, 1 Stat. 232, 238 (emphasis added).

[67] Act of Feb. 20, 1792, ch. 7,§ 16, 1 Stat. 232, 236.

[68] Henkin, *The Postal Age* 52-53. Nonetheless, high per-sheet postage rates appear to have discouraged use of the mail for transmission of bank-notes and commercial papers to some degree. Writing in 1844, a Boston merchant and proponent of lower postage noted, "It is clearly unjust to the letter-writer to compel him to pay, on a sheet of thin paper and bank-note, double the rate of the coarse foolscap sheet that travels in its company, and weighs double. No feature of the law tends so much to injure the department as this: for seldom does the sender of a double or treble letter employ the post-office if he can avoid it. Of the innumerable bank-notes, bills of exchange,

In short, in the 1792 act, a *packet* refers repeatedly and consistently to a packet of letters until one gets to the provisions dealing with newspapers. The sole exception to this generalization is the first sentence of section 14 because of the Senate's addition of the phrase "other than newspapers" after "letters and packets."[69] What was the intent behind this addition? One explanation is that the Senate was merely making clear that the term "letters and packets" did not include newspapers out of an abundance of solicitude for printers of newspapers. In this view, the phrase "other than newspapers" was an expression of emphasis without substantive intent, since the term "letters and packets" did not in any case include newspapers, only letters and packets of letters. The plausibility of this explanation is perhaps strengthened by noting that it was also the Senate that added the final proviso to section 22 continuing the historic arrangement whereby the Postmaster General could allow printers to contract directly with postriders to transport newspapers without payment of postage.

An alternative, more literal interpretation implies a more convoluted postal monopoly. The phrase "other than newspapers" in the first sentence of section 14 could be construed to exempt newspapers from a term, "letters and packets," that would otherwise include newspapers. In this view, the 1792 postal monopoly came in three sizes depending on mode of transport: by individual (letters and packets other than newspapers), by foot or horse post (letters and packets[70]), or by inbound international vessel (letters only[71]). This interpretation appears inconsistent with the general structure of the act and the apparent equivalence between "letters" and "letter or packet" in section 13. It also implies that the odd conclusion that the final proviso in section 22 empowers the Postmaster General to authorize postriders with mail contracts to convey newspapers out of the mails, but riders without mail contracts would barred from

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and commercial obligations, that travel in letters, a very small proportion go through the mails." Whiton, *Post-Office Reform, and Uniform Postages* 27, 34.

[69] Section 2, 1 Stat. 233, might be considered an exception as well. It refers to "all the postage which shall arise on letters, newspapers and packets." However, the logical and literal implication of this list—that *packets* referred to *neither* letters *nor* newspapers—cannot be taken seriously in light of the statute as a whole.

[70] In section 14, the phrase "other than newspapers" qualifies the proscription against carriage of "letter or letters, packet or packets" by individuals but not the proscription against setting up a foot post or horse post to convey "letters and packets."

[71] Section 12 refers only to "letters" not "letters and packets."

carrying newspapers because newspapers would be considered to be "packets" and therefore within the horse post version of the postal monopoly.[72]

In sum, the postal monopoly established by the 1792 act was derived from English precedents and the bowdlerized version of English postal law found in the ordinance of 1782. The law prohibited individuals from carrying letters and packets "other than newspapers" and prohibited establishment of foot posts and horse posts for transportation of letters and packets (without the exception for newspapers). The law permitted private carriage of letters and packets by special messenger but did include traditional English exceptions for private carriage or cargo letters,[73] letters of the carrier, and carriage by private hands. The monopoly covered inbound international letters (not packets) but not outbound letters.

3.3 Postal Acts of 1794, 1799, and 1810

In 1794, Congress revised and refined the postal act of 1792.[74] Magazines and pamphlets were admitted to the mails for the first time but only "where the mode of conveyance, and the size of the mails, will admit of it."[75] The uncertain status of magazines and pamphlets was underscored in 1815 when Postmaster General Return Meigs banned all but religious magazines from the mails.[76]

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[72] Indeed, a strictly literal reading of section 14 might imply a fourth level of postal monopoly. The last portion of the prohibitory text forbids any person from "setting up . . . any packet [i.e., regularly scheduled ship or boat used to carry mail], or other vessel or boat, or any conveyance whatsoever, whereby the revenue of the general post-office may be injured." This sentence might be read to prohibit establishment of any water-borne transportation service that injured the revenue of the Post Office.

[73] Section 15 of the original House bill included an exception from the monopoly for letters and packets relating to cargo, but it was deleted by the Senate ("That it shall be lawful for the masters of ships and vessels, conductors of pack horses, and for carriers of goods by carts or wagons, to be carriers and deliverers of all such letters or packets, as immediately concern any merchandise or lading in such ship or vessel, or such goods or merchandise as are under the immediate care or inspection of such masters, conductors, or carriers: Provided, such master, conductor, or carrier, shall deliver every such letter to the person or persons to whom it is addressed, without hire or reward."). *S. Journal*, 2d Cong., 1st Sess., 367, 383 (1792).

[74] Act of Mar. 8, 1794, ch. 23, 1 Stat. 354.

[75] Act of Mar. 8, 1794, ch. 23, § 22, 1 Stat.354, 362. Rich suggests that the volume of magazines and pamphlets was minimal before 1816. Rich, *History of the Post Office* 145.

[76] Kielbowicz, *News in the Mail* 123. In 1838, a survey by the Post Office indicated that composition of the mails by weight in the cities of New York, Philadelphia, Baltimore, Washington, and Richmond was letters, 3.5 percent; newspapers, 81.2 percent; and "periodicals," 16.0 percent. 1845 *Postmaster General Ann. Rept*., in S. Doc. No. 1, 29th Cong., 1st Sess. 850, 857 (1846).

In the 1794 act, the postal monopoly became one-pronged instead of two-pronged. The traditional English proscription against private carriage by an individual was dropped while the proscription against establishment of private postal systems was retained and expanded. The idea of private "postal" system—i.e., a system of posts or stages—was described more generally as "any foot or horse-post, *stage wagon, or other stage carriage*." This was the first mention of the stagecoach, the first great improvement in land transportation in this period. In similar fashion, the prohibition in section 12 of the 1792 act against carriage of letters and packets by "any packet, or other vessel or boat, or any conveyance whatsoever, whereby the revenue of the general post-office may be injured" was restated in more precise and limited terms: "any packet boat or other vessel, to ply *regularly* from one place to another, between which a *regular* communication by water shall be established by the United States." The 1794 act thus prohibited the establishment of *regular* boat and ship services to compete where the Postal Service had set up *regular* postal service. Carriage of letters and packets was by the occasional vehicle or vessel was not prohibited.

Other refinements in the postal monopoly were introduced in the 1794 act. The qualifying phrase "other than newspapers," previously applicable to carriage by private individuals, was shifted to the section dealing with carriage by private postal systems. It was also expanded to include references to magazines and pamphlets so that it read, "any letter or packet, other than newspapers, magazines or pamphlets." Exceptions for cargo letters and letters of the carrier were added, although considerably modified from the wording found in English precedents. The historic English exception permitting carriage by private hands without compensation was omitted, but it may have been considered superfluous since the proscription against carriage by individuals was deleted.

The revised postal monopoly, embodied in section 14 of the 1794 act, was as follows:

> Sec. 14. *And be it further enacted*, That if any person, other than the Postmaster General, or his deputies, or persons by them employed, shall be concerned in *setting up, or maintaining any foot or horse-post, stage wagon, or other stage carriage*, on any established post-road, or any packet boat or other vessel, to ply *regularly* from one place to another, between which a *regular* communication by water shall be established by the United States, and shall receive *any letter or packet, other than newspapers, magazines or pamphlets*, and carry the same by such foot or horse-

> post, stage wagon or other stage carriage, packet boat or vessel, (excepting only such letter or letters, as may be directed to the owner or owners of such conveyance, and relating to the same, or to the person, to whom any package or bundle in such conveyance is intended to be delivered) every person, so offending, shall forfeit, for every such offence, the sum of fifty dollars: *Provided*, That it shall and may be lawful for any person to send letters or packets by special messenger.[77]

Thus, after 1794, the federal government did not claim a complete monopoly over the carriage of letters, etc. The postal monopoly law prohibited only the establishment of private *postal systems*, i.e., a series of relay stations or a regularly scheduled boat service, for the regular transmission of such items.

A more limited monopoly may have implied less revenue, but if so, this was a consequence Congress choose deliberately. In a plan to improve the operations of the post office submitted to Congress in 1790, Samuel Osgood, the first Postmaster General under the new federal government, warned, "Stage drivers and private postriders may have been the carriers of many letters which ought to have gone in the mail. . . . So far as I have been able to collect from the opinions of others . . ., the injury the general revenue has sustained in this way is greater than I had expected."[78] Osgood urged Congress to prohibit private carriage of letters by individuals even when performed without compensation. Instead, Congress took the opposite course and eliminated restrictions on private carriage by individuals.

In the first decades of the nation, individual travelers apparently transported substantial quantities of letters and packets for friends and acquaintances. In 1822, Postmaster General Return Meigs observed that with the introduction of steamboats more persons traveled by water than by land because of the "greater economy and convenience" and "most of the passengers are charged with letters" since "there is no law prohibiting passengers from carrying letters."[79] Recalling the 1830s, a chronicler of the express industry, A.L Stimson, painted this colorful picture:

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[77] Act of Mar. 8, 1794, ch. 23, § 14, 1 Stat. 354, 360 (emphasis added).

[78] "Plan for Improving the Post Office Department" (Jan. 20, 1790) in *American State Papers: Post Office* 5-6.

[79] "Compensation to Deputies and Mail Agents—Effect of Steamboats on the Revenue of Post Office" (Feb. 1822) in *American State Papers: Post Office* 92.

> We have known men, in that age, who were in the custom of sending parcels of bank notes, drafts, acceptances and bills of exchange, between New York and Boston—brokers, for instance—to put them in the charge of passengers in the cars, or on board the steamboat, whom they "did not know from a side of sole leather." The broker would rush down with this money parcel to the "John W. Richmond" or the "Norwich," just as the last bell was ringing. . . . It is no exaggeration to say that hundreds of thousands of dollars, in bank notes and other valuable paper, used to make the transit between these two cities every year in that unreliable manner.[80]

Stagecoach drivers and wagoners, too, often carried small packages along their routes out of the mails, reportedly including letters.[81]

In the 1794 act, Congress also continued the postal monopoly over inbound international "letters" in almost the same terms as the 1792 act:

> Sec. 12. *And be it further enacted*, That no ship or vessel arriving at any port within the United States, where a post office is established, shall be permitted to report, make entry, or break bulk, until the master or commander shall have delivered to the postmaster, all *letters* directed to any person or persons, within the United States, which, under his care, or within his power, shall be brought in such ship or vessel, except such as are directed to the owner or consignee of the ship or vessel, and except also such as are directed to be delivered at the port of delivery, to which such ship or vessel may be bound. And it shall be the duty of the collector, or other officer of the port empowered to receive entries of ships or vessels, to require from every master or commander of such ship or vessel, an oath or affirmation, purporting that he has delivered all such letters, except as aforesaid.[82]

Section 13 repeated the duty of the postmaster to pay the master of the incoming ship two cents for each "letter or packet" delivered.

In 1799 Congress again revised the postal law.[83] Section 14 of the 1794 act was reenacted as section 12 of the 1799 act. The scope of the postal monopoly was revised only slightly, by

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[80] Stimson, *History of the Express Business* 31.

[81] Harlow, *Old Way Bills* 7-9.

[82] Act of Mar. 8, 1794, ch. 23, § 12, 1 Stat. 354, 359 (emphasis added).

[83] Act of Mar. 2, 1799, ch. 43, 1 Stat.733.

adding a phrase declaring that private postal systems were prohibited not only on post roads but also on "any road adjacent or parallel to an established post road."[84] A reading of the 1799 act as a whole suggests the increasingly variable meanings of words. In specifying postage rates, section 7 of the 1799 act refers to a "letter composed of a single sheet" instead of the previous term "single letter." This phrasing suggests that *letter*, used alone, could refer to an entire written communication, and not just to a single sheet. On the other hand, the same section also states that a packet must contain "four distinct letters" in order to qualify for quadruple postage, using *letter* in the earlier sense of a single sheet of paper. At the end of this section, the 1799 act refers to a *packet* weighing up to three pounds: "No postmaster shall be obliged to receive, to be conveyed by the mail, any packet which shall weigh more than three pounds."[85] *Packet* was thus coming to mean a small package in one of its meanings.

In 1810, Congress revised and codified the postal laws and repealed previous acts.[86] The basic postal monopoly provision was reenacted as section 16 of the 1810 act. The only change from section 12 of the 1799 act was the addition of "sleigh" as one the illegal means of transporting letters and packets. Section 16 of the postal code of 1810 provides as follows:

> SEC. 16. *And be it further enacted*, That if any person, other than the Postmaster-General or his deputies, or persons by them employed, shall be concerned in setting up or maintaining any foot or horse post, stage wagon, or other stage carriage or sleigh on any established post road, or from one post town to another post town, on any road adjacent or parallel to an established post road, or any packet boat or other vessel to ply regularly from one place to another, between which a regular communication by water shall be established by the United States, and shall receive any *letter or packet, other than newspapers, magazines or pamphlets*, and carry the same by such foot or horse post, stage wagon or other stage, carriage, or sleigh, packet boat or vessel (excepting only such letter or letters as may be directed to the owner or owners of such conveyance, and relating to the same, or to the person to whom any packet or bundle in such conveyance is intended to be delivered,) every person so offending shall forfeit for every such offence the sum of 50 dollars: *Provided*, that it shall be lawful for any person

[84] Act of Mar. 2, 1799, ch. 43, § 12, 1 Stat.733 , 735.

[85] Act of Mar. 2, 1799, ch. 43, § 7, 1 Stat. 733, 734.

[86] Act of Apr. 30, 1810, ch. 37, 2 Stat. 592.

to send letters of packets by a special messenger.[87]

Section 14 repeated the command to deliver inbound international "letters" to the post office in the port of entry. There was no material change from section 12 of the 1794 act. Section 15 repeated the duty to the postmaster to pay two cents for each letter or packet so delivered.[88]

3.4 Postal Act of 1815

In the early nineteenth century, the United States was especially dependent upon rivers for transportation and therefore in special need of boats that could move upstream as well as down. The first commercially feasible steamboat was demonstrated on the Hudson River in 1807 by Robert Fulton. After the disruptions of the War of 1812, the golden age of steamboats was ready to begin.[89]

In 1815, Congress began to extend the postal monopoly to the operations of steamboats. Congress did not flatly prohibit use of steamboats for carriage of postal items out of the mails, but it did require the master of each steamboat in domestic service to tender "all letters and packets" to the local postmaster soon after docking.

> Sec. 4. *And be it further enacted*, That it shall be the duty of every master or manager of any steamboat, packet, or other vessel, which shall pass from one part or place to another part or place, in the United States, where a post-office is established, to deliver within three hours after his arrival if in the day time, and within two hours after the next sunrise, if the arrival be in the night, *all letters and packets* addressed to, or destined for such port or place, to the postmaster there, for which he shall be entitled to receive of such postmaster *two cents for every letter or packet* so delivered, unless the same shall be carried or conveyed under a contract with the Postmaster General; and if any master or manager of a steamboat or other vessel, shall fail so to deliver any letter or packet, which shall have been brought by him, or shall have been in his care, or within his power, he shall incur a penalty of thirty dollars for every such failure.
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> Sec. 5. *And be it further enacted*, That every person employed on board any steamboat, or other vessel employed as a packet,

[87] Act of Apr. 30, 1810, ch. 37, § 16, 2 Stat. 592, 596.

[88] Act of Apr. 30, 1810, ch. 37, §§ 14, 15, 2 Stat. 592, 596.

[89] *See generally* Taylor, *Transportation Revolution* 56-73 (1977).

> shall deliver every letter, and packet of letters, intrusted to such person, to the master or manager of such steamboat, or other vessel; and before the said vessel shall touch at any other part of place; and for every failure, or neglect, so to deliver, a penalty of ten dollars shall be incurred for each letter and packet.[90]

These provisions refer only to masters and employees of steamboats. There was no corresponding requirement for the *passengers* traveling on steamboats to deliver letters to the post office (as noted above, the same was true for passengers on inbound international ships).

In 1823, Congress, however, declared "all waters on which steamboats regularly pass from port to port" to be post roads.[91] The effect was the extend the postal monopoly to all water ways if *regularly* used by steamboats.

3.5 Postal Acts of 1825 and 1827

In 1825, Congress again synthesized the postal laws into a general code and repealed prior laws.[92] In the 1825 act, the main monopoly provision was rewritten and placed in section 19, as follows:

> Sec. 19. *And be it further enacted*, That no stage or other vehicle, which regularly performs trips on a post-road, or on a road parallel to it, shall convey *letters*; nor shall any packet boat or other vessel, which regularly plies on a water declared to be a post-road, except such as relate to some part of the cargo. For the violation of this provision, the owner of the carriage, or other vehicle or vessel, shall incur the penalty of fifty dollars. And the person who has charge of such carriage, of other vehicle or vessel, may be prosecuted under this section, and the property in his charge may be levied on and sold, in satisfaction of the penalty and costs of suit: *Provided*, That it shall be lawful for any one to send letters by special messenger.[93]

This was a substantial departure from earlier language. Four changes are particularly notable. First, the phrase "any letter or packet, other than newspapers, magazines or pamphlets" was reduced to the single term *letters*. The term *packets* was dropped as was the exception for

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[90] Act of Feb. 27, 1815, ch. 65, §§ 4-5, 3 Stat. 220-21.

[91] Act of Mar. 3, 1823, ch. 33, § 3, 3 Stat. 764, 767.

[92] Act of Mar. 3, 1825, ch. 64, 4 Stat. 102.

[93] 4 Stat. at 107 (emphasis added).

newspapers, magazines, and pamphlets. Either the drafters considered the term *letters* to be equivalent to the longer phrase or they reduced the scope of this provision to letters alone. Second, in a similar economy of language, the drafters reduced the description of private postal systems from "any foot or horse post, stage wagon, or other stage carriage or sleigh" found in the 1810 act to "stage or other vehicle." This change seemingly eliminated the prohibition against setting up foot or horse posts found in earlier postal laws even though foot and horse posts were the original prototype of staged postal systems of which stagecoaches and packet boats were later manifestations.[94] Third, the adverb "regularly" has been used to qualify the prohibition against staged land carriage in the same manner that it had, since 1794, qualified boat carriage. The revised language read, "no stage or other vehicle, which *regularly* performs trips on a post-road. . . ." Irregularly scheduled land transportation was thus excluded from the postal monopoly.

The fourth revision was a reduction in the description of "cargo letter" exception to the monopoly. The revised, more economical wording referred only to letters "such as relate to some part of the cargo." In the 1810 act, the corresponding exception read: "such letter or letters as may be directed to the owner or owners of such conveyance, and relating to the same, or to the person to whom any packet or bundle in such conveyance is intended to be delivered."[95] The possibly inadvertent elimination of the reference to letters "directed to the owner or owners of such conveyance, and relating to the same" would ultimately lead to doubts about whether a transportation company could transport its own corporate letters if unrelated to cargo on board. An exception to the postal monopoly for "letters of the carrier" was not reintroduced into American postal statutes until 1909.

The postal code of 1825 reenacted other provisions relating to the postal monopoly. The historic obligation placed on masters of ships and vessels to deliver inbound international "letters" to the post office at the port of entry, found in section 14 of the 1810 act, was reenacted without significant revision as section 17 of the 1825 act.[96] Section 18 of the 1825 act likewise reenacted the obligation of the postmaster to pay the master two cents for each "letter or packet"

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[94] Professor Priest declares that this revision was drafted by the Post Office but does not provide a source. Priest, "History of the Postal Monopoly" 18.

[95] Act of Apr. 30, 1810, ch. 37, § 16, 2 Stat. 592, 596.

[96] Act of Mar. 3, 1825, ch. 64, § 17, 4 Stat. 102, 106 (emphasis added).

so delivered. Section 6 of the 1825 act combined sections 4 and 5 of the 1815 act; these obliged each master of a steamboat operating in domestic waters to deliver all "letters and packets" to a post office on arriving in port and obliged steamboat employees to deliver "every letter, and packet of letters" to the master of the steamboat.[97]

The omission of foot posts and horse posts from the postal monopoly of 1825 was quickly repaired. In 1827, Congress reenacted the ancient postal monopoly prohibition against establishment of foot posts and horse posts.[98] Although the 1825 provision referred only to "letters," the 1827 provision employed the more traditional phrase "letters and packets" to describe the scope of the monopoly: Section 3 of the 1827 act read:

> Sec. 3. *And be it further enacted*, That no person, other than the Postmaster General, or his authorized agents, shall set up any foot or horse post, for the conveyance of *letters and packets*, upon any post-road, which is or may be established as such by law; and every person who shall offend herein, shall incur a penalty of not exceeding fifty dollars, for each letter or packet so carried.[99]

Like the 1825 monopoly provision, the 1827 provision omitted the phrase "other than newspapers, magazines, or pamphlets" which was used to qualify the term "letters and packets" in section 14 of the 1794 act and repeated in section 12 of the 1799 act and section 16 of the 1810 act. The main provisions of the postal monopoly of the postal code of 1825, as amended by the 1827 act, are summarized in Table 1.

Table 1. Postal monopoly under the acts of 1825 and 1827

Act of	Ch	Sec	Description
3 Mar 1825	64	6	Master of steamboat to deliver letters and packets and employees to deliver letters to and employees shall deliver letters to post office
3 Mar 1825	64	17	Inbound vessel arriving at port with post office to deliver letters before breaking bulk.
3 Mar 1825	64	18	Postmaster to pay 2¢ per letter or packet from inbound vessel.
3 Mar 1825	64	19	No regular stagecoach or vessel on post road to carry letters except cargo letters and special messenger
2 Mar 1827	61	3	No foot post and horse post on post road to carry letters or packets

[97] Act of Mar. 3, 1825, ch. 64, § 6, 4 Stat. 102, 104 (emphasis added).

[98] Act of Mar. 2, 1827, ch. 61, 4 Stat. 238.

[99] Act of Mar. 2, 1827, ch. 61, § 3, 4 Stat. 238 (emphasis added).

A brief review of postage rates is also useful at this point. Within a decade and a half, the high letter rates of the early postal service would attract private competitors, and new competition would, in turn, prompt changes in the postal monopoly law. The 1825 act struggled with the problem of establishing an understandable scheme for classifying and rating postal items. Section 13 specified the rates for letters and packets in words that echoed the corresponding provision in the 1799 act:

> Sec. 13. *And be it further enacted*, That the following rates of postage be charged upon all letters and packets, (excepting such as are excepted by law, conveyed in the mail of the United States, viz: For every letter composed of a single sheet of paper, conveyed not exceeding thirty miles, six cents. Over thirty, and not exceeding eighty, ten cents. Over eighty, and not exceeding one hundred and fifty, twelve and a half cents. Over one hundred and fifty, and not exceeding four hundred, eighteen and three quarters of a cent. Over four hundred, twenty-five cents.
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> And for every double letter, or letter composed of two pieces of paper double those rates: and for every triple letter, or letter composed of three pieces of paper, triple those rates; and for every packet composed of four or more pieces of paper, or one or more other articles, and weighing one ounce avoirdupois, quadruple those rates; and in that proportion for all greater weights; *Provided*, That no packet of letters, conveyed by the water mails, shall be charged with more than quadruple postage, unless the same shall be charged with more than quadruple postage, unless the same shall contain more than four distinct letters. No postmaster shall receive, to be conveyed by the mail, any packet which shall weigh more than three pounds, . . .[100]

Sharply discounted postage rates for newspapers were set out in section 30. In the same section, lesser discounts were allowed for periodically published magazines and pamphlets, which were permitted in the mail only if "the mode of conveyance and size of the mail will admit." Still smaller discounts were allowed for "such magazines and pamphlets as are not published periodically," the first hint of advertisements in the mail.[101] Since the pay for postmasters was

[100] Section 13 of the 1825 act went on to distinguish between printed paper, pamphlet, or magazine and "letter postage": "Any memorandum, which shall be written on a newspaper, or other printed paper, pamphlet or magazine, and transmitted by mail, shall be charged with letter postage." Act of Mar. 3, 1825, ch. 64, § 13, 4 Stat. 102, 105.

[101] Act of Mar. 3, 1825, ch. 64, § 13, 4 Stat. 102, 111-12. Rich says the rate for non-periodic publications was intended for price currents (price sheets) and other occasional publications, but he gives no source for this

linked to postage collected, postmasters had an incentive to classify borderline items as "letters" for the purpose of postage.[102] Rates of postage in the 1825 postal code are summarized in Table 2.

Table 2. Postage rates per sheet under the act of 1825

Distance	Letters	Newspapers	Magazines	Pamphlets
0-30 miles	6¢	1¢	1.5¢	4¢
30-80 miles	10¢	1¢	1.5¢	4¢
80-100 miles	12.5¢	1¢	1.5¢	4¢
100-150 miles	12.5¢	1.5¢	2.5¢	6¢
100-400 miles	18.75¢	1.5¢	2.5¢	6¢
400+ miles	25¢	1.5¢	2.5¢	6¢

3.6 U.S. v. Chaloner, 1831

In 1831, in *United States v. Chaloner*,[103] a federal court addressed the scope of the postal monopoly apparently for the first time. The question presented was whether a private contractor, engaged in mail transport for the Post Office, violated the law when he collected and carried out of the mail packages containing "executions and nothing else."[104] As noted above, under section 19 of the 1825 postal code, no vehicle making regular trips on a post road was permitted to convey "letters" out of the mails. Under section 20, a mail carrier was obliged to deliver any

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statement. Rich, *History of the Post Office* 145.

[102] The pay for postmasters was based on a commission scheme: up to 30 percent of "the postages" collected by him. The section continues that Postmaster General may allow a commission of up to 50 percent on the postage collected on "newspapers, magazines, and pamphlets." Act of Mar. 3, 1825, ch. 64, § 14, 4 Stat. 105-06.

[103] United States v. Chaloner, 25 F. Cas. 392 (D. Me. 1831). The first judicial interpretation of the scope of the postal monopoly was apparently by a state court. In Dwight v. Brewster, 18 Mass. (1 Pick.) 50 (1822), a Massachusetts court held that it is not contrary to the postal monopoly for a mail carrier to carry bank notes out of the mails: "A letter is a message in writing; a packet is two or more letters under one cover. The merely covering [sic] a parcel of gloves, silk hose, or other merchandise, with paper, and directing it to the person to whom it is sent, would not make such a parcel a letter; nor is there any difference between such a parcel, and one containing bank notes." *Id*. at 56.

Records of the lower courts from the nineteenth century are not perfectly complete. However, in addition to the usual legal databases available today, there exists a *Digest of Decisions of United States and Other Courts Affecting the Post-Office Department and Postal Service* compiled by the Post Office in 1905. This document offers a seemingly complete summary of all postal monopoly decisions up to that time.

[104] The court does not explain further precisely what type of document is referred to. However, it may be noted that section 21 of the 1825 act refers to an "execution" in a list of legal and financial instruments: "any letter or packet, bag, or mail of letters . . . containing . . . any copy of any record of any judgment, or decree, in any court of law, or chancery, or any execution which may be issued thereon."

"way letter"—a letter collected from someone along the route—to the first post office that he came to. Under section 21, a mail carrier who carried a "letter or packet" out of the mails in contravention of the act was subject to a fine of fifty dollars. The issue was whether, by transporting executions out of the mail, the mail contractor had acted in violation of either section 19 or 20 and thus was subject to fine under section 21.

Conceding that "executions" were not "letters," the Government nonetheless argued that the prohibitions in section 19 and 20 should be interpreted to apply to the carriage of packets as well as letters so as to be consistent with the obligation placed on masters of domestic steamboats to deliver "letters and packets" to the nearest post office upon arriving at port.[105] The key to the government's argument was its claim that the term *packet*, as used in the postal laws generally, referred to all types of packages unless explicitly limited to packets of letters. The defendant claimed the opposite, that the term *packet* was consistently used in the postal laws to refer to a packet of letters.

In ruling for the defendant, Judge Ashur Ware rejected both positions as too extreme. He concluded first that in the 1825 act the term *packet* was not used "uniformly, or indeed most usually" in the narrow sense of a packet of letters.[106] At the same time, Judge Ware rejected the government's argument that the steamboat master's duty to deliver "letters and packets" referred to more than a packet of letters. To support his conclusion, the judge pointed to the last sentence of section 6, which required steamboat employees to deliver "every letter, and packet of letters" to the post office. It would be illogical, the judge noted, to oblige the master to deliver all types of packets to the post office while allowing employees to carry packets that did not contain letters. Hence, the master's obligation to deliver "letters and packets" to the post office must refer to no more than letters and packets of letters. Judge Ware observed, "This construction of the 6th section renders the prohibition of that coextensive with that of the 19th, and by interpreting the word packet in the 21st to mean packet of letters, it places all the parts of the statute in harmony."

[105] Act of Mar. 3, 1825, ch. 64, § 6, 4 Stat. 102, 104.

[106] United States v. Chaloner, 25 F. Cas. 392, 393 (D. Me. 1831).

Judge Ware also reviewed prior versions of the postal monopoly law, and noted that private carriage of packets containing newspapers, magazines, or pamphlets had always been permitted. He concluded, "In the revision of those laws by the act of 1825, the word *packet* is dropped. There appears to be no reason to doubt that it was omitted *ex industria* [intentionally], and not unlikely for the purpose of making law conform to what is understood to have been the universal usage from the first existence of the post-office establishment."[107]

In sum, in *Chaloner*, the court concluded that postal monopoly provisions of the 1825 act covered only letters and packets of letters even though the term *packet* was sometimes used more broadly in other parts of the act. Although the court's reasoning appears clear and convincing, in the 1840s and 1910s, the Post Office would, without reference to *Chaloner*, again argue for a broad definition of the term "packet" and hence of the postal monopoly.

3.7 Early Express Operations

Despite the difficulties of transportation and high cost of making special arrangements for private means, there were occasions when businessmen were willing to pay extravagant sums to transmit the news by private means. These occasions offer further insight into the limited nature of the postal monopoly under early American laws.

In 1825 merchants in New York (or possibly another eastern city), learned of a sharp rise in cotton prices in Europe and rushed orders for cotton to cotton exchanges in Mobile and New Orleans before growers received word of the price increase through the mail. The eastern merchants apparently sent their orders via mail contractors but out of the mails. The eastern merchants made a fortune; the growers felt cheated. Postmaster General John McLean was outraged. He vowed to bar mail contractors from transporting such orders and unsuccessfully urged Congress to authorize the Post Office to organize its own express mail.[108] By the mid-1830s, use of private expresses to transmit urgent market information between New York and

[107] United States v. Chaloner, 25 F. Cas. 392, 394 (D. Me. 1831).

[108] John, *Spreading the News* 83-86.

New Orleans had became common, and Congressmen from the South and West again urged establishment of a Post Office express mail to provide the same function.[109]

Newspapers also organized private postal systems to obtain news ahead of rivals. The most famous case was an express service between Washington and New York set up in early 1833 by New York's *Journal of Commerce* to obtain early copies of newspapers and "news slips" (newspaper articles) from Washington and points south. At first, the *Journal of Commerce* express covered only stretches where the government postal system was slow. The Post Office responded by organizing its own express mail service and refusing to transport items transmitted part way by the *Journal of Commerce*. The *Journal of Commerce* then extended its express service the full distance from Washington to New York. The Post Office resumed its express mail service to New York in the winter of 1833-34; the *Journal of Commerce* revived its service the winter of 1835-36.[110]

In July 1836, Congress finally authorized the Post Office to establish a regular express mail service that provided carriage of news slips for free.[111] The Post Office's express mail service ultimately served four routes: New York to Washington, Washington to New Orleans, Washington to St. Louis, and Cincinnati to Montgomery. Even so, newspapers continued to organize special expresses when needed. The Post Office's express mail service was discontinued in 1839 for reasons that are not evident.

3.8 Post Office in the 1830s

By the 1830s, the Post Office was established as first national media network. Under the postal act of 1825, newspaper rates ranged from 6 to 17 percent of letter rates and, unlike letter rates, varied little with the distance. By 1832, newspapers accounted for 95 percent of postal traffic by weight (about 54 percent by volume).[112] Newspaper publishers exchanged thousands of

[109] Kielbowicz, *News in the Mail* 167-69; Milgram, *Express Mail* 24-31.

[110] Kielbowicz, *News in the Mail* 164-70. Apparently, the *Journal of Commerce* made about twenty-five partial or complete runs before the sitting Congress expired on March 3 and President Andrew Jackson began his second term by publishing his inaugural address on March 4.

[111] Act of Jul. 2, 1836, ch. 270, § 39, 5 Stat.80, 88.

[112] John, *Spreading the News* 4, 38.

newspapers among themselves by post for free.[113] The "franking" privilege was used with abandon; Government itself, national and state, generated a large fraction of "newspaper" traffic, up to 30 percent by one estimate.[114] Political incentives to extend the network as far as possible into rural districts, especially in the West and South, were irresistible.[115]

In the mid-1820s, the Post Office acquired a second major function, builder of the national transportation infrastructure. Despite Congressional opposition to federal payment for "internal improvements" such as roads and canals, there was widespread support for the Post Office letting a mail contract to an expensive stagecoach line even if an less expensive postrider would suffice to carry the mail. Stagecoach lines provided the only reliable passenger transportation service in large portions of the western and southern states. The Post Office contributed as much as one-third of the total revenue of the stagecoach industry and became, in effect, the regulator of the Nation's stagecoach system.[116]

Since the early Post Office was funded entirely from postal revenues and all postal revenues were expended on development of the Post Office.[117] Losses incurred in pricing some services below cost were compensated by revenues from other services priced above cost. The great disparity between postage rates for letters and newspapers, in particular, implies a substantial cross subsidy in favor of newspapers—and to a lesser degree other printed matter—especially when sent long distances. High letter rates also paid for losses incurred when stagecoaches were hired to transport small amounts of mail that could have been carried by rider. Generally, it appears that, at least by the 1830s, there was a substantial geographic cross subsidy at work from profitable postal services in the Northeast and Middle Atlantic States to the rest of

[113] John, *Spreading the News* 37.

[114] John, *Spreading the News* 57.

[115] Professor John quotes one congressman in the 1850s as saying that, in twenty-five years, not a single application for a new mail route had been denied. John, *Spreading the News* 51.

[116] John, *Spreading the News* 92-99.

[117] Rich calculates that, between 1793 and 1829, the Post Office paid into the Treasury $57,000 more than total appropriations. Rich corrects for the fact that official Post Office accounts during the period fail to count administrative costs of Post Office headquarters as "expenses" since these were paid from appropriations for the Treasury Department and not from general postal revenues. Rich, *History of the Post Office* 161.

the nation.[118] More specifically, it was the *addressees* of letters, primarily merchants in the Northeast, who paid the costs of these postal subsidies.

The early Post Office was not suited to the exchange of communications among ordinary people. The fee for receiving a letter from a distant part of the country was so expensive—equal to the cost of transporting a bushel of wheat—as to be out of reach of most citizens for most communications.[119] Thus, postal policy discouraged the transmission of letters even while it promoted distribution of newspapers.

The institutional position of the Post Office rose in the federal government with expansion of the postal function. From 1823 to 1829, the Post Office came of age under the able and energetic John McLean, the sixth Postmaster General. McLean formalized the annual report on the state of the Post Office (at the request of President Monroe),[120] organized the office of the Postmaster General into divisions with defined responsibilities,[121] and reformed bidding and accounting systems.[122] Although the "General Post Office" was created as an office within the Department of the Treasury, in the 1820s Postmasters General began to refer to the "Post Office Department" and insisted that the proper role of the Post Office was public service, not collection of general revenues.[123] When Andrew Jackson became president in 1829, McLean declined to release top officials of the Post Office to open jobs for Jackson's supporters. President Jackson took control of the Post Office by appointing McLean to the Supreme Court and elevating the Postmaster General to Cabinet level (ranking third behind the secretaries of state and treasury). From this perch, the Postmaster General was expected to dispense political patronage as well as

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[118] John, *Spreading the News* 49. Professor John suggests that by 1840 almost 50 percent of postal revenue in the mid-Atlantic states and 12 percent of postal revenue in the New England represented a subsidy to other parts of the country.

[119] John, *Spreading the News* 159.

[120] Rich, *History of the Post Office* 120.

[121] *Id*. at 118.

[122] John, *Spreading the News* 94-106.

[123] *See* John, *Spreading the News* 107-09; Rich, *History of the Post Office* 112-13, 164-65. Rich writes, "A careful examination of the letter-books of the Postmasters General shows that the heading 'General Post Office' was in use December, 1821, when it was replaced by 'General Post Office Department.' After September 1, 1823, letters were headed 'Post Office Department.'" *Id*. at 112-13. Congress did not officially designate the Post Office a department of government until 1872, although the postmaster general was considered a member of the cabinet from the President Jackson's administration onward (i.e., after 1829).

manage the postal business.[124] By 1830, the Post Office employed approximately three-quarters of civilian federal employees.[125]

Writing in 1833, Joseph Story, a member of the Supreme Court from Massachusetts and author of a leading commentary on the Constitution, proclaimed the achievements of the national post office in eloquent terms:

> The post-office establishment has already become one of the most beneficent, and useful establishments under the national government. It circulates intelligence of a commercial, political, intellectual, and private nature, with incredible speed and regularity. It thus administers, in a very high degree, to the comfort, the interests, and the necessities of persons, in every rank and station of life. It brings the most distant places and persons, as it were, in contact with each other; and thus softens the anxieties, increases the enjoyments, and cheers the solitude of millions of hearts. It imparts a new influence and impulse to private intercourse; and, by a wider diffusion of knowledge, enables political rights and duties to be performed with more uniformity and sound judgment. It is not less effective, as an instrument of the government in its own operations. . . . Thus, its influences have become, in a public, as well as private view, of incalculable value to the permanent interests of the Union.[126]

It is unclear whether, but for the postal monopoly, private companies would have arisen to undercut high postage rates for letters. Justice Story, for one, seemed to believe that the rationale for the postal monopoly lay not so much in the need to prevent private intercity postal systems as to avoid proliferation of state run postal systems:

> It is obvious at a moment's glance at the subject, that the establishment in the hands of the states would have been wholly inadequate to these objects; and the impracticability of a uniformity of system would have introduced infinite delays and inconveniences; and burthened the mails with an endless variety of vexatious taxations, and regulations. No one, accustomed to the

[124] John, *Spreading the News* 67, 211-17. As an Associate Justice of the Supreme Court, McLean wrote one of the leading legal opinions interpreting the scope of the postal monopoly in favor of the government. United States v. Bromley, 53 U.S. (12 How.) 88 (1851).

[125] John, *Spreading the News* 3. The relative importance of the Post Office in the American government is suggested by the fact that the United States had almost twice as many post offices per capita as England and five times as many as France. *Id*. at 5.

[126] Story, 2 *Commentaries on the Constitution*, 5th ed., § 1125.

> retardations of the post in passing through independent states on the continent of Europe, can fail to appreciate the benefits of a power, which pervades the Union. The national government is that alone, which can safely or effectually execute it, with equal promptitude and cheapness, certainty and uniformity.[127]

Story's concern about state post offices was not unfounded. In the early days of the republic, both Maryland and New Hampshire organized state post offices and appointed their own postmasters general.[128]

3.9 Summary of Early Postal Monopoly Laws

The Post Office was founded by resolution of the Continental Congress on July 26, 1775. The Articles of Confederation, adopted in 1777, gave the federal government a monopoly over the carriage of letters between the states. The first postal act, an ordinance adopted by the Continental Congress in 1782, included a jumbled version of the English postal monopoly laws.

After independence from Great Britain was won, a new Constitution was adopted that authorized Congress "to establish post offices and post roads" but did not create a postal monopoly. The postal act of 1794 continued the proscription against establishment of private postal systems for transmission of letters. A postal system was originally a series of relay stations established for the rapid conveyance of letters by foot messengers or mounted riders. By the 1790s, postal systems included other forms of regular, staged transportation, like stagecoaches, packet boats, and even sleighs. After 1794, the early postal laws did not prohibit private carriage of letters by travelers even for compensation. Masters of inbound international vessels, and later domestic steamboats, were required to deliver letters to the post office at the port of entry, although this duty did not apply to passengers. There was no outbound international postal service, and outbound international letters were not subject to a postal monopoly. Although different provisions of different laws at different times variously described the scope of the monopoly as "letters" or "letters and packets" or "any letter or packet, other than newspapers, magazines or pamphlets," a federal court in 1831 was seemingly correct in concluding that the

[127] Story, 2 *Commentaries on the Constitution*, 5th ed., § 1125.

[128] John, *Spreading the News* 45.

scope of the American monopoly, like the English monopoly, extended only to letters and packets (or small bundles) of letters.

4 Cheap Postage and Private Expresses: Acts of 1845 and 1851

In the 1840s, the postal world was shaken by emergence of the "cheap postage" movement and the simultaneous rise of "private express" companies. A popular outcry for sharply reduced letter rates was set off by the reduction and simplification of letter rates in England in 1840. Private express companies followed from the development of railroad and steamboat lines, which allowed passengers to easily and quickly carry letters from one city to another. Indeed, although not fully appreciated in the 1840s, the threat posed by railroads and steamboats was more fundamental than facilitation of private expresses. The steam-powered transportation revolution would eventually render obsolete the "postal services"—that is, the systems of relay stations—which were the original raison d'être of the Post Office.

Between the 1840s and the 1880s, the United States enlarged and transformed the Post Office. Its main job slowly shifted from management of an intercity transportation network to management of collection and delivery services capable of providing intracity as well as intercity mail delivery. If, for the average citizen, the early Post Office loomed large as the regular source of worldly news, the modern Post Office became even more important as the first practical and inexpensive medium for keeping in touch with distant family and friends and conducting business across the nation. The postal monopoly statutes were reshaped to protect the new missions of the Post Office.

4.1 Cheap Postage and Private Expresses

On January 10, 1840, the British government revolutionized the concept of a national post office. Reform culminated a decade of criticism of the British Post Office. High postage rates had led to widespread evasion of postage and transmission of letters out of the mails. The British law reduced postage rates by about three-quarters and simplified the rate structure. Uniform nationwide rates for letters replaced a hodgepodge of rates that varied with distance and route of travel. The new postage rates were based on weight rather than number of sheets of paper. Postage was assessed the sender rather than the addressee. The first adhesive postage stamp was introduced, the "penny black," a one-cent black stamp bearing the profile of a young Queen Victoria. In a stroke, the ordinary individual, who had no ready means of communicating beyond his village, gained the ability to exchange news and sentiments with friends and family

throughout England. Mail volume surged. In one year, the number of letters rose 55 percent; in five years, 258 percent.[129] In the United States, the British postal reforms helped to stimulate demands for similar measures, especially from merchants in the Northeast. Scholarly magazines analyzed the British experiment with care and admiration.[130]

The rise of a new generation of "private express" companies provided another, perhaps even more important, stimulus for postal reform. The new private expresses operated differently from earlier expresses organized by newspapers and commodities traders. They transported letters and parcels not by establishing systems of relay stations but by relying on railroads and steamboats for regular, end-to-end transportation. The earliest private express companies developed in the Boston area because Boston was a leader in railroad development.[131] Private express employees traveled on railroads with valises full of packages and letters, often collecting them at one end and delivering at the other. William Harnden, popularly credited as the "father" of private express services, first advertised in Boston newspapers in February 1839, offering to carry packages between New York and Boston via intervening railroad and steamship lines. Companies such as Adams Express (forerunner of American Express) and Wells Fargo and Company quickly followed.[132] In essence, private expresses developed new types of postal services by taking advantage of the possibilities offered by new modes of steam-powered transportation—possibilities that the Post Office itself was slower to make use of even though, in 1838, Congress had declared all railroads to be "post route[s]."[133]

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[129] Daunton, *Royal Mail* 23. *See generally*, Robinson, *British Post Office* 244-320; Coase, *Rowland Hill and the Penny Post*; Crew and Kleindorfer, "Rowland Hill's Contribution."

[130] *See, e.g.*, "Post Office Reform in England" and "The Progress and Present Condition of the General Post Office," *U.S. Democratic Review (*1839); "Post-Office Reform—Cheap Postage," *Hunt's Merchant's Magazine*, 1840; "The Post-Office System, as an Element of Modern Civilization," *The New Englander* 1: 9-27 (1843); Whiton, "Post-Office Reform, and Uniform Postages," *Hunt's Merchant's Magazine*, 1844; Maclay, "Post-Office Reform," *Hunt's Merchant's Magazine* 10 (Jan. 1844); "Post Office Reform," *The American Review*, 1845.

[131] Boston was a breeding ground for private expresses because it encouraged railroad development to counter the growing prominence of New York City after the completion of the Erie Canal in 1825. For the same reason, Baltimore and Charleston were early leaders in railroading. *See generally* Taylor, *Transportation Revolution* 77 (1977).

[132] Harlow, *Old Way Bills* 7-9. For a short history of the express companies, see John, "Private Mail Delivery in the United States During the Nineteenth Century." A first hand account of the origins the private express companies is provided in the old book Stimson, *History of the Express Business*.

[133] Act of Jul. 7, 1838, ch. 172, § 2, 5 Stat. 271, 283. It is unclear why this provision uses the term "post route" instead of the traditional term "post road."

Congress was inundated with citizen petitions for "cheap postage."[134] Demands for postage rate reform in the U.S. were reinforced by widespread evasion of postage and circumvention of the postal system. Postmasters allegedly "franked" (i.e., authorized carriage free of postage) large amounts of inappropriate mail in return for money or favors.[135] Businessmen entrusted quantities of letters to travelers. Hotel keepers organized transmission of boarders' letters by private hands.[136]

While the private expresses flourished, the Post Office despaired. At the end of 1841, the Postmaster General Charles Wickliffe made the threat of private express companies a central theme of his annual report.[137] In 1843, Post Office accounts showed a 5 percent decline in revenues, to $4.30 million, and a loss of about $70,000 (although most of this loss was due to prior year obligations).[138] In 1844, revenues amounted to $4.24 million and expenditures to $4.30 million, a further loss of almost $60,000. The Postmaster General pointed to the private expresses and declared, "without further legislation on this subject, it is idle to expect the department to sustain itself at any rate of postage."[139] In retrospect, predictions of impending financial ruin may seem overdone. Between 1840 and 1845, the accounts of the Post Office show a steady improvement in the bottom line, from a net loss of 4 percent in 1840, to a loss of 2 percent from 1841 to 1843, to a loss of 1 percent in 1844 and 1845. Even so, the dramatic success of the private expresses could not be ignored.

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[134] S. Doc. No. 137, 28th Cong., 1st Sess. 1 (Feb. 22, 1844). Senator William Merrick, chairman of the committee proposing the postage reform bill, estimated that the Senate had received 15,000 petitions to lower postage rates. Cong. Globe, 28th Cong., 1st Sess., 521 (Apr. 15, 1844).

[135] A Senate committee estimated that one-eighth of all mail was transmitted without postage. S. Doc. No. 137, 28th Cong., 1st Sess. 3 (Feb. 22, 1844).

[136] Cong. Globe, 28th Cong., 2d Sess., Appendix 247 (1845)(remarks of Mr. Patterson).

[137] 1841 *Postmaster General Ann. Rept*., in H.R. Doc. No. 2, 27th Cong., 2d Sess. 435, 438 (1842). *See* 1842 *Postmaster General Ann. Rept*., in S. Doc. No. 1, 27th Cong., 3d Sess. 721, 724 (1843).

[138] Gross revenue in FY 1842 was $ 4.55 million. In FY 1843, revenue was $4.30 million and expenditures, $4.37 million. The Postmaster General noted, however, that "not less than $50,000" of the loss represented prior year obligations. 1843 *Postmaster General Ann. Rept*., in H.R. Doc. No. 2, 28th Cong., 1st Sess. 687, 688 (1844).

[139] 1844 *Postmaster General Ann. Rept*., in H.R. Doc. No. 2, 28th Cong., 2d Sess. 663, 668-69 (1845).

4.2 Failure of the Pre-industrial "Postal" Monopoly Law

In 1843, the government launched high profile prosecutions against the private express companies under the postal monopoly law.[140] The most important cases were *United States v. Adams*[141] in New York City and *United States v. Kimball*[142] in Boston. In *Adams*, decided in November 1843, a private express company was accused of violating section 19 of the postal code of 1825 by carrying letters on board a steamship. Judge Betts concluded, however, that section 19 prohibited the carriage of letters by a steamboat or other vessel but did not apply to a passenger employed by a private express company.[143] The steamboat company could not be held liable, the court concluded, unless it had actual knowledge that its passengers were carrying letters.[144] Since the steamboat did not, the case was dismissed. In *Kimball*, decided in April 1844, the court considered private carriage of letters by passengers on railroads. Judge Sprague agreed with the *Adams* court's interpretation of section 19 of the 1825 act and further ruled that "the setting up of a post by railroad car or steamboat is not setting up a foot post" in violation the 1827 act.

> The conveyance was by railroad cars—and that that is not a foot post according to the usual and ordinary acceptation of language is manifest. But it is urged, that it is within the mischief designed to be suppressed; and that there can be no doubt that the legislation intended to prohibit the setting up of any and all posts by individuals. . . . Here lies the stress and difficulty of the case. *Since the passing of the post office laws new modes of conveyance have been established, and a condition of things arisen not then known*

[140] The first case, *United States v. Gray*, 26 F. Cas. 18 (D. Mass. 1840), was brought against William Gray, one of the earliest of the Boston "expressmen." He was accused of carrying three letters by Lowell Railroad cars in violation of the postal code of 1825. The court held that whether such conduct took place is a matter of fact for the jury; the jury acquitted.

[141] United States v. Adams, 24 F. Cas. 761 (S.D.N.Y. 1843).

[142] United States v. Kimball, 26 F. Cas. 782 (D. Mass. 1844).

[143] United States v. Adams, 24 F. Cas. 761, 763 (S.D.N.Y. 1843)

[144] United States v. Adams, 24 F. Cas. 761, 763 (S.D.N.Y. 1843). Attorney General Legare assured the Postmaster General of the advisability of this case. 4 Op. Att'y Gen. 159 (Mar. 22, 1843). Postmaster General Wickliffe was so outraged at the loss in the *Adams* case that he appended the entire file, including Legare's opinion, to his 1843 annual report. It may be noted, however, that Wickliffe's predecessor, Postmaster General John Niles, did not share the view that the postal monopoly law prohibited use of railroads by private express carriers. 1840 *Postmaster General Ann. Rept.*, in Cong. Globe. App., 26th Cong., 2d Sess. 14, 16 (1840) ("there is no prohibition against persons conveying letters and packets who may pass over mail routes in the same vehicle which transports the mail, and railroads afford great facilities for transporting the mail in this way.")

> *or contemplated. . . . However willing the court might be to attain that end, it cannot strain or force the language used beyond its fair and usual meaning*.[145]

In short, the courts held that private express operations did not fall within the scope of traditional postal monopoly laws because they were not, strictly speaking, postal systems—not systems of relays stations such as used by foot posts, horse posts, and stagecoaches.[146] In response, the Postmaster General renewed his request to Congress for legislation to suppress the private express companies.[147]

Indeed, Postmaster General Wickliffe believed that the Post Office's exclusive privilege should extend not only to letters however conveyed but to all mailable matter. He sought to put this view into effect by administrative order. For stagecoaches and other common carriers, transportation of passengers and freight on many routes was unprofitable without a contract to transport the mail. Beginning in 1841, Wickliffe added a provision to all contracts for mail transportation under which the carrier was required to pledge that it "will not convey any mail-matter out of the mail, nor knowingly convey any person carrying on the business of transporting mail-matter, without the consent of the department."[148] On September 1, 1843, Wickliffe wrote railroads, steamboat lines, and other mail contractors deploring private carriage of newspapers and emphasizing his requirement that mail contractors refrain from transporting newspapers out of the mails or persons acting as private expresses.

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[145] United States v. Kimball, 26 F. Cas. 782, 784-85 (D. Mass. 1844) (emphasis added).

[146] Although these were the leading cases, the outcomes of other cases were mixed. In *United States v. Fisher* (unreported, E.D. Pa. Jun. 1844), a case discussed in *Pomeroy* and *Hall* (cites following) but not found, Judge Randall apparently dealt with facts similar to those presented in *Kimball* and found the private express guilty. However, in a later case, *Hall*, Judge Randall states his intention to reverse his decision in *Fisher* and defer to *Kimball*. In *United States v. Gilmour*, (unreported, D. Md. 1844?), cited briefly in *Pomeroy* but not found, the court apparently held that the defendant private express violated the postal monopoly established by the 1825act. In *United States v. Pomeroy*, 27 F. Cas. 588 (N.D.N.Y. 1844), the court dealt with facts similar to those presented in *Kimball* and *Fisher*; after discussing both cases, the court agreed with *Kimball*. In *United States v. Hall*, 26 F. Cas. 75, 77 E.D. Pa. 1844), Judge Randall concluded a private express may be guilty of assisting in a violation of the postal monopoly laws if it notifies the railroad or steamship company that is carrying letters. The defendant in the *Hall* case was not named "Hall" but "James Hale"; the error may have been due to misreading when transcribing handwritten records into printed versions.

[147] 1844 *Postmaster General Ann. Rept*., in H.R. Doc. No. 2, 28th Cong., 2d Sess. 663, 669 (1845).

[148] H.R. Doc. No. 213, 28th Cong., 1st Sess. 2 (Mar. 30, 1844) (letter from Postmaster General in answer to a resolution asking what steps have been taken to prevent and punish infractions of the United States laws prohibiting the establishment of private mails).

> . . . I beg leave to refer you to the stipulations of your bond to this department, by which it will be seen that you have covenanted not to transport any person or persons engaged in carrying mail-matter out of the mail. . . .
>
> A practice has grown up of sending newspapers in the cars and steamboats employed to transport the mail. This is a right claimed by some editors: others have addressed letters to their subscribers, and invited them to receive their papers in this way, in preference to the mail. This is a subject which has given rise to no small portion of abusive denunciation of the head of this department. . . .
>
> It is true that the act of 1825 has authorized the Postmaster General, *in making contracts for the transportation of the mail* [emphasis original], to authorize the contractor, under certain conditions, to carry newspaper out of the mail. *Without such privilege, no such right exists; and the contractor who carries them violates his contract with the department*.[149]

Although he invoked the spirit of the monopoly, Wickliffe relied upon the Post Office's contracting authority as the legal basis for this policy of excluding competitors. Wickliffe referred specifically to section 30 of the 1825 act, which provided, "The Postmaster General, in any contract he may enter into for the conveyance of the mail, may authorize the person with whom such contract is to be made, to carry newspapers, magazines, and pamphlets, other than those conveyed in the mail . . . ."[150] As discussed above, this provision was derived from section 22 of the 1792 act and, originally, from the thirteen paragraph of the ordinance of 1782. Whether Wickliffe properly construed this contracting provision is open to question. Carriage of newspapers out of the mails by mail contractors was in fact commonplace, and Wickcliffe's predecessor did not consider the practice illegal.[151] In any case, Wickliffe's demands on mail

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[149] Letter from C.A. Wickliffe, Postmaster General, to mail contractors (Sep. 1, 1943), *reprinted* 1843 *Postmaster General Ann. Rept*., in H.R. Doc. No. 2, 28th Cong., 1st Sess. 687, App. 4, 720, 721-22 (1844) (emphasis added except as noted).

[150] Act of Mar. 3, 1825, ch. 64, § 30, 4 Stat. 102, 111.

[151] Wickliffe's predecessor, Postmaster General Niles, believed that use of the contracting provision to prohibit private carriage of newspapers by railroads and steamboats was legally dubious: "*The practice of carrying newspapers out of the mail, without having secured the privilege in the contract, I found to be so general that it could not be suppressed without great inconvenience to the public*; and as the ambiguity of the law admitted of doubts in regard to the restriction, I concluded that I should best discharge my duty by permitting these practices to continue, and leave it for Congress either to remove the prohibition or to make the law more explicit for its enforcement. . . ." 1840 *Postmaster General Ann. Rept*., in Cong. Globe. App., 26th Cong., 2d Sess. 14, 16 (1840) (emphasis added). At a minimum, Wickliffe's use of the contracting provision to exclude competitors could be deemed exclusionary and anticompetitive by the later-day standards of antitrust law. *See generally* Areeda and Turner, 3 *Antitrust Law* § 731e (1978) ("It is presumptively exclusionary for a monopolist to extract a supplier's

contractors provoked substantial protest, and President John Tyler referred the matter to Attorney General John Nelson for advice.

Whether by misunderstanding or design, Attorney General Nelson's opinion gave broad support for the postal monopoly that not required by Wickliffe's letter. On November 13, 1843, Attorney General Nelson concluded that the term *packet* as used in the postal monopoly laws included newspapers, magazines, and pamphlets. He came to this conclusion by reviewing the postal monopoly provisions of prior acts. He pointed out that, as noted above, the specific proscription against establishment of private postal systems, found in the acts of 1794, 1799, and 1810, covered the carriage of letters and packets "*other than newspapers, magazines, or pamphlets*." Quoting the 1810 act, Nelson reasoned that prior to 1825,

> [I]t is quite clear, that whilst "no private foot or horse post, stage-wagon, or other stage carriage, or sleigh [etc.] . . ." for the conveyance of letters, could have been legally set up. [sic] "Newspapers, magazines, or pamphlets," might, in virtue of the exception in the laws referred to, have been so conveyed; and as the act of 1825 made no provision whatever upon the subject of private posts . . . the right to establish such private posts then existed without restriction. The act of 1827, however, revived the prohibition to which I referred, without the exception of newspapers, magazines, or pamphlets, contained in previous laws; extending its restrictive operation to all "foot or horse posts for the conveyance of letters or packets (all packets) upon any post road which is or may be established by law." The 19th section of the act of 1825 had inhibited the conveyance of letters by stage or other vehicles, or by packets or other vessels , under private authority; and *the additional enactment of the 1827 extended the inhibition to foot and horse-posts, upon post roads, and embraces within its interdict the conveyance of letters and packets, omitting the exception of "newspapers, magazines, and pamphlets*."[152]

In short, by adopting a broad interpretation of *packet*, Nelson interpreted the 1827 amendment to *prohibit* foot and horse posts from carrying newspapers, magazines, and pamphlets while interpreting the 1825 act to *permit* stagecoaches and packet boats to carry such items. Nelson's analysis is superficial; he does not consider the contrary authority of the

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promise that, notwithstanding his ability to do so, he will not supply any of the monopolist's rivals.")

[152] 4 Op. Att'y Gen. 276, 278-79 (1843) (emphasis added). The sentence fragment indicated in the quoted text was probably due to an incorrect transcription from the original written version to the printed, bound version.

Chaloner case (holding *packet* means a packet of letters) nor examine other provisions of the acts under consideration.[153] And having implicitly ruled that stagecoaches and other common carriers were permitted to carry newspapers, magazines, and pamphlets out of the mail because they were "packets" not "letters," Nelson then agreed, without elaboration, that the Postmaster General may use the contracting authority to prohibit mail contractors from carrying newspapers, magazines, and pamphlets.

In a message to Congress on January 21, 1845, Postmaster General Wickliffe reiterated Attorney General Nelson's broad interpretation of *packet* and proffered an even broader public policy rationale for extending the monopoly to cover all types of documents.[154] For two decades, he said, the Post Office had been embarrassed by the rapid transmission of market information from New York to Mobile and New Orleans by means of private expresses organized by commodities brokers. Now, Postmaster General Wickliffe reported, New York merchants were again using private expresses to send newspapers and news slips to agents in New Orleans ahead of the mails. The evil was not, Wickliffe stressed, merely a loss in Post Office revenue but an uneven and unfair dissemination of information:

> The objects and purposes of a public mail are, to convey intelligence, by letter or packets, for all alike who may desire to send. . . . It must have been obvious to Congress in 1825 and 1827 as it is to us of the present day, that, upon certain post routes between important commercial cities, individuals, by the employment of proper means, could transmit regularly packets and

[153] *See* United States v. Chaloner, 25 F. Cas. 392 (D. Maine, 1831). Nelson's interpretation of the 1827 act presented a further difficulty. Under the act of 1825, the Post Office was obliged to transport magazines and pamphlets only when "the mode of conveyance and size of the mail will admit." Act of Mar. 3, 1825, ch. 64, § 30, 4 Stat. 102, 111. This test was applied individually by each postmaster as circumstances dictated. R.B. Kielbowicz, *News in the Mail* 122 (1989). The proposition that Congress barred private carriage of magazines and pamphlets without requiring public carriage seems far fetched. As noted above, in 1815 the Postmaster General barred magazines and pamphlets from the mail generally, and in 1833, the Post Office refused the *Journal of Commerce* permission to send newspapers and news slips by means of express mail. In 1878, the Supreme Court concluded that prohibiting private carriage without providing public carriage is unconstitutional:"But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it 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." Ex parte Jackson, 96 U.S. 727, 735 (1878).

[154] S. Doc. No. 66, 28th Cong., 2d Sess. (Jan. 21, 1845)(report of the Postmaster General in relation to the establishment of a private express between New York and New Orleans).

> letters in less time, their matter being of less weight, transported for none but selected favorites, than the Government, who is bound to carry all which is offered, and to distribute on the way side to intermediate towns and cities. To prevent the injury to commerce and trade, and to agriculture and manufactures, upon which the commerce and trade of a country depend, it was evidently designed by Congress that no person but the Postmaster General or his authorized agents should set up any foot or horse post for the purpose of conveying letters or *packets* on the post road. The words *packets* or *letters* are not used in this connexion as synonymous. Packets, more properly, may be defined to mean printed matter, such as newspapers, prices current, slips, &c.[155]

Wickliffe thus argued that the purpose of the postal monopoly established by the acts of 1825 and 1827 was, or should be, to prevent private dissemination of information in advance of public dissemination.

4.3 Postal Act of 1845

The success of the English postal reforms, crescendo of public demands for cheap postage, and widespread circumvention of the public post ultimately brought a response from Congress. The postal act of 1845[156] was written by the Whig-led Senate. The House of Representatives, controlled by Democrats, played virtually no role in crafting the legislation.[157] In 1844, in the first session of the 28th Congress, Senator William Merrick of Maryland, chairman of the Committee on Post Offices and Post Roads, introduced S. 51, "a bill to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenue of the Post Office Department." S. 51 was discussed thoroughly except for the monopoly provisions and was approved by the Senate on April 29, 1844.[158] The House, dominated by southern and western interests, declined to consider the bill, citing fears that lower postage rates would imperil the finances of the Post Office.[159] In

[155] S. Doc. No. 66, 28th Cong., 2d Sess. 3 (Jan. 21, 1845).

[156] Act of Mar. 3, 1845, Ch. 43, 5 Stat. 732. Note that in 1845, as in most years, Congress passed several acts relating to the Post Office so that there was no act officially called the "Postal Act of 1845."

[157] In the 28th Congress, the Senate was composed of 28 Whigs, 25 Democrats, and 1 Independent; the House of Representatives was composed of 81 Whigs and 142 Democrats. President John Tyler was a Whig.

[158] Cong. Globe, 28th Cong., 1st Sess. 422 (Mar. 22, 1844), 459 (Mar. 29), 467 (Apr. 1), 471 (Apr. 2), 516 (Apr. 13), 520 (Apr. 16), 526 (Apr. 17), 533 (Apr. 18), 548 (Apr. 23), 554 (Apr. 24), and 562 (Apr. 29, passed).

[159] S. 51 was referred to the House Committee on the Post Office and Post Roads on May 2, 1844. Cong.

December 1844, early in the short second session of the 28th Congress,[160] Senator Merrick reintroduced his postal bill as S. 46 (bills did not survive the end of the session at this time). The Senate expended another nine days debating S. 46, with roughly half of all members participating actively, and passed the bill a second time. By the end of this process, the Senate had substantially revised Merrick's bill.[161] The only House consideration occurred in a few chaotic hours in the closing days of the session; the House made only one substantive change, revising the postage rates upward slightly.[162]

The postal act of 1845 represented a victory for those urging a sharp reduction in postage rates for letters and a defeat for Postmaster General Wickliffe[163] and others seeking to preserve and enlarge the postal monopoly as a revenue source for subsidizing low newspaper rates and stagecoach service in the South and the West.[164] The argument pressed by proponents of cross

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Globe, 28th Cong., 1st Sess. 571 (1844). On May 15, the House committee reported H.R. 389, a bill to reduce the basic postage on letters to 5 cents and recommended against passage. The committee extended its report to recommend against passage of the Senate bill as well. H.R. Rept. No. 477, 28th Cong., 1st Sess. (May 15, 1844). On the same day, Mr. Amasa Dana of New York filed a minority report on behalf of three members of the committee making the case in favor of reduced postage rates. H.R. Rept. No. 483, 28th Cong., 1st Sess. (May 15, 1844). On June 11, the committee formally reported S. 51 and recommended rejection; S. 51 was not considered thereafter. Cong. Globe, 28th Cong., 1st Sess. 666 (1844). A separate bill to suppress private expresses, H.R. 290, was favorably reported by the House committee. Cong. Globe, 28th Cong., 1st Sess. 460 (Mar. 29, 1844). It was debated during the last week of the session but not passed. Cong. Globe, 28th Cong., 1st Sess. 671-72 (Jun. 12, 1844), 677-78 (Jun. 13).

[160] In this period, Congress convened in the first week of December. Since each congress expired on the third of March following an election, the second session of each congress (sometimes it was the third session) was limited to approximately three months.

[161] Cong. Globe, 28th Cong., 2d Sess. 195 (Jan. 27), 205 (Jan. 28), 212 (Jan. 29), 220 (Jan. 30), 234 (Feb. 3), 238 (Feb. 4), 248 (Feb. 5), 252 (Feb. 6), 257 (Feb. 7), 260 (Feb. 8, passed).

[162] Cong. Globe, 28th Cong., 2d Sess. 337 (Feb. 24, 1845), 347 (Feb. 25), 357 (Feb. 27).

[163] Senator Merrick explained to the Senate that Postmaster General Wickliffe "chooses to avow himself opposed to the bill." Cong. Globe 28th Cong., 1st Sess. 532, 533 (Apr. 17, 1844). Senator Sevier of Arkansas noted that "this bill, from the beginning, was urged through against the well known hostility of the Postmaster General." Cong. Globe 28th Cong., 1st Sess. 555 (Apr. 24, 1844). Wickliffe rejected substantially lower postage rates except under very stringent circumstances. S. Doc. No. 39, 27th Cong., 3d Sess. 1 (Jan. 9, 1843) (report of the Postmaster General in compliance with a resolution of the Senate, on the subject of adapting the rates of postage to the federal currency, without diminishing the revenues of the department).

[164] In describing House consideration, a writer in 1848 recalled, "When the bill came to the other house, it was so violently opposed that there was at one time hardly a hope of its being passed at all. One of the chief objections to it, was that it would break up nearly every stage route at the South, because stage-coaches there are only kept up by the exorbitant sums they receive for carrying small mails that might better be carried on horseback. At length, however, it was literally forced through the house . . . ." "Post-Office Reform," 112 (*The New Englander*, 1848).

subsidy was eloquently stated in a House committee May 1844 report recommending against lower postage rates:

> At this time, the necessity of adopting measures to preserve our national mail system is forcibly presented to our deliberations. Through no other agency can the stated means of transmitting intelligence be maintained co-extensively with the population and settlement of the country. That it should be so maintained, we hold to be a matter of obligation upon the Government, and due to the citizen, wherever situated in our territory. The obligation was assumed in our national compact; and its faithful performance is demanded by every consideration of national regard for the social and political interests of the whole people, and by the policy most favorable to free institutions and the growth and development of the country. . . .
>
> The antagonistical principle is, that the citizen should be required to pay no more for the transmission of his letter than the actual cost; and, if Government cannot convey it on these terms, it should surrender the business to individuals who can. But individuals, we know, cannot perform the whole duty of Government in this respect. Individuals will carry the mails wherever it can profitably be done; but they will not take them to the sparse settlements and remote points, but at a cost too burdensome to be borne. To content the man dwelling remote from towns with his more lonely lot, by giving him regular and frequent means of intercommunication; to assure the emigrant who plants his new home on the skirts of the distant wilderness, or prairie, that he is not forever severed from the kindred and society that still share his interest and love; to prevent those whom the swelling tide of population is constantly pressing to the outer verge of civilization from being surrendered to surrounding influences, and sinking into the hunter or savage state; to render the citizen, how far soever from the seat of his Government, worthy, by proper knowledge and intelligence, of his important privileges as a sovereign constituent of the Government; to diffuse, throughout all parts of the land, enlightenment, social improvement, and national affinities, elevating our people in the scale of civilization, and binding them together in patriotic affection;—these are considerations which the advocates of the right of individual enterprise to the conveyance of the mails disregard.[165]

[165] H.R. Rept. No. 477, 28th Cong., 1st Sess. 1-2 (May 15, 1844). Although this report reflects the position of the losing side, it has been repeatedly cited, incorrectly, as evidence of the intent of Congress in enacting the postal act of 1845. *See* Air Courier Conference v. American Postal Workers Union, 498 U.S. 517, 527 (1991); Priest, "History of the Postal Monopoly" 18.

In February 1845, Congressman Yancey from Alabama railed against the "belles and beaux" and "the letter-writing gentry" who would benefit from the reduced rates in the postal bill, a bill that would necessitate higher customs duties inevitably to be paid by the working man:

> What will be the effect of the great change contemplated? Either to ruin a great number of mail routes in the South and West, and in the sparsely populated regions of the older country, or . . . to make their support a charge on the treasury. . . .
>
> Who most use and load down your mails? Not the quiet farmers of the land, but your politicians, merchants, manufacturing capitalists, brokers, stock jobbers, professional men; and last, though not least . . . the belles and beaux. And yet these same farmers, sir, who do emphatically constitute the bone and sinew of the country, the great mass of the tax-paying population, are to be called upon to give these letter-writing gentry *cheap* postage at an expense to them of *high taxes*! . . .
>
> . . . this is but a part, a link in that grand system of throwing the entire burdens of government upon the customs.[166]

Despite such pleas by many from the South and West, supporters of cheap postage won the day. The postal act of 1845 addressed three major issues: reduction in letter postage, restriction of franking privileges, and extension of the postal monopoly. For Senator Merrick, the right approach was to restore public support in the Post Office by lowering postage rates significantly (over the objections of Postmaster General Wickliffe) and abolishing the franking privilege. With such support, Merrick (like the Postmaster General) proposed to ban private express operations and extend the scope of the monopoly to include all mailable matter, including newspapers, magazines, and pamphlets, because no matter how low the rates of postage might be, Merrick believed the department could not compete with private individuals on the profitable routes.[167] The full Senate, however, had a fundamentally different vision.

Reduction in postage rates was the Senate's first concern. In the second session of the 28th Congress, Merrick's bill, S. 46, provided for a reduction in postage for a letter of a single sheet to five cents for transmission up to 100 miles.[168] Over the objection of Senator Merrick, the

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[166] Cong. Globe, 28th Cong., 2d Sess. Appendix 308 (Feb. 1845) (remarks of Mr. Yancey of Alabama) (emphasis original).

[167] Cong. Globe 28th Cong., 2d Sess. 195-97 (Jan. 27, 1845) (remarks of Mr. Merrick).

[168] S. 46, 28th Cong. 2d Sess. § 1 (Jan. 6, 1845).

Senate adopted, by a vote of 33-14, an amendment by Senator Simmons of Rhode Island to establish a uniform nationwide rate of five cents for single letters. On motion of Senator Benton of Missouri, the five-cent rate was made applicable to any correspondence weighing less than a half ounce, regardless of the number of sheets of paper.[169] Together these revisions amounted to radical reduction in postage rates for letters, far beyond what Merrick had proposed.

The Senate also rejected Merrick's effort to limit the right of members of Congress to send and receive letters and newspapers free of postage, although the Senate agreed that Congress should pay the Post Office for franked mail and otherwise approved the bulk of Merrick's reform of franking privileges.[170]

Of the three major issues presented by the bill, revision of the postal monopoly received the least attention from Senate. In the first session of the twenty-eight Congress, the Senate approved a version of Merrick's bill without considering the postal monopoly provisions. In the second session, the Senate took up the bill again but did not address the postal monopoly provisions until well into the session. In the Committee of the Whole, Senator Huntington of Connecticut proposed to exempt from the monopoly carriage of newspapers, magazines, and pamphlets. He cited the need to facilitate publication of newspapers and periodicals. Senator Merrick objected strenuously that such an exception would allow private expresses to carry letters surreptitiously; indeed, "he would not give a button for the protection the bill would afford to the revenue of the department . . . ."[171] Nonetheless, Huntington's amendment prevailed, 21-18. On February 6, Senator Merrick asked the full Senate to strike out the Huntington amendment. The debate was limited but spirited. Senator Woodbury of New Hampshire, an acute contributor to the deliberations, appeared to capture the sense of the Senate. According the account in the *Congressional Globe,* Senator Woodbury first clarified the effect of the Huntington amendment then went on to criticize the effort of Merrick to repeal it.

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[169] *Cong. Globe* 28th Cong., 2d Sess. 253 (Feb. 6, 1845).

[170] Postmasters accounted for 83 percent of franked mail and the rest of the government, 5 percent; Congress accounted for only 12 percent. *Cong. Globe* 28th Cong., 1st Sess. 458 (Mar. 29, 1844).

[171] *Cong. Globe* 28th Cong., 2d Sess. 234 (Feb. 3, 1845). Senate rejection of a government monopoly over dissemination of news occurred only two weeks after January 21, when Postmaster General Wickliffe submitted his report to the Senate, quoted above, arguing that such a monopoly was need to prevent merchants from transmitting the latest market news from New York to New Orleans.

> *Mr. Woodbury*. . . . [The Huntington amendment] does not allow letters to be carried at all except in the mail—but merely newspapers and periodicals by private hands, where more convenient to the community, and which, in many places, they have been accustomed to do from the foundation of government. . . .
>
> But now—not for taxation, and not by any express grant to do it, government becomes a great monopolist, not only for carrying letters, but even newspapers and periodicals. It seeks to drive off all competition and, like some other governments, as to salt and tobacco, would permit no rivals in business; would monopolize the trade in carrying all printed matters as well as letters. But the chairman virtually admitted in another place that this was all wrong—because he had submitted an amendment to grant what we ask by the Postmaster General at his discretion. (Mr. Merrick said that discretion was modified now.) Mr. W. was glad to hear it abandoned; for if any thing was worse than a restriction in private business, imposed without express authority, and in check of the free and convenient diffusion of knowledge, and thus creating an odious public monopoly by construction alone, it would be to introduce, also, a dispensing power in one branch of the government, which might in bad times be abused to the worst partisan purposes.[172]

Senator Woodbury's comments reflected several aspects of the Senate deliberation. First, the Senate was very concerned about allowing free dissemination of news; a monopoly over the transportation of newspapers raised the spectre of censorship.[173] Second, the Senate viewed the scope of the monopoly in terms of letters, on the one hand, and newspapers and periodicals, on the other. It gave no specific attention to advertising mail, even though advertisements passed through the mail in small quantities. Third, the Senate was under the impression that there was not in fact a pre-existing monopoly over distribution of newspapers and periodicals. Fourth, the

[172] *Cong. Globe* 28th Cong., 2d Sess. 253 (Feb. 6, 1845).

[173] For example, Senator Allen of Ohio remarked, "It was very easy to see that, if the United States had a right and absolute control over the printed matter of the country, and therefore absolute power to make it circulate thorough *one channel*, they likewise had a right to say *how much* should circulate through that channel, and consequently had the entire control over the press of the United States ." *Cong. Globe* 28th Cong., 2d Sess. 252 (Feb. 6, 1845)(emphasis original). *See also Cong. Globe* 28th Cong., 2d Sess. Appendix 209, 211 (Jan. 16, 1845)(remarks of Senator Niles of New York).

Senate specifically rejected the idea that the Postmaster General should have discretion to decide whether or not newspapers and periodicals could be carried privately.[174]

As enacted, the postal act of 1845 sharply reduced postage rates for letters even though the House restored the 100-mile limit for the five-cent stamp. Postage rates for newspapers were unchanged except that the rate for newspapers sent less than thirty miles was reduced to zero.[175] The 1845 act also introduced, for the first time, a low postage rate for circulars, handbills, and advertisements. Previously, the Post Office charged letter postage on "every article which is not either newspapers, magazine, or pamphlet . . . whether it be a printed or written communication."[176] The Post Office, however, had difficulty developing consistent criteria for categorizing different types of printed matter.[177] One important type of circular in that period was the "price current," a list of current prices. For one price current, *Shipping Commercial List and New York Price Current*, the Post Office apparently charged newspaper rates at first, then reversed itself in 1837 and charged letter postage, and then reversed itself again in 1842 after a ruling by a hesitant Attorney General Legare.[178] With such high postage rates, advertisements were rarely sent in the mail.[179] By the mid-1840s, even Postmaster General Wickliffe[180] and the

[174] Following approval of the Huntington amendment, the Committee of the Whole rejected Senator Merrick's proposed amendment to give the Postmaster General discretion to allow private carriage of newspapers, magazines, and pamphlets. *Cong. Globe* 28th Cong., 2d Sess. 234 (Feb. 3, 1845).

[175] Act of Mar. 3, 1845, Ch. 43, §§ 1-3, 5 Stat. 732-33.

[176] *The Post Office Law, with Instructions and Forms Published for the Regulations of the Post Office*, Instruction IV.6 (1817). *See also*, 1843 *Postal Laws and Regulations* § 147 (1843) ("Letter postage is also to be charged on all handbills, printed or written prospectuses, proposals for new publications, circulars written or printed, lottery bills and advertisements, blank forms, sheets of music, deeds, laws processes, policies of insurance, and manuscript copy for publication.").

[177] R.B. Kielbowicz, *News in the Mail* 122-27.

[178] 4 Op. Att'y Gen. 10 (1842).

[179] A writer in 1845 explained the virtues of new low rates for miscellaneous printed matter: "Printed or lithographed circulars, handbills, prices current letters, were formerly charged letter postage. . . . In consequence of the former high rate of postage, few were sent by the mails; and to obviate its payment, merchants had their circulars, cards, &c., printed in newspapers which they sent to their customers, thus unnecessarily burthening the mails. By this new law, the mails will be relieved of a heavy burden, the post-office will have an additional revenue from this source, and to our merchants, publishers, and men of business, facilities will be afforded of extending their correspondence to an extent which no one now conceives. Hundreds of thousands, and, perhaps, millions of circulars &c., will now be sent through the post-office." "The New Postage Law and Its Advantages" (*Hunt's Merchant's Magazine*, 1845).

[180] 1843 *Postmaster General Ann. Rept.*, in S. Doc. No. 2, 28th Cong., 1st Sess. 687, 699 (1844).

Democratic majority of the House Post Office Committee[181] were advocating lower rates for "miscellaneous printed matter."

Another rate change effected by the 1845 act was a doubling of the charge for "drop letters." "Drop letters" were letters deposited at a post office for collection by the addressee at the same post office; they were not transported "in the mail." The rate increase was intended to discourage the practice of private expresses transporting intercity letters to a post office for collection by local addressees.[182]

Table 3. Act of 1845: reduction in letter postage

Distance (miles)	1825 rates per sheet	1845 rates per 1/2 oz.	Change
0-30	6¢	5¢	17%
30-80	10¢	5¢	50%
80-150	12.5¢	5¢	60%
100-300	18.75¢	5¢	73%
300-400	18.75¢	10¢	47%
400+	25¢	10¢	60%

Finally, in another important reform, the 1845 act began the "star route" system. Prior to 1845, the Post Office often paid generous sums to stagecoaches to carry the mail along routes that could have been served more cheaply by means of a postrider. Section 18 of the 1845 act directed the Postmaster General to contract with whichever carrier could provide transportation with due "celerity, certainty, and security" regardless of the mode of transportation.

> Sec. 18. And be it further enacted, That it shall be the duty of the Postmaster General in all future lettings of contracts for the transportation of the mail, to let the same, in every case, to the lowest bidder, tendering sufficient guarantees for faithful performance, without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty, and security of such transportation . . . .[183]

[181] H.R. Rep. No. 477, 28th Cong., 1st Sess. 13 (1844) ("There is a species of printed matter, that belongs neither to newspapers nor pamphlets, but forms a class midway between them and letters—such as handbills, circulars, prices current, and the like—which, in our opinion, should be subjected to a corresponding postage rate.").

[182] Act of Mar. 3, 1845, ch. 43, § 1, 5 Stat. 732, 732-33. *See* S. Rept. No. 137, 28th Cong., 1st Sess. 10 (1844).

[183] Act of Mar. 3, 1845, ch. 43, § 18, 5 Stat. 732, 738.

Over time, postal officials designated such contracts for transportation of the mail with three stars or asterisks instead of repeatedly writing "celerity, certainty, and security," and the contracts became known as "star route" contracts.

4.4 Private Express Prohibitions in the Postal Act of 1845

In the postal act of 1845, the legal premises of the postal monopoly law moved beyond the original concept of postal service as a system of relay stations established along a *post road*. The postal monopoly proscription was recast as a ban against conveying monopoly items between places served by the Post Office, i.e., from one city or town to another city or town. At the same time, the 1845 postal monopoly retained the idea of regular carriage, introduced in the postal code of 1825. Hence, private carriage of monopoly items was still permitted in areas where the Post Office did not provide regular service. This service-based concept of the postal monopoly did not replace the earlier post road-based concept but added to it. Pre-1845 postal monopoly laws were not repealed, and portions of the 1845 act employed both concepts.

Section 9, the key monopoly prohibition of the 1845 act, barred establishment of a "private express" operating between places regularly served by the Post Office. This provision read in pertinent part:

> Sec. 9. *And be it further enacted*, That it shall not be lawful for any person or persons *to establish any private express or expresses* for the conveyance, nor in any manner to cause to be conveyed, or provide for the conveyance or transportation by regular trips, or at stated periods or intervals, from one city, town, or other place, to any other city, town, or place in the United States, between and from and to which cities, towns, or other places the United States mail is regularly transported, under the authority of the Post Office Department, of *any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals* . . . .[184]

Section 10 of the postal act of 1845 extended the 1825 ban on the carriage of letters by "stage or other vehicle." The section included both the new and the old ideas of the postal monopoly. It prohibited both carriage along "post routes" (the road-based approach) and carriage between places regularly served by the Post Office (the service-based approach). For no apparent

[184] Act of Mar. 3, 1845, ch. 43, § 9, 5 Stat. 732, 735 (emphasis added).

reason, section 10 uses the term "post route" where one would expect the more traditional term "post road." The new provision read as follows:

> Sec. 10. *And be it further enacted*, That it shall not be lawful for *any stage-coach, railroad car, steamboat, packet boat, or other vehicle or vessel*, nor any of the owners, managers, servants, or crews of either, which regularly performs trips at stated periods on a *post route*, or between two or more cities, towns, or other places, from one to the other of which the United States mail is regularly conveyed under the authority of the Post Office Department, to transport or convey, otherwise than in the mail, *any letter or letters, packet or packages of letters, or other mailable matter whatsoever*, except such as may have relation to some part of the cargo of such steamboat, packet boat, or other vessel, or to some article at the same time conveyed by the same stage-coach, railroad car, or other vehicle, and *excepting also, newspapers, pamphlets, magazines, and periodicals* . . . .[185]

Section 11 prohibited common carriers from transporting persons acting as a private express. Section 12 prohibited person from sending any "any letter or letters, package or packages, or other mailable matter, excepting newspapers, pamphlets, magazines, and periodicals" by private express.[186]

Section 13 reinforced the 1815 provision requiring masters and employees of domestic steamboat to deliver letters and packets to the post office promptly after docking. Section 13, however, speaks only of the delivery of "letters":

> Sec. 13. *And be it further enacted*, That nothing in this act contained shall have the effect, or be construed to prohibit the conveyance or transportation of *letters* by steamboats, as authorized by the sixth section of [the postal code of 1825]. Provided, That the requirements of said sixth section of said act be strictly complied with, by the delivery, within the time specified by said act, of all *letters* so conveyed, not relating to the cargo, or some port thereof, to the postmaster or other authorized agent of the Post Office Department at the port or place to which said *letters* may be directed, or intended to be delivered over from said boat . . . .[187]

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[185] Act of Mar. 3, 1845, ch. 43, § 10, 5 Stat. 732, 736 (emphasis added).

[186] Act of Mar. 3, 1845, ch. 43, § 13, 5 Stat. 732, 736.

[187] Act of Mar. 3, 1845, ch. 43, § 13, 5 Stat. 732, 736-37.

As shown in these passages, in most cases, the 1845 act expanded the list of items subject to the postal monopoly to "any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals."[188] This phrase did not, however, means what it sounds like. The phrase "matter properly transmittable in the United States mail" was a term of art employed to define the monopoly. The definition of the term was set out in section 15:

> Sec. 15. *And be it further enacted*, That "mailable matter," and "matter properly transmittable by mail," shall be deemed and taken to mean, all letters and newspapers, and all magazines and pamphlets periodically published, or which may be published in regular series or in successive numbers, under the same title, though at irregular intervals, and all other written or printed matter whereof each copy or number shall not exceed eight ounces in weight, except bank notes, sent in packages or bundles, without written letters accompanying them; but bound books, of any size, shall not be held to be included within the meaning of these terms. And any packet or packets, of whatever size or weight, being made up of any such mailable matter, shall subject all persons concerned in transporting the same to all the penalties of this law, equally as if it or they were not so made up into a packet or packages.[189]

Under this definition, the postal monopoly established by sections 9 and 10 of the 1845 act apparently included all financial and legal documents (for example, bank notes and deeds) formerly referred to as "enclosed" within a letter and all printed matter except newspapers and periodic publications *weighing up to eight ounces*. The weight limit on mailable matter, however, was three pounds,[190] so the postal monopoly did not literally include all of the enumerated items "properly transmittable in the United States mail."

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[188] The wording of sections 9 and 15 implicitly rejected the broad interpretation of the *packet* urged by Attorney General Nelson and Postmaster General Wickliffe. In these sections, a p*acket* apparently refers to a packet of letters. Newspapers, magazines, and pamphlets are referred to as "other matter," i.e., distinct from "letters, packets, or packages of letters." Likewise distinct is "all other written or printed matter whereof each copy or number shall not exceed eight ounces in weight." Similarly, section 13 of the 1845 act qualifies section 6 of the 1825 act in a manner that implies the phrase "letters and packets" in the 1825 act referred to letters and packets of letters, consistent with the ruling by the *Chaloner* court. Whereas section 6 of the 1825 act refers to "letters and packets" carried on board a steamboat, section 13 of the 1845 refers to "transportation of letters by steamboats, as authorized by the sixth section of the [1825] act" and the necessity of delivering "all letters so conveyed." Act of Mar. 3, 1845, ch. 43, §§ 9, 15, 5 Stat. 732, 736-37.

[189] Act of Mar. 3, 1845, ch. 43, § 15, Stat. 732, 737. This section goes on to provide an exception for printed matter sent in bulk to dealers and for printed matter carried by travelers for personal use.

[190] Act of Mar. 3, 1825, ch. 64, § 13, 4 Stat. 102, 105.

The 1845 act also added a new statutory exception to the postal monopoly for carriage of mail by private hands without compensation. At the end of the section 11 prohibiting common carriers from transporting employees of private express companies, the follow proviso appears:

> [N]othing in this act contained shall be construed to prohibit the conveyance or transmission of letters, packets, or packages, or other matter, to any part of the United States, by private hands, no compensation being tendered or received therefor in any way . . . .[191]

The private hands exception to the postal monopoly was codified as a separate section in the postal code of 1872 and ultimately included in subsection 1696(c) of Title 18.[192]

Reviewing the 1845 as a whole, what can be surmised about the purpose of the expansion of the postal monopoly? In the Senate debate, the proposition that the traditional prohibition against private postal systems should be extended to private expresses was accepted without question. In the new monopoly provisions (the earlier provisions were not repealed), the range of items.

Table 4. Act of 1845: private express laws

Section	Description
9	No private express to carry mailable matter except NPMP (newspapers, pamphlets, magazines, and periodicals) between places in U.S. regularly served by Post Office
10	No regular vehicle or vessel to carry mailable mater except NPMP, except cargo letters
11	No vehicle or vessel to transport private express persons carrying mailable matter except NPMP, except mailable matter carried by private hands or special messenger
12	No person to send mailable matter except NPMP by private express
13	Strict compliance with 1825.03.03 c. 64 § 6
15	Definition of mailable matter
17	One half of fine to informers

covered by the monopoly was changed from "letters" or "letters and packets" (the terms of earlier laws) to "any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals" and

[191] Act of Mar. 3, 1845, ch. 43, § 11, Stat. 732, 736.

[192] 18 U.S.C. § 1696(c) (2006).

weighing eight ounces or less. The reason for this change in the description of items included within the monopoly is unexplained except by the procedural process that led to this result. Senator Merrick wanted to expand the monopoly to all mailable matter and the majority of the Senate wanted to protect private carriage of " newspapers, pamphlets, magazines and periodicals." There was no specific discussion of what types of postal items other than "letters and packets" would be or should be incorporated in the monopoly or why.

4.5 Judicial Interpretation: U.S. v. Bromley, 1851

In the years immediately following 1845, the courts considered the scope of the new postal monopoly provisions only twice. The first case was *United States v. Thompson*.[193] The presiding judge was Judge Sprague, who had presided over the *Kimball* case two years earlier. Thompson was accused of transmitting letters or other mailable matter by private express. The defendant maintained, inter alia, that he was not carrying "letters" but "orders for goods to be carried by his express or receipts for goods or money delivered, or letters enclosing money, bills, drafts, checks, or notes."[194] In a frequently quoted phrase, the court charged the jury, "The word 'letter' had no technical meaning, but must be understood in the sense which was generally understood among business men."[195] It is unclear, however, whether this instruction influenced the outcome of the case. Although the jury returned a verdict of not guilty, it seems to have concluded that Thompson was innocent because he did not authorize his agents to carry the mail matter in question.

In *United States. v. Bromley*, decided in 1851, the Supreme Court held that the private express statutes of 1845 applied to an order for goods.[196] Bromley was captain of a canal boat chartered by the Post Office to carry mail. The government charged Bromley with the carriage of ten letters outside the mails and sought a fine of fifty dollars for each letter under section 10 of the 1845 act. It was admitted that a crew member transported, on at least one occasion, "a request

[193] United States v. Thompson. 28 F. Cas. 97 (D. Mass. 1846).

[194] United States v. Thompson. 28 F. Cas. 97 (D. Mass. 1846).

[195] United States v. Thompson. 28 F. Cas. 97, 98 (D. Mass. 1846).

[196] United States. v. Bromley, 53 U.S. (12 How.) 88 (1851).

to send some tobacco" written on an unsealed half sheet of paper.[197] One witness stated that he recollected a note given to the crew member "written on two thirds of a sheet of foolscap . . ."[198] The District Court held for the defendant, ruling that the paper in question was "not a letter or mailable matter" within the meaning of the 1845 act. The Circuit Court affirmed. Apparently, neither court issued a written opinion.

The Supreme Court reversed and remanded. The Court first held that the postal monopoly was not to be narrowly construed even though it provided for criminal penalties.[199] On the merits, the Court held that a order for goods came within the purview of the 1845 act. The Court's entire discussion of this point follows:

> We think the instruction of the court was erroneous. The letter or order, as it is called by some of the witnesses, was folded in the form of a letter and directed as such, though it was not sealed. A seal was not necessary to constitute it a letter or to make it chargeable with postage. The letter was not within the exception of the statute, as it did not relate to the cargo or to any article on board of the boat. It was an order for tobacco on Mr. Palmer, of Rochester, who was a dealer in that article. Among merchants, an order to the wholesale dealer for merchandise is a common subject of correspondence. And it may be doubted whether any other subject can be named on which more letters are written and forwarded in the mail. *Two thirds of the half sheet which composed the letter was covered with writing, from which an inference may be drawn that something more than a mere order for goods was requested by the writer. But an order for goods, folded and directed as a letter, is clearly mailable matter,* and a conveyance of it, as charged, is a violation of the law.[200]

In brief, the Court holds that an order for goods is covered by the 1845 act because it is "mailable matter" without deciding whether it is a "letter." While the Court observes that an

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[197] United States. v. Bromley, 53 U.S. (12 How.) 88, 91 (1851).

[198] United States. v. Bromley, 53 U.S. (12 How.) 88, 92 (1851).

[199] United States. v. Bromley, 53 U.S. (12 How.) 88, 96-97 (1851). The Court declared, "That the act which prescribes the offence charged is a revenue law, there would seem to be no doubt. . . . Revenue is the income of a state, and the revenue of the Post Office Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports." In holding that the postal monopoly law should benefit from a liberal, rather than a strict, rule of construction, despite its penal nature, the Court's approach was inconsistent with holdings in *Kimball* and other lower courts. The Court did not discuss these earlier cases nor the cases cited by them.

[200] United States. v. Bromley, 53 U.S. (12 How.) 88, 97 (1851). (emphasis added).

order for goods is a "common subject of correspondence," it then suggests that if two-thirds of a half sheet of paper is covered with writing, "an inference may be drawn that *something more than a mere order for goods* was requested by the writer." The implication is that the Court was reluctant to hold a mere order for goods, standing alone, to be a "letter." The Court resolves this uncertainty by concluding, "But an order for goods, folded and directed as a letter, *is clearly mailable matter*." Thus, the Court held that a mere order for goods is "mailable matter" and that "something more" could render it a "letter." In later years, however, lawyers for the Post Office would cite *Bromley* as demonstrating that the Supreme Court's had ruled that an order for goods is a "letter" covered by the postal monopoly.[201]

4.6 Triumph of Cheap Postage

The 1845 act did not placate the public appetite for lower, simpler postage rates for letters. The 1845 reduction in letter rates proved to be a financial success. By 1848, postage revenue, which dipped in the wake of the 1845 reduction in postage, had recovered and exceeded expenses by 5 percent. Another reform that reduced expenses and boosted revenue was prepayment of letter postage, which was introduced at an option in 1847 when Congress authorized the Post Office to sell postage stamps.[202] Prepayment of postage on letters did not become compulsory until 1855.[203]

In 1851, Congress responded to intense public pressure and again cut letter postage rates substantially. The rate for a half-ounce letter was lowered to three cents for transmission up to 3,000 miles on condition that postage was prepaid; the rate for non-prepaid letters was five cents.[204] This time, the primary author of the bill was the House of Representatives, which supported the three-cent letter rate only after a long debate between congressmen from the densely settled eastern states, who sought a two-cent rate, and congressmen from the more rural southern and western states, who proposed a five-cent rate. By way of partial compensation for the rural states, the 1851 act provided for free postal service for weekly newspapers transported

[201] It may be noted that the author of the opinion, Justice John McLean, was a former Postmaster General and would likely not have participated in the case under modern standards of ethics.

[202] Act of Mar. 3, 1847, ch. 64, § 11, 6 Stat. 188, 201.

[203] Act of Mar. 3, 1855, ch. 173, § 1, 10 Stat. 641, 642.

[204] Act of Mar. 3, 1851, ch. 20, § 1, 9 Stat. 587, 587-88.

within a single country[205] and statutory assurance that "no post-office now in existence shall be discontinued, nor shall the mail service on any mail route . . . be discontinued or diminished, in consequence of any diminution of the revenue that may result from this act . . . ."[206]

In this manner, between 1845 and 1851, Congress adopted a policy of a cheap, uniform postage rates for domestic intercity letters, excepting those to or from the Pacific states. Weight-based, rather than sheet-based rates made possible the introduction of envelopes, stimulated by development of a practical envelope-folding machine in 1853.[207]

The cheap postage movement was a revelation for the country. Congress and the people suddenly realized that the Post Office could serve as a medium for the exchange of personal correspondence as well as a device for the dissemination of news. Family members and friends spread across the continent could, for the first time, communicate with one other easily and inexpensively. In retrospect, it was clear that traditional postal policy, with its high letter rates, had enforced a needless isolation on people. As the House committee explained in 1850 in favoring reporting the bill that would reduce postage rates in 1851:

> *The former rates of postage in this country, prior to 1845, operated as an embargo upon knowledge and truth,* and shut out from a great portion of our people the benefits intended to be conferred upon them by the establishment of the Post Office Department. The committee propose . . . to bring truth; intelligence, and useful knowledge to the door of every man in the Union, the richest and the poorest.[208]

At the same time, the rise of the private expresses as a viable alternative to the traditional Post Office abruptly revealed the potential for private enterprise to organize on a scale to rival the government if government failed to perform satisfactorily. Heretofore, in a time when virtually all private businesses were small and local, the need for government to supply large-scale services was taken for granted. By the end of the 1840s, however, some congressmen could imagine a day when private expresses would replace the government Post Office, an inconceivable prospect a decade earlier. A House committee report on cheap postage warned:

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[205] Act of Mar. 3, 1851, ch. 20, § 2, 9 Stat. 587, 588.

[206] Act of Mar. 3, 1851, ch. 20, § 7, 9 Stat. 587, 590.

[207] *See* Benjamin, *History of Envelopes* 9-11.

[208] H.R. Rep. No. 411, 31st Cong., 1st Sess. at 2 (Jul. 24, 1850).

> Unless the public mails of the country, in their speed, keep full pace with the wants of the people, and the rapid transmission of reading matter is constantly kept in view, they must, in time, on all the important routes, be entirely superseded by private expresses and individual enterprise, now often many days in advance of the regular mails.[209]

Cheap postage was, in fact, the government's primary defense against the private expresses.

The triumph of cheap postage necessarily implied a significant reduction in the use of high letter postage to subsidize the distribution of newspapers. After 1851, subsidies for newspapers were seemingly funded, or substantially funded, from the public treasury since the three-cent rate for letters must have reduced their profit margin. Except for the Civil War years of 1862 to 1866, when Post Office service was suspended in much of the South and the West, from 1852 to 1879, the annual expenses of the Post Office exceeded revenues by an average of 27 percent, and the shortfall never amounted to less than 10 percent. On the other hand, introduction of a uniform national rate for letters probably implied an increased intra-class subsidy—i.e., short distance letters may have subsidized long distance letters—although proponents of the measure in 1851 argued that the cost per letter of long distance transportation was insignificant.[210] The bottom line was that between 1845 and 1851, it appears that Congress substantially limited the profits derived from letter mail and modified the uses to which these profits were put. Subsidies for stagecoach services was reduced where stagecoaches were replaced by star route carriers.[211]

The long Congressional debate about cheap postage casts doubt on simple economically oriented explanations about the purpose of the postal monopoly. Although Congressional deliberations were often laced with detailed projections of postal costs and revenues, Congress never addressed the financial implications of specific monopoly provisions. Creation or protection of a cross-subsidy between monopoly profits earned on some services and losses

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[209] H.R. Rep. No. 731, 30th Cong., 1st Sess. (Jun. 23, 1848). *See generally* John, "Private Enterprise/Public Good."

[210] In the congressional debates, proponents of the uniform rate argued that the cost of transportation of a letter over a long distance such as, for example, Boston to St. Louis, was no more than one-tenth of a cent. *Cong. Globe*, 31st Cong., 2d Sess. 240 (Jan. 14, 1851) (remarks of Mr. Fowler).

[211] The broad trends suggested in the text are no more than that. Without detailed cost and revenue data, it does not seem possible to be more specific. It is even possible that the three-cent rate for letters after 1851 was, for a time, below what would today be called attributable costs.

sustained on other services do not appear as explicit or decisive issues in Congressional debates on the scope of the postal monopoly law. Indeed, accounts of the Post Office were wholly inadequate to determine which services, if any, were priced below incremental or long run marginal cost, the economic criterion for a subsidy. As far as appears from the legislative record, governmental and political factors may have been as important as economic issues in driving the evolution of the postal monopoly law.[212]

[212] Historian Richard John notes that practical political considerations may have played a role in shaping the postal monopoly: "The failure of postal deregulation owed something to the role that postal patronage had come to play by the 1840s in campaign finance. For the party workers who rallied voters to the polls, postal contracts and jobs were a highly coveted reward. The 'naked truth,' declared postal reformer Joshua Leavitt in 1845, was that Congress perpetuated the postal monopoly neither for the benefit of the people, nor by virtue of any constitutional authority, but to provide party leaders with patronage jobs for their supporters." John, "Private Enterprise/Public Good" 338.

5 Local and International Postal Services, 1840s to 1860s

Today, there is no monopoly over the intercity carriage of letters or other mailable matter. In 1974, the Postal Service gave away this portion of its monopoly by adopting (without apparent legal authority) regulations allowing private intercity carriage of letters ultimately tendered to the Postal Service for local delivery. What is economically significant for the Postal Service today is a monopoly over the "last mile," i.e., the right to make local delivery of mail. Yet the idea that the Post Office should extend its services to include local mail evolved only slowly. Local intracity collection and delivery was regarded as a different type of service from "postal service" and originally left to private companies to develop. Likewise, there was no thought of international postal services. In an age when postage was usually paid by the addressee, the Post Office had no incentive to collect letters for delivery to foreign recipients. Outbound international letters were given to the captains of outbound vessels or their passengers. All of this began to change in the 1840s.

5.1 Beginnings of Local Postal Service

Since before the Revolutionary War, intercity letters were occasionally delivered to addressees in the environs of a post office by messengers informally appointed by the postmaster.[213] The postal act of 1794 explicitly authorized this practice.[214] Local "letter carriers" were not employed by the Post Office but paid two cents per letter by the addressee in addition to the postage due, which the letter carrier collected for the postmaster. The 1794 act also provided that a person could drop a letter at a post office for later collection by someone residing in same city. For each local "drop letter," postmasters received one cent. Custody of drop letters and delivery by letter carriers were not considered postal services, and letters so handled were not "in the mail." Statutory provisions relating to letter carrier delivery of posted letters and local drop letters remained unchanged through the 1825 act.[215]

[213] Rich, *History of the Post Office* 104.

[214] Act of May 8, 1794, ch. 23, § 28, 1 Stat. 354, 366.

[215] Act of Mar. 3, 1825, ch. 64, § 36, 4 Stat. 102, 112-13.

Given the high cost of delivery, most addressees preferred to go to the post office for their letters. In major cities, merchants asked the postmaster to establish private letter boxes at the post office so they could collect their mail without waiting in the public queue. Despite official discouragement of private boxes, in 1825 the New York City post office had 900 private boxes compared to six city delivery carriers. By 1850, the number of private boxes had risen to more than 3,000.[216] In 1825, the postmaster of New York unofficially agreed to collect the letters of certain merchants from a designated store, saving them the trouble of taking the letters to the post office.[217] The postal act of 1836 first sanctioned the use of letter carriers to collect mail and deliver local drop letters, albeit for an additional fee.[218]

Notwithstanding these early steps by the Post Office toward local service, true local postal services were pioneered not by the government but by private companies, called "penny posts," operating in New York City and other major cities. In the 1840s, penny posts inaugurated many of the service features that later became standard attributes of government postal service, including: house delivery, street collection boxes, prepayment by adhesive stamps, special delivery, and local parcel post. At least 140 private local posts operated in the United States.[219] By June 1842, City Despatch Post was delivering 450 local letters per day in New York City, compared to the Post Office's 250. In August 1842, Postmaster General Wickliffe bought the City Despatch Post in New York City, hired its former owner as manager, and went into the local mail business under the name United States City Despatch Post. This experiment lasted four and a half years. In late 1846, United States City Despatch Post closed, apparently brought down by the doubling in drop letter rates decreed by the postal act of 1845 (to handicap intercity private expresses).[220] After 1845, private penny posts flourished in New York, Boston, Philadelphia, and other cities.[221]

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[216] Harlow, *Old Post Bags* 396-400.

[217] Rich, *History of the Post Office* 105.

[218] Act of Jul. 2, 1836, ch. 270, § 41, 5 Stat. 80, 89.

[219] *See* Perry, *Byways of Philately* 1; Patton, *Private Local Posts* xiii.

[220] *See* note , above. *See* Scheele, *Short History of the Mail Service* 72. For each local letter U.S. City Despatch was required to charge the two cent drop letter charge plus a charge of up two cents for delivery to the addressee, for total charge of up to four cents per local letter. Whether due to such considerations or otherwise, U.S. City Despatch charged three cents per letter while its main rival, Boyd's, charged two cents. Patton, *Private Local Posts* 52-53, 118. On the Post Office purchase of City Despatch, see 1842 *Postmaster General Ann. Rept*., in S. Doc.

The Post Office's first significant foray into local delivery was taken in the wake of the postage reduction act of 1851.[222] The 1851 act halved the drop letter rate to one cent. A further fee of one cent was charged for delivery of local or intercity letters; a portion of the delivery charge, set by the Postmaster General, was allowed to the letter carrier as commission.[223] In addition, section 10 of the act gave the Postmaster General authority to establish "convenient places of deposit" and to designate new "post routes" within cities:

> Sec. 10. [I]t shall be in the power of the Postmaster-General, at all post-offices where the postmasters are appointed . . . to establish post routes within the cities or towns, to provide for conveying letters to the post-office by establishing suitable and convenient places of deposit, and by employing carriers to receive and deposit them in the post-office; and at all such offices it shall be in his power to cause letters to be delivered by suitable carriers, to be appointed by him for that purpose . . . .[224]

By 1859, the Post Office had established delivery systems in fourteen of the largest cities. That year, the Post Office delivered over 11 million letters, newspapers, and pamphlets,[225] but it seems almost all were intercity items, for Postmaster General Joseph Holt complained that, in respect to local letters, "this correspondence is almost entirely in the hands of private expresses."[226]

5.2 U.S. v. Kochersperger and the Local Service Monopoly, 1860–61

In 1860 Postmaster General Holt moved aggressively to take over local postal services in major cities. He first urged Congress to repeal the one-cent drop letter rate, allowing the Post

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No. 1, 27th Cong., 2d Sess. 721, 727, 755-62 (1843).

[221] In other major countries as well, local delivery services were pioneered by private companies and only later brought with the government's monopoly. *See* Smith, *Development of Rates of Postage* 247-62 (United Kingdom, Canada, France, Germany).

[222] Act of Mar. 3, 1851, ch. 20, 9 Stat. 587.

[223] Act of Mar. 3, 1851, ch. 20, § 1, 9 Stat. 587, 588.

[224] Act of Mar. 3, 1851, ch. 20, § 10, 9 Stat. 587, 591.

[225] 1859 *Postmaster General Ann. Rept*., in S. Exec. Doc. No. 2, 36th Cong., 1st Sess. 1385, 1476 (1859) (Report of the Officer of the Auditor of the Treasury for the Post Office Department).

[226] 1859 *Postmaster General Ann. Rept*., in S. Exec. Doc. No. 2, 36th Cong., 1st Sess. 1385, 1399 (1859).

Office to reduce its charge for local delivery by about 50 percent. Congress promptly did so.[227] On July 17, 1860, Holt declared, pursuant the postal act of 1851, that all streets, lanes, and avenues within the city limits of Boston, New York, and Philadelphia were "post routes." He then informed the private posts that the effect of this order was to extend to all city streets the 1827 monopoly law against establishment of private foot posts and horse posts on "post roads." In this manner, the Postmaster General declared a monopoly over local postal service in the three largest American cities and the elimination of the private companies that had pioneered the service.

In Philadelphia, Blood's Despatch resisted. Blood's Despatch, started in 1842, was one of the earliest and most successful penny posts.[228] When Blood declined to close in response to the Postmaster General's order, the government filed suit. In *United States v. Kochersperger*,[229] Judge Cadwalader, writing for himself and Judge Grier, rejected the claim of the government. The court's long and scholarly opinion traced the development of postal service and the postal monopoly from earliest English precedents through eight decades of American law. The court found that postal law was conceived in terms of the traditional long distance "general post," a transportation service between "post offices."[230] In law, a "post office" or "mail station" referred to the entire area served by an individual post office. A "local post" consisted of collection and delivery of postal items within the district served by a single post office, possibly aided by subordinate branch post offices.[231] As far as the local post was concerned, the court discerned "no prohibition of the business of private letter carriers within such limits."[232] The court rejected the government's contention that by allowing the Postmaster General to designate "post routes" within a postal district, the 1851 act authorized the Postmaster General to expand the scope of the 1827 prohibition against establishment of private foot posts and horse posts along "post roads."[233] Similarly, the court rejected the government's contention that Blood Express violated

[227] Act of Apr. 3, 1860, ch. 11, § 2, 12 Stat. 11.

[228] Perry, *Byways of Philately* 2.

[229] United States v. Kochersperger, 26 F. Cas. 803 (E.D. Pa. 1860).

[230] United States v. Kochersperger, 26 F. Cas. 803, 807 (E.D. Pa. 1860)

[231] United States v. Kochersperger, 26 F. Cas. 803, 807 (E.D. Pa. 1860).

[232] United States v. Kochersperger, 26 F. Cas. 803, 811 (E.D. Pa. 1860).

[233] United States v. Kochersperger, 26 F. Cas. 803, 811-12 (E.D. Pa. 1860) ("The 'post-routes,' which this

the 1845 prohibition against establishment of a private express "from one city, town, or other place, to any other city, town, or place" because the language of the statute, read in context, implied a delivery service operating between postal districts and not within a single postal district.[234] In short, the *Kochersperger* court held that local postal service was not within the scope of the postal monopoly as it existed at that time.

For Postmaster General Holt, however, the public interest in governmental monopolization of local delivery services was self-evident. In his annual report for 1860, Holt implied that a postal monopoly over local services was justified by a need to use profits from some postal services to subsidize losses in others, even though at the time he was proposing to serve only the three most populous cities in the Nation:

> No objection, on the score of policy or principle, can be successfully urged against the suppression of the private expresses occupied in the conveyance of letters and packets in our cities. The growth of these cities, and the wants of our civilization, render the ministrations of the postal service, in the delivery of letters and packets at the residence of the citizen, as indispensable as they are in the transportation and delivery of the mails at the various post offices in the country districts. But the service can only be maintained as a unit by clothing it with the rights and privileges of a complete government monopoly in all the fields of its operation. Some of the its branches are well known to be heavy burdens upon the department; and they would be in supportably oppressive, were it not for the relief afforded by other branches which are remunerative, but which will continue to be so only so long as the competition of private enterprise is effectually excluded.[235]

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tenth section of the act of 1851 authorizes the postmaster general to establish in the respective towns or cities are thus local posts to and from interior subordinate stations of the cities or towns. The definition of them is thus distinctly given in the act itself . . . . We think, therefore, the word post-routes is used in it in a special sense in which it is not synonymous with post-roads, and the latter word is, consequently, misapplied in the postmaster general's order").

[234] 26 F. Cas. at 805. "Where 'cities, towns, or other places' are mentioned in the act, the word places designates mail-stations which are neither cities nor towns. But no 'places' other than mail-stations are designated. Points within the limits of a mail-station or postal district are not within the meaning of the word 'places,' as used in the act." *Id.* at 813.

[235] 1860 *Postmaster General Ann. Rept.*, in S. Exec. Doc. No. 1, 36th Cong., 2nd Sess. 417, 444-45 (1860).

Postmaster General Holt appended the *Kochersperger* decision to his report and called for legislative action.[236]

In early 1861, Congress, at the very brink of Civil War, reversed the *Kochersperger* decision. In February 1861, the House of Representatives, elected to the 36th Congress in November 1858, was sitting in a lame duck second session. In the preceding weeks, representatives from South Carolina, Mississippi, Alabama, Georgia, and Louisiana had resigned as their states seceded from the United States. On February 10, Jefferson Davis, a former U.S. Senator from Mississippi, was named president of the Confederate States of America. The inauguration of President Abraham Lincoln, elected in November 1860, was still several weeks in the future.

Amid these momentous events, on February 15, 1861, at the close of consideration of the Post Office appropriations bill, the House adopted an obliquely worded rider offered by Representative Schuyler Colfax of Indiana on behalf of the Post Office which declared:

> That the provisions of the third section of an act entitled "An act amendatory of an act regulating the Post Office Department" approved March 2, 1827, be, and same are hereby, applied to all post routes which have been, or may hereafter be, established in any town or city by the Postmaster General, by virtue of the tenth section of the act entitled "An act to reduce and modify the rates of postage in the United States, and for other purposes," approved February 27, 1851.[237]

The gist of this amendment was to reverse the *Kochersperger* decision by making the 1827 ban on setting up horse posts and foot posts on "post roads" applicable to local "post-routes" designated by the Postmaster General under the act of 1851. Since 1827 act referred only to private carriage of "letters and packets," the monopoly over local postal services was not as extensive as the monopoly provisions adopted in the postal act of 1845. In explanation of this amendment, Representative Colfax declared:

> By the law of March 2, 1827, it is declared that "no person other than the Postmaster General, or his authorized agent, shall set up any foot or horse post for the conveyance of letters and packets

[236] *Id*. at 444, 523-40.

[237] *Cong. Globe*, 36th Cong., 2d Sess. 938 (Feb. 15, 1861).

> upon any post road which is or may be established as such by law; and that every person who shall offend, shall incur a penalty," &c. By the act of March 3, 1851, the Postmaster General is authorized to establish post routes within all cities and towns where the postmasters are appointed by the President and Senate. In accordance with that law, the Postmaster General has declared the streets and alleys in the various cities of the Union post routes. This act of the Postmaster General has been resisted in Philadelphia, but has been acquiesced in by the private letter expresses in New York, Boston, and other cities,. *The only question is, whether the law of 1827 shall be carried out, and authorize the Postmaster General to established those post routes, and to prevent persons carrying letters over those routes*, unless authorized by him, *so that the Government can have the letter-carrying in these cities in their own hands, as they should have*.[238]

Colfax's rider to the postal appropriations bill was enacted into law without further discussion or amendment.[239] The House approved the provision without comment or recorded vote. On February 28, the Senate approved the Post Office appropriations bill with modifications to other provisions. Despite extensive debate about monies due various mail contractors, the Senate did not discuss extension of the postal monopoly to local delivery services.[240] Congress thus extended the postal monopoly to the collection and delivery of letters and packets, by far the most economically significant facet of the modern postal monopoly. Although the 1861 postal appropriations act gave legislative backing to the Postmaster General's order declaring a monopoly over local delivery services, it did not authorize the Post Office to provide local delivery services comparable to those of the penny posts.

It was the important postal act of 1863 that initiated true local postal service by the Post Office by authorizing "free" city delivery in major cities, i.e., delivery without charge to the addressee.[241] The postage rate for local letters was set at two cents. In addition, mail was, for the

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[238] *Cong. Globe*, 36th Cong., 2d Sess. 938. (Feb. 15, 1861).

[239] Act of Mar. 2,1861, ch. 73, § 4, 12 Stat. 204, 205.

[240] H.R. 971, 36th Cong., 2d Sess. *Cong. Globe*, 36th Cong., 2d Sess., reported from House committee, 691 (Feb. 1, 1861); discussed in House, 912-13 (Feb. 14); discussed and passed by House, 934-39 (Feb. 15); referred to Senate committee, 986 (Feb. 18); reported by Senate committee, 1255 (Feb. 27); discussed and passed by Senate, 1266-69, 1270-71, 1275-77, 1278-80 (Feb. 28); Senate-amended version received in House, 1322 (Mar. 1), referred to House committee, 1325 (Mar. 1); reported from House committee, 1334, 1335 (Mar. 1); discussed and passed by House, 1415, 1416-18, 1421-22 (Mar. 2); received in Senate, 1350 (Mar. 2); enrolled, 1356 (Mar. 2).

[241] Act of Mar. 3, 1863, ch. 71, 12 Stat. 701.

first time, divided into three "classes": letters, regular printed matter, and miscellaneous matter. The Postmaster General was authorized to establish branch post offices, collection boxes, and delivery services "when, in his judgment, the public interest or convenience may require it." Letter carriers became salaried employees of the Post Office.[242] Despite this plunge in the local delivery services, however, the 1863 act retained the historic distinction between postal items "in the mail" and local postal items.[243] While postage rates for local letters were established by law, delivery rates for local newspapers, periodicals, and circulars were negotiated by the local postmaster and publishers. The postmaster was furthered authorized to deliver local packages "exceeding the maximum weight of mailable packages."[244] Local postal service and intercity postal service were still not conceived as a single service.

5.3 Search and Seizure Authority, 1852

Although the postal monopoly law had since 1792 obliged masters of incoming international vessels to give all letters to the local postmaster, Postmaster General N. K. Hall complained in his annual report for 1851 that the law was widely evaded. He urged Congress to give the Post Office authority to search incoming vessels for letters and seize them if found.

> It is well know that vessels from foreign ports continually bring into this country large numbers of letters which are not delivered into the post offices of the ports of arrival, as required by law. In steamers running on the routes from New York and New Orleans to San Francisco, including even the mail steamers under contract with the United States, large numbers of letters are continually sent by express companies, and the authority now vested in this Department and its officers is insufficient to prevent it. The evil is one of such magnitude, and bears so heavily upon the revenues of the Department, that it is earnestly recommended that the laws applicable to the subject be carefully revised. It is suggested that it be made highly penal for express companies, their agents, or other persons, to carry letters on these routes outside the mails, and that

[242] Act of Mar. 3, 1863, ch. 71, § 11 (letter carrier salaries), § 12 (local delivery services), § 13 (branch post offices and receiving boxes), §§ 19-20 (classes of mail), §23 (local letter rate; no carrier's fee for delivery), 12 Stat. 701, 703-05.

[243] For example, Act of Mar. 3, 1863, ch. 71, § 23, 12 Stat.701, 705, referred to "the rate of postage on all letters not transmitted through the mails of the United States, but delivered through the post-office or its carriers, commonly described as local or drop letters . . . ."

[244] Act of Mar. 3, 1863, ch. 71, § 15, 12 Stat. 701, 704.

> it be made the special duty of all officers of the customs, and all special agents of the Post Office Department, to examine on board vessels, on their arrival, all packages which they shall have good reason to believe contain letters, and to seize the same, under such restrictions and with such directions for their subsequent disposal as may be deemed expedient. The master or other officer in charge of such vessels should also be required to make an affidavit before such vessel shall be permitted to break bulk or make entry in any port of the United States, that he has, to be the best of knowledge and belief, delivered or caused to be delivered to the post office at or nearest to such port, all bags, packages, or parcels containing letters theat were on board such ship at the time of its arrival, except such letters are exempted by law.[245]

On July 6, 1852, the House Committee on Post Offices and Post Roads reported a bill, H.R. 294, that closely followed the requests of the Postmaster General.[246] The long first section of this bill both required the master of an incoming ship or vessel to take an oath that all letters had been delivered to the post office and empowered special agents of the Post Office to search incoming vessels and seize illegally carried letters. Subsequent sections included other measures to restrict private carriage of letters. Section 2 would have it a crime, for the first time, for a passenger on an incoming international vessels to carry letters (it was not enacted). Section 3 barred a private express from carrying letters "between ports or places within the United States and any port in any foreign country between which the mails of the United States are carried."[247] Section 4 authorized the Postmaster General to summarily cancel the contract of any mail contractor found transporting a private express or person carrying letters. Section 10 of H.R. 294 provided the grant of authority to manufacture stamped envelopes.

The House did not act on H.R. 294. In the Senate, in the closing days of the first session of the 32d Congress, the Committee on Post Offices and Post Roads, attached the provisions of H.R. 294 to a House-passed post road bill. On the next-to-last day of the session, the Senate approved the amended post road bill without commenting on the search and seizure provisions.

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[245] 1851 *Postmaster General Ann. Rept*., in *Cong. Globe*. App., 32d Cong., 1st Sess. 22, 29 (1851).

[246] *Cong. Globe*, 32d Cong., 1st Sess. 1664 (Jul. 6, 1851). *See* H.R. 294, 32d Cong., 1st Sess.

[247] Section 9 of the 1845 act only barred private expresses from carriage within the United States, i.e.,"from one city, town, or other place, to any other city, town, or place in the United States, between and from and to which cities, towns, or other places the United States mail is regularly transported . . . ." Act of Mar. 3, 1845, Ch. 43, §9, 5 Stat. 732, 735.

The House rejected the Senate amendments, recording, by a vote of forty-three to ninety-six, its particular objection to amendment number 42, corresponding to the first section H.R. 294, the Post Office's search and seizure authority. On the last day of the session, a House-Senate conference committee recommended disposition of the different positions of the two chambers, but failed to make a recommendation on amendment number 42. Both chambers approved the conference report, apparently without noticing the omission.[248] Although overwhelmingly rejected by the House and missing from the conference report, amendment 42 was included as section 5 in the final post roads act.[249] It provided as follows:

> Sec. 5. *And be it further enacted*, That no collector or other officer of the customs, shall permit any ship or vessel, arriving within any port or collection district of the United States, to make entry or break bulk until all letters on board the same shall be delivered into the post office at or nearest said port of place, nor until the captain or commander of such ship or vessel shall have signed and sworn to a declaration before such collector or officer of the customs, in the form and to the effect following; that is to say:
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> "I, A B, commander of the (state the name of the ship or vessel) arriving from (state the place) and now lying in the port of (state the name of the port,) do, as required by law, solemnly swear (or affirm, as the case may be) that I have, to the best of my knowledge or belief, delivered or cause to be delivered into the post office at or nearest said port, every letter, and every bag, parcel or package of letters that were on board the (state the name of the ship or vessel) during her last voyage, and that I have so delivered or caused to be delivered all such letters, bags, parcels, and packages as were in my possession or under my power or control."
>
> And the collector and every officer of the customs at every port, without special instructions, and every special agent of the Post Office Department, when instructed by the Postmaster-

[248] *Cong. Globe*, 32d Cong., 1st Sess., Senate committee report, 2268 (Aug. 20, 1852); discussed in Senate, 2329-31 (Aug. 25), discussed and passed in Senate, 2371 (Aug. 26); House discusses and rejects Senate amendments, 2477-80 (Aug. 30); conference report approved by Senate, 2486 (Aug. 31), conference report approved by House, 2490-91 (Aug. 31). *See also H.R. Journal*, 32d Cong., 1st Sess., 1130 (amendment 42 rejected, Aug. 30), 1145 ((onference report approved without reference to 42d amendment, Aug. 31); *S. Journal*, 32d Cong., 1st Sess. 681-82 (conference report approved without reference to amendment 42, Aug. 31).

[249] Act of Aug. 31, 1852, ch. 113, 10 Stat. 121. The House also expressly rejected, without vote, amendment number 50, corresponding to section 10 of H.R. 294 (stamped envelope exception to the postal monopoly). Amendment number 50, however, was explicitly reinstated by the conference committee.

> General to make examinations and seizures, shall carefully search every vessel for letters which may be on board, or have been carried or transported contrary to law; and each and every of such officers and agents, and every marshal of the United States and his deputies, shall at all times have power to seize all letters, and packages, and parcels, containing letters which shall have been sent or conveyed contrary to law on board any ship or vessel, or on or over any post route of the United States, and to convey such letters to the nearest post office; or may, if the Postmaster General and the Secretary of the Treasury shall so direct, detain the said letters, or any part thereof, until two months after the trial and final determination of all suits and proceedings which may at any time, within six months after such seizure, be brought against any person for sending, or carrying, or transporting any such letters contrary to any provisions of any act of Congress; and one half of any penalties that may be recovered for the illegal sending, carrying, or transportation of any such letters shall be paid to the officers so seizing, and the other half to the use of the Post Office Department; and every package or parcel so seized, in which any letter shall be concealed, shall be forfeited to the United States, and the same proceedings may be had to enforce such forfeiture as are authorized in respect to goods, wares, and merchandise forfeited by reason of any violation of the revenue laws of the United States; and all laws for the benefit and protection of officers of the customs seizing goods, wares, or merchandise, for a violation of any revenue law of the United States, shall apply to the officers and agents making seizures by virtue of this act.[250]

Postmaster General Hall asked only for authority to search incoming international vessels, almost all of section 5 deals with the control of letters imported on such vessels. Yet there is an unqualified phrase in the middle of the third sentence which could permit a broader construction. The third sentence could be parsed to read: "every special agent of the Post-Office Department, when instructed by the Postmaster-General to make examinations and seizures, . . . shall at all times have power to seize all letters, and packages, and parcels, containing letters which shall have been sent or conveyed contrary to law . . . *on or over any post-route of the United States*."

Read in this manner, section 5 authorizes postal inspectors (called "special agents" at this time) to seize unlawfully carried letters *on any domestic post route*, i.e., throughout United States.

[250] *Cong. Globe*, 32d Cong., 1st Sess. 2478 (Aug. 30, 1852).

While such a reading may appear questionable given the overall thrust of section 5, this is the interpretation which has emerged from several reenactments. Section 5 of the 1852 act is the source for four of the thirteen postal monopoly provisions found in current law: section 1699 of Title 18 and sections 604 through 606 of Title 39.[251] The last three provisions provide general search and seizure authority "on any postal route."

5.4 Stamped Envelope Exception, 1852–1864

With introduction of weight-based rates in 1845, envelopes became feasible and popular. In an amendment to the post roads act of 1852 (the same act that granted the Post Office search and seizure authority), Congress authorized the Postmaster General to sell "suitable letter envelopes . . . with one or more suitable postage-stamps . . . printed or impressed thereon." In the same section, Congress provided that letters enclosed in government stamped envelopes could be conveyed by private carriers: "letters when inclosed in such envelopes . . . may be sent, conveyed, and delivered otherwise than by post or mail, notwithstanding any prohibition thereof, under any existing law."[252] This provision did not authorize private carriage of letters in ordinary envelopes with postage stamps affixed. The envelopes contemplated by the statute were to be printed or impressed with stamps by the Post Office.

In 1864, the Senate proposed repeal of the stamped envelope exception to the postal monopoly. The Senate measure was added during committee consideration of a House bill relating to transportation of outbound international mail.[253] The Senate was motivated by allegations of abuse of the exception in California where private express services were especially active. The House objected to total repeal of the exception and demanded a conference. There was no other substantial point of disagreement between the chambers. The conference committee adopted a compromise which authorized the Postmaster General to suspend the exception for stamped envelopes on selected routes. The conference committee's compromise was explained by Congressman John Alley, a Republican from Massachusetts and chairman of the House Committee on the Post Office and Post Roads, as follows:

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[251] 18 U.S.C. § 1699 (2006); 39 U.S.C.§§ 604-06 (2006).

[252] Act of Aug. 31, 1852, ch. 113, §8, 10 Stat. 121, 141-42.

[253] *Cong. Globe*, 38th Cong., 1st Sess. 1174 (Mar. 18, 1864).

> To the seventh amendment of the Senate the House disagreed, and that was an addition to the House bill . . . [which] repeals the law of 1852 so far as it authorized the conveyance of letters otherwise than in the mails. By the law of 1845, all mail matter was prohibited from being carried upon post routes by any one out of the mails. In 1852 that law was amended so as to provide that letters and other mail matter might be carried by express companies or by individuals, provided the legal postage was prepaid and the envelopes in which the mail was carried were stamped. . . . In case of the repeal of that law, we should fall back on the law of 1845. That was regarded as working a hardship, at the time of the enactment of the law of 1852, upon the business interests of the country, and the reasons alleged by Senate for its repeal were, that upon the Pacific coast, in many instances, great abuses had been practiced.
>
> The conference committee agreed upon an amendment to that provision of the Senate, and to it the unanimous consent of the committee of both Houses was given. As proposed to be amended, it will read as follows: . . . .
>
> That leaves the matter entirely in the discretion of the Postmaster General, and he may adopt the remedy so far as it may seem necessary to promote the interest of the public service.[254]

The conference report was agreed. As enacted in the postal act of 1864, the provision modifying the stamped envelope exception read:

> Sec. 7. *And be it further enacted,* That the Postmaster-General be, and he is hereby, authorized and empowered to suspend the operation of so much of the eighth section of the act of the thirty-first of August, eighteen hundred and fifty-two, as authorizes the conveyance of letters otherwise than in the mails on any such mail routes as in his opinion the public interest may require.[255]

In this manner, Congress authorized the private carriage of letters enclosed in government stamped envelopes and then, twelve years later, authorized the Postmaster General to suspend the exception on selected routes.[256] This suspension authority was codified in the postal laws as subsection 601(b) of Title 39[257] and played important role in the development of

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[254] *Cong. Globe*, 38th Cong., 1st Sess, 1243 (1864) (emphasis added).

[255] Act of Mar. 25, 1864, ch. 40, § 7, 13 Stat. 36, 37.

[256] The exception for stamped envelopes was extended to envelopes with postage paid by metered indicia in 1938.

[257] 39 U.S.C. § 601(b) (2006).

postal monopoly regulations by the Postal Service in 1974. The suspension authority was repealed by the Postal Accountability and Enhancement Act of 2006.

5.5 Outbound International Mail Monopoly, 1865

Before 1845 American postal law addressed international postal services only in a limited manner. Delivery of inbound international mail was monopolized to the extent that the master of an inbound international vessel was required to deliver "letters" to the postmaster at the first port of call.[258] Although masters of inbound vessels was so obliged, passengers were not, an exception that became more important with the rise of private expresses. In addition, the Postmaster General was authorized to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices."[259] Such arrangements related to the handling of mails once they arrived in an American port, not to contracting for international transportation.

As befitted an arm of a global sea power, the British Post Office had operated regularly scheduled "packet ships" between New York and England since the mid-eighteenth century.[260] After the end of the War of 1812, however, the British Post Office lost most of this business to fast sailing ships operated by New York merchants, who were seeking to make their city the major port of entry for international commerce. In 1840, the first practical trans-Atlantic steamship line, the Cunard Line, was introduced by a British company, and American private express companies began their own successful international services by using trans-Atlantic steamers.[261]

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[258] Postage rates for foreign letters referred to rates charged for the domestic delivery of letters received from international vessels and did not include a charge for inbound international transportation. *See* Act of Feb. 20, 1792, ch. 7, §10, 1 Stat. 235, 239; Act of May 8, 1794, ch. 23, § 10, 1 Stat. 354, 359; Act of Mar. 2, 1799, ch. 43, § 8, 1 Stat. 733, 734; Act of Apr. 30, 1810, ch. 37, § 12, 2 Stat. 592, 596; Act of Mar. 3, 1825, ch. 64, § 15, 4 Stat. 102, 106.

[259] Act of Feb. 20, 1792, ch. 7, §26, 1 Stat. 234, 239. *See* Act of May 8, 1794, ch. 23, § 26, 1 Stat.359, 366; Act of Mar. 2, 1799, ch. 43, § 25, 1 Stat.733, 740; Act of Apr. 30, 1810, ch. 37, § 32, 2 Stat. 592, 603; Act of Mar. 3, 1825, ch. 64, § 34, 4 Stat. 102, 119. *See also* Rich, *History of the Post Office* 104.

[260] Robinson, *Carrying British Mails Overseas* 43-50, 58; Albion, *Square-Riggers on Schedule* 17.

[261] *See* Taylor, *Transportation Revolution* 116; Stimson, *History of the Express Business* 43; Harlow, *Old Way Bills* 22-23).

The Post Office did not begin outbound international postal service in earnest until the mid-1840s. In June 1844, Congress adopted a resolution authorizing the Postmaster General to arrange for international transportation of letters to Canada and Europe and require prepayment of all fees for international letters.[262] In his annual report for 1844, however, Postmaster General Wickcliffe remarked that he still lacked specific authority to contract for international transportation:

> Under existing laws, the Postmaster General is not authorized to contract for transporting the mail on the high seas, or beyond the limits of the United States. The necessity and unity of a regular mail between this country and Cuba, and other foreign ports, must be apparent to all; and such mail would have been put in operation long since, if the power to do so had existed. I respectfully suggest the power to contract for the transportation of mails to foreign ports be authorized and the rates of postage fixed by law.[263]

On March 3, 1845, Congress adopted an act establishing rates for outbound international mail and authorizing the Post Office to contract for international transportation in American ships.[264] In an extraordinary provision, international passengers, who had heretofore escaped obligation under American postal monopoly laws, were required to respect exclusive dealing arrangements included in a ship's mail transportation contract:

> Sec. 4. *And be it further enacted*, That it shall not be lawful for any person to carry or transport any letter, packet, newspaper, or printed circular or price current, (except newspapers in use, and not intended for circulation in the country to which such vessel may be bound,) *on board the vessels that may hereafter transport the United States mail . . . .*[265]

In 1864, Postmaster General William Dennison urged to Congress to go further and stop private carriage of outbound international letters altogether to protect the revenues of the Post Office:

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[262] Resolution of Jun. 15, 1844, 5 Stat. 718.

[263] 1844 *Postmaster General Ann. Rept*., in H.R. Doc. No. 2, 28th Cong., 2d Sess. 663, 760 (1845). This report also includes copies of preliminary arrangements with England and France negotiated pursuant to the resolution. *Id*. at 692-97.

[264] Act of Mar. 3, 1845, ch. 69, 5 Stat. 748. This act is distinct from the act to reduce postage, limit franking privileges, and restrict private expresses adopted on the same day.

[265] Act of Mar. 3, 1845, ch. 69, § 4, 5 Stat. 748, 749 (emphasis added).

> To protect the postal revenues from losses incident to the unauthorized conveyance of letters by private ships or vessels departing from the United States for foreign countries, I recommend the passage of a law requiring, as a condition of clearance, that the master or commander of any steamship or other vessel departing for a foreign port or ports, shall make an oath that he has not received on board his ship or vessel, and has not under his care or within his control, any letters addressed to a foreign country which have not been received directly from the post office at the port of departure, except such as are directed to the consignee of the ship or vessel.[266]

In March 1865, on its final day, the 38th Congress granted the Post Office a monopoly on outbound international mail in almost precisely the terms sought by Postmaster General:

> Sec. 10. *And be it further enacted*, That no steamship or other vessel departing from the United States for a foreign port or ports, shall be permitted to receive on board, or convey any letters or letter packets originating in the United States, which have not been regularly posted at, and received from, the post-office at the port of departure; and it shall be the duty of the collector, or other officer of the port empowered to grant clearance of vessels, to require as a condition of clearance, from the master or commander of such steamship or vessel, an oath or affirmation that he has not received on board his ship or vessel, and has not under his care or control, and will not receive or convey any letters or letter packets addressed to a foreign country, except . . . [cargo letters and letters in stamped envelopes].[267]

The only explanation of this provision in the congressional debate of this bill was offered by Senator Jacob Collamer, chairman of the Senate Committee on Post Offices and Post Roads and a former Postmaster General, who suggested that it, section 12 in the bill under consideration, was merely a technical provision to implement the preceding section:

> The eleventh section relates to the carrying of mail by steamships. The present law on that subject provides that if they are American ships they may be allowed the inland and the sea postage for this service, and if foreign ships the sea postage only. There was doubt whether the Postmaster General was always obliged to give them all that. . . . [I]n order to remove any doubt about that this section eleven is put in . . . .

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[266] 1864 *Postmaster General Ann. Rept*., in H.R. Exec. Doc. No. 1, 38th Cong., 2d Sess. 777, 789 (1864).

[267] Act of Mar. 3, 1865, ch. 89, § 10, 13 Stat. 504, 506.

> *Section twelve only carries into effect section eleven by compelling vessels to take the mails.* It is a provision to compel them when they take clearances to take the mails if so required.[268]

In fact, section 12 did not merely carry into effect section 11; it granted the Post Office a monopoly over outbound international "letters or letter packets." The present version of this 1865 provision is found in section 602 of Title 39.[269]

[268] *Cong. Globe*, 38th Cong., 2d Sess. 656 (Feb. 8, 1865) (emphasis added). Senator Collamer had served as Postmaster General from March 8, 1849, to July 22, 1850.

[269] 39 U.S.C. § 602 (2006).

6 Postal Code of 1872 and Early Implementation

The current postal monopoly statutes were enacted in the postal code of 1872, except a handful of relatively minor subsequent amendments and three new exceptions introduced by the PAEA in 2006. Since the 1872 act was first consolidation of the postal laws since 1825, its preparation was a major task given the development of the national economy and vast changes in the nature of postal services. In the process of codification, the postal code of 1872 substantially revised the language of the postal monopoly statutes. The intent of Congress in adopting these revisions is not well documented in the usual sources of committee reports and congressional debate. A review of the long evolution of this act does, however, offer intimations of what was likely intended.

6.1 POD Draft Postal Code of 1863

Beginning in the early 1850s, Postmasters General regularly urged Congress to revise and codify the jumble of postal laws that had accumulated since postal code of 1825.[270] In 1861, Postmaster General Montgomery Blair pleaded that a new postal code would "greatly facilitate the performance of their duties by the numerous officers and agents attached to this department."[271] In February 1863, Blair took the initiative and sent Congress a draft bill to "revise and codify" the postal laws.[272] Blair declared that his draft bill was "for the most part but a digest of the existing postal laws, the provisions of which would be but slightly affected by the modifications therein suggested."[273]

In the Post Office's draft code, laws were organized in a logical sequence, and certain revisions desired by the Post Office were introduced. For example, at the end of the 1827 prohibition against establishment of private foot posts and horse posts over "post roads," new

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[270] *See* 1850 *Postmaster General Ann. Rept*., in *Cong. Globe*. App., 31st Cong., 2d Sess., at 15, 17 (1850); 1851 *Postmaster General Ann. Rept*., in *Cong. Globe*. App., 32d Cong., 1st Sess., at 22, 30 (1851).

[271] 1861 *Postmaster General Ann. Rept*., in S. Exec. Doc. No. 1, 37th Cong., 2d Sess., at 551, 581 (1861).

[272] Post Office, *The Post Office Department [1863]*. See bibliography for details. This draft code was derived from and included citations to "the compilation of the laws issued by the department in 1859." Id. cover page.

[273] *1863 Postmaster General Ann. Rept.* 21 (1863).

language was added to clarify that the postal monopoly applied to "post roads" within a single postal district, i.e., to local postal services:

> Sec. 165. No person other than the Postmaster General or his authorized agents shall set up any foot or horse post for the conveyance of letters and packets upon any post road which is or may be established as such by law, *or within any postal district in which the Postmaster General has or shall establish a delivery by carriers as in this code provided.*[274]

While it may be argued that the additional language was implied by the amendment of 1861, discussed above, it represented a revision rather than a mere codification. Moreover, to overcome the distinction between "post roads" and local "post routes" drawn by the *Kochersperger* court, section 83 of the draft code declared that local post *routes* were post *roads*:

> All post routes separately described as such by act of Congress, all railroads and railroad bridges, and all waters on which steamboats regularly pass from port to port within the United States, shall be considered, and are established, as post roads . . . . ; also, *all streets, lanes, and alleys in any city or town where the Postmaster General has established, or shall establish, a letter delivery by carriers, shall be considered and held to be post roads* during the period such carriers shall be employed therein, and subject to all the provisions of law respecting post roads.[275]

The Post Office's proposed code also added new language to the postal monopoly provisions of the 1845 act. In both the proscription against private expresses (section 9 of the 1845 act) and the ban on carriage of postal items by private transportation services such as stagecoaches, railroads, and other common carriers (section 10), the draft code proposed to prohibit carriage of "any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals *and other matter classed in this code as miscellaneous mail matter*."[276] The italicized words were added by the drafters at the Post Office. No other changes were made in either

[274] Post Office, *The Post Office Department [1863]* at 76 (emphasis added). In section 83, the draft code drew upon several statutory sources and stated explicitly what the 1861 act only implied: that the Postmaster General could extend the postal monopoly to "all streets, lanes, and alleys in any city or town where the Postmaster General has established, or shall establish, a letter delivery by carriers." Id. at 47.

[275] Post Office, *The Post Office Department [1863]* at 47 (section 83).

[276] Post Office, *The Post Office Department [1863]* at 77 (section 166).

provision. In the draft code, the definition of "miscellaneous mail matter," a term synonymous with "third class matter," was set out in the mail classification provisions:

> Sec. 47. Mailable matter shall be divided into three classes, namely: 1st, letters; 2d, regular printed matter; *3d, miscellaneous matter*.
>
> Sec. 48. The first class embraces all correspondence wholly or partly in writing, except that mentioned in the third class; the second class embraces all mailable matter exclusively in print, and regularly issued at stated times, without addition by writing, mark, or sign; *the third class embraces all other matter which is or may hereafter be by law declared mailable; embracing all pamphlets, occasional publications, books, book manuscripts and proof-sheets, whether corrected or not; maps, prints, engravings, blanks, flexible patterns, samples, and sample cards; phonographic paper, letter envelopes, postal envelopes, or wrappers, cards, paper, plain or ornamental; photographic representations of different types; seeds, cuttings, bulbs, roots, and scions*.[277]

Thus, in the draft code of 1863, the Post Office proposed to *reduce* the scope of the monopoly established by sections 9 and 10 of the 1845 act by adding miscellaneous mail to the list of exemptions. Why? There appears to be no extant document explaining the Post Office's thinking in this regard. In "explanatory notes" accompanying the draft code, Post Office lawyers state only that new provisions had been added "the necessity for which has been found by experience" and that "other modifications of present laws are verbal or unimportant."[278]

Beyond this cryptic note, plausible surmise is all that is possible. By 1863, the range of miscellaneous mailable matter had expanded considerably from 1845 to include not only handbills and circulars but also items ranging from maps and photographs to seeds and bulbs. At this time, the volume of circulars was relatively small. Circulars accounted for about 12 percent of postal items delivered in the cities where local postal services had been established, but they were a negligible percentage in all but two, New York and Boston.[279] Given discounted rates for

[277] Post Office, *The Post Office Department [1863]* 28. The mail classifications provisions were included in the postal act of 1863. Act of Mar. 3, 1863, ch. 71, §§ 19, 20, 12 Stat. 701, 704-05 (emphasis added). Sections 19 and 20 of the 1863 act are identical to sections 47 and 48 of the draft code.

[278] Post Office, *The Post Office Department [1863]* 93.

[279] *1863 Postmaster General Ann. Rept.* 74. Only in New York City did circulars constitute a significant fraction of postal items delivered (21 percent). In Boston, circulars constituted less than 2 percent of items delivered.

miscellaneous matter, the contribution of miscellaneous matter to common operating costs of the Post Office was likely small. Then, too, other postal monopoly laws continued to refer only to "letters" or "letters and packets," including section 19 of the 1825 act (stagecoaches on post roads), section 3 of the 1827 act (foot posts and horse posts), section 6 of the 1825 act (delivery of letters on board domestic steamboats), and sections 17 of the 1825 act and 5 of the 1852 act (delivery of inbound letters on board international ships). A simple, uniform, well understood standard for the scope of the postal monopoly may have been considered desirable. Regardless of motivation, these revisions in the text of the postal monopoly provisions proposed by the Post Office in the draft postal code of 1863 appear significant because they may be the origin of changes in the postal monopoly provisions adopted in the postal code of 1872.

6.2 Postal Code of 1872

The postal act of 1872 codified the postal laws for the first time since 1825 and remained the basic postal law of the United States until 1960.[280] The first draft of the postal act of 1872 was produced by a special commission established to revise and codify all of the statutes of the United States. The Commissioners had been appointed by President Andrew Johnson under terms of a 1866 law.[281]After several delays, on January 26, 1869, Commissioners William Johnston and Charles P. James reported to Congress that they had finished a handful of specimen titles to demonstrate their approach. One of the specimen titles, presumably because of the preliminary work done by the Post Office in 1863, was a new postal code, then "in the hands of the public printer." In a January 1869 progress report, the Commissioners described their approach to revisions and codification as an effort to strike a balance between fidelity to the existing statutes and a determination to render the statutes in straightforward language intelligible to a person without legal training.

> In the execution of the work the commissioners have found it difficult to determine very precisely the boundaries of their authority "to make alterations" of the original text of the statutes. They are instructed to make such as shall reconcile its

[280] Act of Jun. 8, 1872, ch. 335, 17 Stat. 283. As explained the text, the 1872 postal code was later incorporated without significant change in the Revised Statutes of 1874, so that after 1873 it was customary to the refer to the 1872 postal code by referring to the corresponding section of the Revised Statutes.

[281] Act of Jun. 27, 1866, ch. 140, 14 Stat. 74.

contradictions, supply its omissions, and amend its imperfections; but this instruction may be construed liberally or strictly. It becomes necessary, therefore, to look beyond its terms for the ground of a correct rule.

The very nature of the work seems to set limits which are sufficiently strict. The commissioners are confined, on one hand, to the material contained in the statute books, and are required, on the other, to omit nothing which is neither obsolete nor redundant. Every essential provision of the existing laws must be reproduced, with such additions only by the commissioners as shall give to these provisions their intended effect. It is manifest that this necessity of itself sets a limit to condensation and brevity of form, and that if symmetry does not characterize the statutory provisions relating to a particular subject, when "brought together," it cannot be imparted in the process of revision.

The commissioners feel assured, however, that if, in addition to these essential limitations, they are required, in handling the material before, to construe somewhat strictly their authority to "amend the imperfections of the original text," . . . the result will not be so useful as it might be made by the exercise of freer authority. The residuum of the existing statutes must, upon such a method, be of much greater bulk than is desirable. The statute law of the land, unlike the unwritten law, is directly consulted by the unlearned as well as by the professional persons, and is apt to be unintelligible to them unless it is stated with brevity and expressed in language to which they are accustomed. And it is certain that the same kind of language by means of which men understand each other in their daily intercourse will perfectly express the legislative will more frequently than is admitted by the practice of statute writers. The mass of men who are concerned to know the statute law have neither the training nor the time requisite for mastering an artificial and peculiar style of statement. A people who are more in the habit than any other of the world of reading their own laws, and whose time is valuable in proportion to the rapidity and enormous multiplicity of their transactions, is peculiarly entitled to have the form of them adopted to their convenience.[282]

[282] Revision of Statutes Commission, *Report of the Commissioners to Revise the Statutes of the United States*, H.R. Misc. Doc. No. 40-31 (3d Sess. 1869), at 2. One of the three original commissioners resigned, leaving the work to Johnston and James. In a first report on June 26, 1868, the Commissioners reported submission of specimen titles for the laws relating to patents, the army, and public printing. S. Misc. Doc. No. 40-101(2d Sess. 1868).

In their draft postal code, the Commissioners substantially rewrote the patchwork of postal monopoly laws that had accumulated since 1825.[283] Postal monopoly provisions were restated in fourteen sections which introduced significant changes from prior law.[284] Generally, the Commissioners' revision of the postal monopoly statutes introduced two types of changes in the substantive postal monopoly law. First, in the list of items defining the scope of the prohibition, the Commissioners consistently substituted *letters and packets* for the broader language appearing in postal monopoly provisions of the 1845 act. Thus, sections 234 through 237 of the draft code, derived from sections of 9 through 12 of the 1845 act, used the phrase *letters and packets* in place of the expression "letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals."[285] In section 238, the draft code used *letter and packet* in place of "any letter, packet, newspaper, or printed circular or price current" in restating the 1845 provision prohibiting persons from carrying certain items on outbound international vessels with mail contracts. In sections 229 (steamboat letters), 240 (letters from inbound vessels), 242 (search authority), 243 (seizure authority), and 245 (letters in stamped envelopes), the Commissioners' draft followed the antecedent statutes and referred only "letters," without reference to packets. In section 239, relating to vessels carrying outbound international mail, the phrase "letters and letter packets" was changed to "letters and packets."

The second general change introduced by the Commissioners was a blurring of the distinction between domestic and international commerce. In section 234, prohibiting establishment of a private express, the limiting phrase "in the United States" was dropped, so that the prohibition was extended to international mail.[286] International restrictions were also extended to domestic commerce. Section 238 forbade a person from carrying any letter or packet on board "any vessel" carrying the mail whereas its 1845 antecedent referred only to vessels carrying international mail. Sections 239, 240, and 241 of the draft code were all derived from

[283] Revision of Statutes Commission, *The Statutes Relating to the Postal Service*. See bibliography for details.

[284] *But see* Craig and Alvis, *The Postal Monopoly*, at 74-77, in which two Postal Service lawyers argue that the Commissioners intended not to change prior law and that their draft code introduced no changes in the postal monopoly provisions. The Postal Service adopted a similar position in the *ATCMU* case in 1976.

[285] Revision of Statutes Commission, *The Statutes Relating to the Postal Service* 51-52.

[286] Revision of Statutes Commission, *The Statutes Relating to the Postal Service* 51.

the long 1852 provision providing search and search procedures for thwarting private carriage of letters on board vessels arriving from international waters. In the Commissioners' draft, section 240 requires delivery of letters from any inbound vessel; section 240 authorizes searches of "all vessels"; and, most expansively, section 241 permits seizure to all letters found "on board any vessel or on any post route."[287]

In the Commissioners' proposed code, section 234 became an all-purpose postal monopoly provision. It read as follows,

> Sec. 234. No person shall establish any private express for the conveyance of *letters or packets*, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods, *over any post-route which is or may be established by law*, or from any city, town or place to any other city, town or place [omitted: "in the United States"] to any other city, town or place between which the mail is regularly carried, and every person so offending, or aiding or assisting therein, shall for each offence, forfeit and pay one hundred and fifty dollars.[288]

According to the committee's marginal notes, section 234 was derived from *both* section 3 of the 1827 act and section 9 of the 1845 act. Section 3 of the 1827 act was the ban against setting up horse posts and foot posts over "post roads" that, in 1861, was extended to include "post routes" within a single city or town.[289] Section 9 of the 1845 act was the prohibition against establishment of private express services between pairs of post offices within the United States if regular service was already provided by the Post Office. By combining the two provisions, the prohibition became substantially more general. The prohibition against private express operations now applied to both intercity and intracity services, and it applied to operations over all post routes regardless of whether served by the Post Office.[290] Moreover, by omitting the

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[287] Revision of Statutes Commission, *The Statutes Relating to the Postal Service* 53.

[288] Revision of Statutes Commission, *The Statutes Relating to the Postal Service* 51.

[289] Act of Mar. 2, 1861, ch. 73, 12 Stat. 204.

[290] Section 234 probably should have referred to "post roads" rather than "post routes" since section 210 declared "all letter-carrier routes established in any city or town for the collection and delivery of mail matter by carriers" to be post *roads*. In the marginal notes, neither section 210 nor section 234 cites the 1861 act as the source for the postal monopoly over local collection and delivery. The source for section 210 is noted as the Act of Jul. 27, 1854, ch. 109, §2, 10 Stat. 312, 313. While the 1854 act did declare the prohibitions of the 1845 act to apply to local carrier routes established under "this act," the act applied only to letter carrier routes in the state of California and the territories of Oregon and Washington.

limiting phrase "in the United States" found in section 9 of the 1845 act, the prohibition was extended to international and well as domestic services. In short, this new provision joined the intercity postal monopoly of 1845, the local postal monopoly of 1861, and international postal monopoly of 1864.

In addition, the Commissioners retained the pre-1845 proscription against conveyance of letter and packets by means of staged transportation services. In the Commissioners' draft, this provision was section 237 which read as follows:

> Sec. 237. No stage-coach, railway-car, steamboat, or other vehicle or vessel which regularly performs trips at stated periods on any post route, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried, shall carry, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, or to some article carried at the same time by the same stage-coach, railway car, or other vehicle, except as provided in section two hundred and forty-five (245) [stamped envelopes]. And for every such offence the owner of the stage-coach, railway car, steamboat, or other vehicle or vessel shall forfeit and pay one hundred dollars; and the driver, conductor, master, or other person having charge thereof, and not at the time owner of the whole or any part thereof, shall in like manner forfeit and pay for every such offence fifty dollars.[291]

Despite such significant departures from earlier acts, the Post Office certified to Congress that the Commissioners' draft code was an accurate codification of the law. The Post Office's scrutiny of the Commissioners' draft postal code began about October 29, 1869, when the Postmaster General appointed a review committee. On March 30, 1870, the committee submitted a thirty-page report which attested to the essential correctness of the Commissioners' work while proposing certain corrections and revisions. The committee explained the principles guiding its review:

> [W]e desire to state the general principles by which we have been guided. The critical accuracy of the code in stating the substance of the existing law, and its general excellence in a literary point of view, leave us nothing to do in that direction; and we have confined ourselves to corrections and suggestions of a practical nature, such as have occurred to us and to others whom we have

[291] Revision of Statutes Commission, *The Statutes Relating to the Postal Service* 52.

> consulted, in connection with the practical working of the postal system in this country. Some provisions of the older statutes are obsolete in practice; some are of no essential value under the development of our national resources, since the fundamental laws of 1825 and 1836 were passed; some would be, if rigidly carried out, positive hindrances to the efficiency of the postal service; and, in all such cases, we have been guided in our observations by the practice of the department, as it has grown up during the last forty years, to meet unexpected emergencies and changes which could not be foreseen.[292]

Satisfied as to "the critical accuracy of the code in stating the substance of the existing law," the committee offered only one suggestion in regard to the postal monopoly provisions: a reduction in the penalty for carrying mail on board vessels with mail contracts from five hundred dollars to fifty dollars.[293] The Postmaster General sent the report of the committee to the House of Representatives on April 13, 1870.[294]

The Commissioners' draft code, together with corrections and revisions recommended by the Post Office, became the foundation for Congressional deliberations. Less than two weeks after receiving the Post Office's report, on April 25, 1870, Representative John Farnsworth of Illinois (Republican), Chairman of the House Committee on Post Office and Post Roads, introduced H.R. 1860, a bill to revise and consolidate the postal laws. In H.R. 1860, the Commissioners' draft code was set out as the base text including the Commissioners' marginal notes giving legal sources. Revisions to the Commissioners' draft were set out as additions in italics or deletions in brackets.[295] The House committee endorsed nearly all revisions and corrections proposed by the Postmaster General's committee. In addition, the House committee proposed ten new sections near the end of the bill (out of a total of 317 sections). These ten provisions, declared Chairman Farnsworth, represented the only substantive changes from prior

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[292] Post Office Department, "Report of the Committee Appointed by the Postmaster General to Examine and Revise the Postal Code" 3-4 (1870).

[293] Id. at 22.

[294] Letter from J. A. Creswell, Postmaster General, to Hon. Alexander Ramsey, chairman, Senate Committee on Post Offices and Post Roads (Apr. 13, 1870), in National Archives RG 28, Entry 2 (copies of letters sent by the Postmaster General to 1952).

[295] H.R. 1860, 41st Cong.. (2d Sess. 1870). Even corrections to the Commissioners' draft were italicized. For example, section 58 of H.R. 1860 is set in italicized type and indicated as a change even though it was, in substance, an inadvertent omission from the Commissioner's draft.

Table 5. Postal monopoly provisions in Commissioners' draft code of 1869

Sec	Summary of provision with additions to prior law shown in *italics* and deletions in brackets ([ ])	Marginal notes by Commissioners
229	Master of steamboat to deliver letters and packets [and employees to deliver letters] to post office	3 Mar 1825 ch 64 § 6 3 Mar 1845 ch 43 §§ 11, 13, 17
233	Postal employees may not carry letters or packets contrary to law [contrary to "this act" relating to misconduct by Post Office employees] *contrary to law*	1 Jul 1864 ch 197 § 12
234	No private express to carry [mailable matter with exceptions] *letters and packets* between places [in the United States] regularly served by Post Office *or over post routes*	3 Mar 1827, ch 61 § 3 3 Mar 1845 ch 43 § 9
235	No vehicle or vessel to transport private express persons carrying [mailable matter with exceptions] *letters and packets*	3 Mar 1845 ch 43 §§ 9, 11, 17
236	No person to send [mailable matter with exceptions] *letters and packets* by private express	3 Mar 1845 ch 43 § 12, 17
237	No regular vehicle or vessel to carry [mailable mater with exceptions] *letters and packets*, except cargo letters	3 Mar 1845 ch 43 § 10, 17
238	No person to carry any [letter, packet, newspaper, printed circular, price current] *letter or packet* on any [international] vessel carrying mail	3 Mar 1845 ch 69 § 4
239	No outbound international vessel to carry [letters or letter packets] any *letter or packet*	3 Mar 1865 ch 89 § 10
240	Inbound vessel arriving to deliver letters at first port to post office before breaking bulk; oath prescribed	3 Mar 1825 ch 64 § 17 31 Aug 1852 ch 113 § 5
241	Customs and special postal agents may search of [inbound] vessels for letters	31 Aug 1852 ch 113 § 5
242	Customs and special postal agents may seize letters [found on inbound vessels] which have been conveyed contrary to law	31 Aug 1852 ch 113 § 5
243	Disposition of seized packages and parcels [from inbound vessels] prescribed	31 Aug 1852 ch 113 § 5
244	Nothing in this act shall prohibit carriage of [letters, packets, or packages, or other matter,] *letters or packets* carried by private hands or special messenger	3 Mar 1845 ch 43 § 11
245	Letters enclosed in stamped envelopes issued by Post Office may be carried out of mail; Postmaster General may suspend exception	31 Aug 1852 ch 113 § 8; 25 Mar 1864 ch 40 § 7

law.[296] The original bill contained printing errors, and it was reintroduced in corrected form as H.R. 2295 on June 24, 1870.[297]

[296] Under questioning by another member, Farnsworth declared that the bill was "is a codification of existing laws with some amendments, which are printed in italics. . . . The only amendments substantively changing

The postal code lingered in Congress for two years. On December 13, 1870, the House approved H.R. 2295. The Senate, however, did not complete consideration of the bill before expiration of the 41st Congress. In the next Congress, Farnsworth reintroduced the postal code as H.R. 1. The House sent H.R. 1 to the Senate on December 12, 1871. The Senate made numerous, but minor, amendments, and differences were quickly resolved at the end of May 1872. In debate, Congress focused primarily on issues such as salaries of letter carriers, the extent of the free city delivery service, franking privileges, and the general level of postage. On June 8, 1872, President Ulysses Grant signed the new postal code into law.[298]

Except for renumbering, the postal monopoly provisions of the postal code of 1872 were identical to those in the draft code proposed by the Commissioners in 1870. The prohibition against establishment of a private express, section 234 in the Commissioners' draft, became

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existing law are near the end of the bill." *Cong. Globe*, 41st Cong., 3d Sess. 30 (Dec. 7, 1870). *See also Cong. Globe*, 42d Cong., 2d Sess. 15 (Dec. 5, 1871) (Farnsworth: "It is simply a codification of the postal laws, with a few corrections, additions, and amendments, not generally of importance, but necessary to make the legislation on this subject clear and harmonious.").

[297] H.R. 2295, 41st Cong. (2d Sess. 1870). On June 24, 1870, Chairman Farnsworth "reported" H.R. 2295, which was immediately read a first and second time and recommitted to the committee. H.R. 2295 is almost identical to H.R. 1860. The purpose of reintroduction was apparently to obtain a "clean" bill that corrected errors. In H.R. 1860, the section of new provisions (§§ 289-298 in H.R. 2295) ended abruptly in midsentence in §292). H.R. 2295 also omitted editorial queries (e.g., §§ 42, 45 of H.R. 1860). In H.R. 2295, changes from the Commissioners' draft code were indicated in the same manner as in H.R. 1860.

[298] The course of Congressional deliberations appears in the *Congressional Globe* as follows:

H.R. 1860, 41st Cong., 2d Sess.—*Cong. Globe*, 41st Cong. 2d Sess.: referred to House committee, 2962 (Apr. 25, 1870).

H.R. 2295, 41st Cong., 2d Sess.—*Cong. Globe*, 41st Cong. 2d Sess.: reported and recommitted in House, 4799 (Jun. 24, 1870).

H.R. 2295, 41st Cong., 3d Sess.—*Cong. Globe*, 41st Cong. 3d Sess.: reported in House, 30 (Dec. 7, 1870); discussed in House, 30-37 (Dec. 7), 41-47 (Dec. 8); correction, 64 (Dec. 12); discussed, 83-86 (Dec. 13); passed in House, 86 (Dec. 13); received in Senate, 155 (Dec. 19); referred to Senate committee, 155 (Dec. 19); reported in Senate, 509 (Jan. 16, 1871); assigned a day, 814 (Jan. 30); discussed in Senate, 957-62 (Feb. 4).

H.R. 1, 42d Cong., 1st Sess.—*Cong. Globe*, 42d Cong. 1st Sess.: referred in House, 12 (Mar. 7, 1871).

H.R. 1, 42d Cong., 2d Sess.—*Cong. Globe*, 42d Cong. 2d Sess.: reported in House, 15 (Dec. 5, 1871); called up, 31 (Dec. 6); read, 42 (Dec. 7); discussed in House, 71 (Dec. 12); passed in House, 71 (Dec. 12); received in Senate, 171 (Dec. 18, 1871); referred to Senate committee, 172 (Dec. 18); referred anew, 232 (Dec. 20); reported in Senate, 380 (Jan 15, 1872); made special order, 978 (Feb. 13); discussed in Senate, 2640-53 (Apr. 22); passed Senate with amendment, 3893 (May 27); conferees appointed by Senate, 3893 (May 27); House notified, 3932 (May 28, 1872); conferees appointed by House, 3932 (May 28); Senate notified, 3949 (May 28); conference report in House, 4091(May 31), and agreed by House, 4091 (May 31); Senate notified, 4106 (May 31); conference report discussed and agreed by Senate, 4105-6 (May 31); House notified, 4104 (May 31); enrolled in House, 4177 (Jun. 3); enrolled in Senate, 4187 (Jun. 3); approved by president, 4459 (Jun. 8,1872).

section 228 of the final act.[299] The prohibition against carriage of letters by common carriers, section 237 in the draft, became section 231 in the final act.[300] As proposed by the Commissioners, the exception for stamped letters adopted in 1852 and the Postmaster General's authority to suspend that exception adopted in 1864 were simplified and combined into a single provision, section 239 of the act.[301] The Commissioners' substantive revisions in the earlier postal monopoly provisions were never commented upon in the Congressional debates.

The only change in the postal monopoly laws denominated as such by congressional sponsors was a provision giving special postal agents, i.e., postal inspectors, authority to search vehicles leaving a post office, a package having been in such vehicle, and any building used by a common carrier for "mailable matter" transported contrary to law . In the final version of the postal code of 1872, this provision became section 299 and read as follows:

> Sec. 299. That the Postmaster-General of the United States may empower, by a letter of authorization under his hand, to be filed among the records of his department, any special agent or other officer of the post-office establishment *to make searches for mailable matter transported in violation of law*; and that the agent or officer so authorized may open and search any car or vehicle passing, or lately before having passed, from any place at which there is a post-office of the United States to any other such place, and any box, package, or packet, being, or lately before having been, in such car or vehicle, and any store or house (other than a dwelling-house) used or occupied by any common-carrier or transportation company in which such box, package, or packet may be contained, whenever said agent or officer has reason to believe that *mailable matter*, transported contrary to law, may therein be found.[302]

[299] Act of June 8, 1872, ch. 335, § 228, 17 Stat. 283, 311. This provision is substantively identical to section 234 of the Commissioner's draft.

[300] Act of June 8, 1872, ch. 335, § 231, 17 Stat. 283, 311. This provision is substantively identical to section 237 of the Commissioner's draft.

[301] Act of Jun. 8, 1872, ch. 335, § 239, 17 Stat. 283, 312.

[302] Act of June 8, 1872, ch. 335, § 299, 17 Stat. 283, 322 (emphasis added). In the original House bill, this provision was H.R. 2295, 41st Cong. (2d Sess. 1872), § 295.

The different origin of this provision, compared to the other fourteen postal monopoly provisions, is evident from the fact that this is the only provision that refers to "mailable matter" rather than "letters and packets" or merely "letters." It was also adopted without debate.[303]

6.3 Revised Statutes of 1874

The postal code of 1872 was reenacted in the Revised Statutes enacted in 1874.[304] The Revised Statutes was a revision and codification of the entire body of U.S. statutes in effect on December 1, 1873. It was the master work of which the Commissioners' 1869 draft postal code was an early specimen title. The Revised Statutes were positive law, replacing prior statutes, which were repealed. A corrected edition was published in 1878.[305] Subsequent statutes were not incorporated into the Revised Statutes so they became dated. Nonetheless, the 1878 edition of the Revised Statutes continued to serve as the authoritative statement of the law for statutes, like most of the postal statutes, which were infrequently amended after 1878. In 1926, the House of Representatives began the United States Code, but this remained an unofficial codification of U.S. statutes unless and until Congress enacted a title of the code into positive law and repealed prior laws. Title 39, the postal laws, was not revised and enacted into a new, positive postal code until 1960.

In the Revised Statutes, the postal code of 1872 was divided between title 9, the Post Office Department, and title 46, Postal Service. Postal monopoly provisions were included in the latter title, reenacted with minor rewording. The all-purpose postal monopoly provision prohibiting all types of private express operations became section 3982[306] in the Revised Statutes and is now subsection 1696(a) of Title 18.[307] The prohibition against carriage of letters and packets became section 3985 and is now section 1694 of Title 18.[308]

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[303] *Cong. Globe*, 41st Cong., 1st Sess. 85 (Dec. 13, 1870).

[304] Act of Jun. 20, 1874, ch. 333, 18 Stat. 113.

[305] Act of May 2, 1877, ch. 82, 19 Stat. 268.

[306] Revised Statutes (1878) § 3982.

[307] 18 U.S.C. § 1696(a) (2006).

[308] 18 U.S.C. § 1694 (2006).

In essence, except three statutory exceptions added by the PAEA in 2006, the postal monopoly provisions of the Revised Statutes are the postal monopoly statutes of today, altered only by minor amendments and stylistic rephrasing and reorganization introduced during reenactments. Table 6 shows the progression of the postal monopoly provisions proposed by the Commissioners in 1869 through the postal code of 1872 and the Revised Statutes. For convenience, the corresponding provision in current law is indicated in the last column.

Table 6. Postal monopoly statutes: from Commissioners' draft of 1869 to current law

Commissioners 1869	Postal code 1872	Revised Statutes 1878	Summary of provision	Current law
229	223	3977	Master of steamboat to deliver letters and packets to post office	18 USC 1698
233	227	3981	Postal employees not to carry letters or packets contrary to law	18 USC 1693
234	228	3982	No private express to carry letters and packets between places regularly served by Post Office or over post routes	18 USC 1696(a)
235	229	3983	No vehicle or vessel to transport private express persons carrying letters and packets	18 USC 1697
236	230	3984	No person to send letters and packets by private express	18 USC 1696(b)
237	231	3985	No regular vehicle or vessel to carry letters and packets, except cargo letters	18 USC 1694
238	232	3986	No person to carry any letter or packet on any vessel carrying mail	18 USC 1695
239	233	3987	No outbound international vessel to carry any letter or packet	39 USC 602
240	234	3988	Inbound vessel arriving to deliver letters at first port to post office before breaking bulk; oath prescribed	18 USC 1699
241	235	3989	Customs and special postal agents may search of vessels for letters	39 USC 604
242	236	3990	Customs and special postal agents may seize letters which have been conveyed contrary to law	39 USC 605
243	237	3991	Disposition of seized packages and parcels prescribed	39 USC 606
244	238	3992	Nothing in this act shall prohibit carriage of letters or packets carried by private hands or special messenger	18 USC 1696(c)
245	239	3993	Letters enclosed in stamped envelopes issued by Post Office may be carried out of mail; Postmaster General may suspend exception	39 USC 601
None	299	4026	Special postal agents may search vehicles leaving a post office, packages therein, and facilities of a common carrier for mailable matter.	39 USC 603

6.4 Early Interpretations of the Postal Monopoly of 1872

The postal code of 1872 gave the Post Office the status of an independent department of government and authorized the Postmaster General to appoint an "assistant attorney-general for the Post Office Department."[309] The Assistant Attorney General soon began to issue opinions on the postal law governing departmental operations. These opinions constituted the first administrative determinations on the scope of the postal monopoly statutes by the Post Office.[310] The first three Assistant Attorneys General were Thomas A. Spence, Alfred A. Freeman, and Edwin E. Bryant. Bryant served until March 20, 1889. Collectively, they issued twenty opinions which, according to their categorization scheme, dealt with the postal monopoly statutes. Their opinions were not addressed to the public and not published. They were internal government documents addressed to officers of the Post Office and, in a few cases, to other government officials such as U.S. attorneys.

After 1872, just as before, it was the Attorney General who was the final arbiter of the government's position with respect to the postal laws when there was a public dispute. It was not until after the turn of the twentieth century that the Post Office Department gradually began to ascribe more legal substance to its opinions. In 1905, the opinions of the Assistant Attorney General were first published. 1n 1914, the title "Assistant Attorney General" was changed to "Solicitor." A more general overview of the work of the office of Assistant Attorney General/ Solicitor will be more convenient at that point in the story.

Little more than a year after enactment of the 1872 postal code, on August 1, 1873, Assistant Attorney General T.A. Spence issued the first opinion on the scope of the postal monopoly.[311] Spence wrote to the First Assistant Postmaster General in response to an order by the War Department declaring that "packages of official mail matter, such as returns, etc., weighty or bulky in character, may be transmitted by express . . . ."[312] Spence disagreed with the

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[309] Act of Jun. 8, 1872, ch. 335, §§ 1, 3, 17 Stat. 283, 283-84.

[310] Opinions of the Assistant Attorney General—the title was changed to "Solicitor" in 1914—were published in nine volumes from 1905 to 1952. These volumes usually appeared many years, sometimes several decades, after the opinions were issued. See the bibliography for details. In this paper, all volumes in this set are cited as "Op. Sol. P.O.D."

[311] 1 Op. Sol. P.O.D. 36 (1873) (No. 14).

[312] 1 Op. Sol. P.O.D. 36, 37 (1873) (No. 14).

War Department and held that the postal monopoly applied to a governmental department in the same manner as to a private citizen. He declared that, "It was the purpose of [§§ 228, 230, 231 of the 1872 act] to prevent, by penal enactments, the transmission of mailable matter of the first class (all correspondence wholly or partly in writing) by express or other unlawful means."[313]

Spence went on to point out that the term "packet" was not equivalent to "package." Since the mailable matter provision, section 134, limited the mails to "packages" weighing not more than four pounds, packages exceeding four pounds were nonmailable and therefore outside the monopoly. Spence interpreted this weight limit to apply only to the second and third class matter, not to first class letters:

> The term package in [§ 134], and throughout the law, appears to be used in a different sense and with a different intendment from the term "packet" found in the section above referred to.
>
> The latter is restricted to mailable matter of the first class; the former is used throughout the law as applicable to mailable matter of the second and third class. . . . [The weight limit of § 134] not being applicable to mailable matter of the first class, all matter of that class can be conveyed through the mails, without regard to its weight, and all the inhibitions of the several sections of the Postal Code prohibiting transmission by express . . . apply to it.[314]

This construction of the 1872 postal monopoly was promulgated in the next edition of the Post Office's standard legal manual, the periodically updated *Postal Laws and Regulations*. While the 1873 edition of the *Postal Laws and Regulations* repeated the formulation of the postal monopoly found in the 1845 act,[315] the next edition, issued in 1879, was revised by repeating the 1872 act's statutory prohibition against the private carriage of "letters or packets" and noting, "The term packet, as used in this and the following sections of law is restricted to mailable matter of the first class. (Opin. No. 14, Ass't-Gen. P.O. Dept. — Spence)."[316] This note was repeated in the 1887 and 1893 editions as well.[317]

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[313] 1 Op. Sol. P.O.D. 36, 38-39 (1873) (No. 14).

[314] 1 Op. Sol. P.O.D. 36, 38-39 (1873) (No. 14).

[315] 1873 *Postal Laws and Regulations* § 339. ("The law, Section 228, imposes a fine of $150 upon the person who may establish an express for the transmission of mailable matter out of the mails.")

[316] 1879 *Postal Laws and Regulations* § 555.

[317] 1887 *Postal Laws and Regulations* § 706; 1893 *Postal Laws and Regulations* § 675. The regulations

In the 1872 act, first class matter was defined as "all correspondence, wholly or partly in writing, except book-manuscripts and corrected proof-sheets passing between authors and publishers."[318] The postal monopoly statute, however, only prohibited private carriage of "letters and packets." Were there some types of written correspondence that were subject to first class postage rates but not "letters or packets" within the scope of the monopoly? For postal lawyers, the answer was closely related to legal issues arising contemporaneously in international postal law.

The modern legal framework for international postal relations was developed during the same period as the 1872 codification of the postal laws. The first general international meeting of postal officials was held in Paris in 1863 at the invitation of Postmaster General Montgomery Blair. The Paris conference resulted in agreement on general principles for bilateral postal conventions.[319] When general principles embodied in multiple bilateral agreements proved inadequate, postal officials from twenty-one countries met in Berne, Switzerland, in 1874 and agreed on a multilateral convention forming the General Postal Union.[320] In 1878, this convention was refined, and the enlarged union, embracing thirty-one countries, was renamed the Universal Postal Union.[321]

Concepts of international postal law influenced preparation of the postal act of 1879[322] and interpretation of the postal laws generally. In the domestic mails, the 1879 act replaced the

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also contain a note stating that: "It will be observed that the *Congress has not yet, by statute, extended the monopoly of transportation to second, third, or fourth class matter*, although admitted to the mails." 1887 *Postal Laws and Regulations* § 705; 1893 *Postal Laws and Regulations* § 674 (emphasis added). Similarly, in an 1882 report on the possibility of reducing the letter rate to two cents, the House Committee on the Post Office and Post Roads, after discussing postage rates for different classes of mail, observed, "It must be obvious, therefore, that the burden of maintaining the [Post Office Department] falls most unequally upon letters. Upon what principle of justice this should be so is not easy of comprehension. Following the example of the oldest and best established governments in the world, the founders of the Constitution delegated to the government monopoly in the carriage of letters, and the wisdom of that action has gone unquestioned by the people to this day. *Competition by private carriers is, however, allowed for all the other classes of matter permitted to go in the mails.*" H.R. Rep. No. 1816, 47th Cong., 2d Sess. 8 (1882) (emphasis added).

[318] Act of Jun. 8, 1872, ch. 335, §131, 17 Stat. 283, 300.

[319] *See* 1863 *Postmaster General Ann. Rept*. 6-10 (1863). On the origin of the Universal Postal Union, *see generally* Codding, *Universal Postal Union* 1-42; Scheele, *Short History of the Mail Service* 101.

[320] General Postal Union, Oct. 9, 1874, 19 Stat. 577.

[321] Universal Postal Union, Jun. 1, 1878, 20 Stat. 734.

[322] Act of Mar. 3, 1879, ch. 180, §§ 7-21, 20 Stat. 355, 358-60. The mail classification scheme established

three mail classes established in 1863 with four classes: first, written matter; second, periodic publications; third, miscellaneous printed matter; and fourth, merchandise.[323] In the international post, the 1878 convention provided for an exchange of all types of letters, documents, and samples, with discounted postage rates for postcards, printed matter, commercial papers, and samples of merchandise. Printed matter and commercial papers were not entitled to discounted international rates if they contained "any letter or manuscript note having the character of an actual and personal correspondence."[324] In the 1879 act, the definition of "printed matter" was derived from the 1878 Universal Postal Convention: "the reproduction upon paper, by any process except that of handwriting, of any words, letters, characters, figures, or images, or any combination thereof, not having the character of actual and personal correspondence."[325] The key phrase, *actual and current correspondence*, was an incorrect translation of the corresponding international provision.[326] The 1879 act went on to declare that miscellaneous printed matter bearing a handwritten inscription could qualify for third class postage rates in the domestic mail only if the inscription "does not partake of the nature of personal correspondence," the same words of qualification used in the international convention.

In late 1879, the Post Office issued a new set of postal regulations implementing the 1879 act. The regulations interpreted the phrase "does not partake of the nature of personal correspondence" by quoting the provisions of the 1878 convention that distinguished "printed matter" and "commercial papers" from documents which "have the character of actual and personal correspondence."[327] The effect was that business documents such as invoices and bills

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by the 1879 act survived until the Postal Service restructured the classes in 1996.

[323] The four classes of mail established in 1879 remained the basic classification scheme for mail until 1996. *See* Postal Rate Commission, docket MC95-1, Opinion and Recommended Decision, II-6 to II-16 (1996).

[324] Universal Postal Convention, Jun. 1, 1878, art. 5(3), 20 Stat. 759. *See id*., art. 2, art. 5, det. reg. 16, det. reg. 17, 20 Stat. 734, 735, 737-38, 759-61.

[325] Act of Mar. 3, 1879, ch. 180, § 19, 20 Stat. 355, 360.

[326] The provenance of the phrase "current and personal correspondence" cannot be doubted because, in both the 1879 act and in the English translation of the convention (in *Statutes at Large*), the same incorrect translation of the authoritative French text of the Convention is duplicated. The French phrase *actuelle et personnelle* means "current and personal" not "actual and personal."

[327] 1879 *Postal Laws and Regulations* § 232, which read, "Sec. 232. Personal correspondence negatively defined—The character of personal correspondence referred to in the preceding section [§ 22 of 1879 act] cannot be ascribed to the following, viz: 1st, To the signature of the sender or to the designation of his name, of his profession, of his rank, of the place of origin, and of the date of dispatch. 2d. To a dedication or mark of respect offered by the

of lading could be posted at low third class rates instead of higher first class rates because such documents not "have the character of actual and personal correspondence." For business mailers, the new regulation was most welcome.

Assistant Attorney General A.A. Freeman objected to this regulation. He protested that the regulations erroneously allowed a domestic mailer to include in third class mail any document that could be classified as a "printed matter" or "commercial papers" in the international post. Freeman argued, in substance, that even if a document is not "personal correspondence," it is subject to first class postage under U.S. law if it is "wholly or partly in writing" and not explicitly exempted from first class postage.

> I am not criticizing in this communication the correctness, in the abstract, of this definition of the term "personal correspondence." It is taken substantially from the seventeenth article of the Universal Postal Union. . . .
>
> . . . .
>
> The fault of the present application of that definition, however, lies in the fact that the statute under consideration does not allow commercial papers, bills of invoice, bills of lading, invoices, circulars, handbills, etc., or anything whatever, whether in the nature of an actual and personal correspondence or otherwise, to be written on the blank lines of third-class matter except a simple manuscript dedication or inscription.
>
> . . . .
>
> . . . If anything more were needed to show that this regulation, particularly the fifth paragraph, is in direct violation of law it will be seen by reading it in connection with the eighth section of the act. That section declares that all matter wholly or partially in writing shall belong to the first class. The regulation, however, declares that papers of legal procedure, deeds of all kinds, waybills, bills of lading, invoices, and various documents of insurance companies, circulars, handbills, etc., partially in writing,

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sender. 3d. To the figures or signs merely intended to mark the passage of a text, in order to call attention to them [sic]. 4th. To the prices added upon the quotations or prices current of exchange or markets, or in a book. 5th. To all printed commercial papers filled out in writing, such as papers of legal procedures, deeds of all kinds, waybills or bills of lading, invoices, and the various documents of insurance companies, circulars, handbills, &c. 6th. To instructions or requests to postmasters to notify the sender in case of the non-delivery of other than first-class matter, so that he may send postage for its return." The first five items were substantially identical to Universal Postal Convention, Jun. 1, 1878, det. regs. 16(1), 17(3), 20 Stat. 734, 759-61.

> shall belong to the third class.[328]

Freeman's exegesis was sound and his interpretation of the law prevailed. The Postmaster General withdrew the popular regulation extending third class postage rates to commercial papers and printed matter completed in handwriting.

Controversy ensued. Apparently some businessmen shifted more business to private carriers rather than pay first class rates for what used to be transmitted by the Post Office at third class rates. On June 15, 1881, Postmaster General T.L. James wrote to Attorney General Wayne MacVeagh asking for clarification of the scope of the postal monopoly over such documents:

> I have the honor to request that you inform me whether, according to your construction of the law, it is a violation of sections 3982 and 3985 of the Revised Statutes, for an express company to carry for hire, regularly, in sealed or unsealed envelopes, written matter which is by law subject to letter postage when sent by mail, such as manuscript for publication, deeds, transcripts of records, insurance policies, and other written or partly written documents used by insurance and other companies in the transaction of their business.
>
> In other words, will you define the limits of the monopoly of the Post Office Department in the carriage of first class matter, that is, matter which is by law subject, when sent in the mail, to letter postage, and also the exact meaning of the words "letter or packet" as used in the sections of the Revised Statutes referred to.
>
> Questions involving these points are constantly presented to this Department for decision, and I greatly desire your decision thereon.[329]

On June 29, 1881, Attorney General MacVeagh replied that the postal monopoly did not apply to the sorts of written commercial papers mentioned in the Postmaster General's letter even though such items were subject to "letter postage" and thus first class matter:

> In my opinion, it is no violation of R.S., Secs. 3982 and 3985,

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[328] 1 Op. Sol. P.O.D. 541, 547-49 (1880) (No. 226). Freeman's opinion was submitted two weeks after another postal lawyer, A.H. Bissell, wrote the Postmaster General offered a spirited defense of the regulation: "The Department appealed to not only the highest sources attainable, but the highest sources imaginable, the convention of Paris." Bissell further notes, "this construction of the law adopted by the Department has been favorably commented upon by the press and received with great favor by the public." 1 Op. Sol. P.O.D. 534, 535, 537 (Dec. 14, 1880) (No. 222).

[329] Letter from T.L. James, Postmaster General, to W. MacVeagh, Attorney General (Jun. 15, 1881), in National Archives (POD), Entry 2.

> for an express company to transport the documents mentioned in yours of 15th instant., viz., manuscript for publication, deeds, transcripts of record, insurance policies, &c.
>
> It is prohibited, and an offence, to carry "letters or packets." What is a letter I can make no plainer than it is made by the idea which common usage attaches to that term. From the connection in which it is used, I have no doubt that "packets" means a package of letters.[330]

The Post Office's Assistant Attorneys General subsequently followed MacVeagh's ruling that the postal monopoly embraced only that portion of first class matter which could be considered "letters and packets" or "personal correspondence." For example, in 1885, Assistant Attorney General E.E. Bryant addressed the question of whether the postal monopoly prohibited private carriage of "certificates of tax sales legally executed in writing." He concluded,

> The Department does not insist that written papers, such as deeds, contracts, evidence of title or of debt, tax certificates, mortgages or legal papers such as pleadings, depositions, affidavits, or briefs shall be transported from place to place in the mails and in no other manner. When unaccompanied by any other matter in the nature of personal correspondence they may be transmitted by private express . . . .[331]

In 1885, Bryant held that "postal cards" were not within covered by the postal monopoly provision relating to carriage of letters by steamboats.[332] In 1889, Assistant Attorney General J. M. Tyner informed a railroad that it could transport out of the mails "mere news matter prepared

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[330] Letter from W. MacVeagh, Attorney General, to T.L. James, Postmaster General (Jun. 29, 1881), in National Archives (POD), Entry 136, Box 1, Case 9. Entry 136 consists of case files and correspondence relating to "railway mail service" cases, i.e., investigations of railroads for possible violation of the postal monopoly laws.

[331] 2 Op. Sol. P.O.D. 2 (1885) (No. 428). Similarly, in 1898, in response to a question whether answered letters were within the postal monopoly, postal attorney H. J. Barret advised: "[I]f 'old letters' are classed as commercial papers in ascertaining rates of postage in foreign mails, they should be allowed equal privileges with commercial papers in our domestic mails . . . . Manuscripts for publication, deeds, transcripts of record, insurance policies, etc., which are above denominated 'commercial papers,'although designated first class matter if presented for mailing, are not considered as matter in the transmission of which the Government claims a monopoly." 3 Op. Sol. P.O.D. 211, 213 (1898) (No. 1141).

[332] In 1885, Bryant considered whether "postal cards" were covered by RS § 3977, now 18 U.S.C. § 1698 (2006), which required the master of a steamboat to deliver "letters and packets" to the postmaster in a port promptly after docking in return for a payment of two cents per letter. Bryant declared, "a postal card is not a 'letter or packet,' and the postmaster is not authorized to make payment thereon. The 'letters and packets' referred to in said section . . . are those in which at the time of passage of that section the full first-class rate of postage was chargeable, and not the classes of mail matter on which lesser rates were charged." 2 Op. Sol. P.O.D. 40 (1885) (No. 470). *Accord*, 2 Op. Sol. P.O.D. 453 (1887) (No.686).

by the correspondents of the press for the columns of their papers" and "such manuscript as is intended for publication, when not accompanied by any matter in the nature of personal correspondence."[333]

A number of Assistant Attorney General opinions issued prior to 1890 dealt with statutory exceptions to the postal monopoly. The Assistant Attorney General held that stamped envelope exception applied only to government-stamped envelopes and did not permit private carriage of letters in envelopes with postage stamps affixed.[334] The cargo letter exception was held to permit private carriage of merchandise and "a letter, bill, or other communication relating to that article alone;"[335] inclusion of the terms of sale and commission may be tolerated as a "slight abuse."[336] The special messenger exception was held to permit a lady to send out invitations or sealed cards by means of messenger company acting for hire provided "each message is delivered for the particular occasion only."[337]

On the other hand, it was held that a steamboat could not deliver letters out of the mails to landings located along a river between post offices; the letters must be carried to a post office and sent by post back to the landings.[338] Nor can a railroad carry intra-company letters between a headquarters and a branch office for an unrelated another company[339] or even for a hotel that was operated in a joint venture with the railroad.[340]

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[333] Letter from J.M. Tyner, Assistant Attorney General, to J.L. Bell, General Superintendent, Railway Mail Service (Mar. 25, 1889), in National Archives (POD), Entry 136, Case 9. This opinion was not included in the set of legal opinions published by the Assistant Attorney General in 1909. In 1896, Postmaster General Wilson affirmed this position in a letter distributed to newspapers. "News Correspondence Exempt: It May Be Carried by Railroads Under the New Postal Order," *New York Times*, Aug. 21, 1896, p. 4.

[334] 1 Op. Sol. P.O.D. 474 (1880) (No. 197); 2 Op. Sol. P.O.D. 397 (1886) (No. 645).

[335] 2 Op. Sol. P.O.D. 540 (1888) (No. 758). *Accord*, 2 Op. Sol. P.O.D. 700 (1889) (No. 862).

[336] 1 Op. Sol. P.O.D. 432 (1879) (No. 173).

[337] 2 Op. Sol. P.O.D. 484 (1887)(No. 712).

[338] 1 Op. Sol. P.O.D. 511 (1880) (No. 212).

[339] 2 Op. Sol. P.O.D. 333 (1886) (No. 606).

[340] 2 Op. Sol. P.O.D. 415 (1887) (No. 660).

6.5 Prior-to-Posting Exception, 1879

In an early opinion, the Assistant Attorney General Freeman ruled that the postal monopoly statutes did not allow establishment of a private "down-town letter office" in New York City. The office would collect letters with proper postage affixed until late in the business day and then rush them by messenger to the railroad station just in time to give them to Post Office's railway mail car before departure. On March 27, 1878, Assistant Attorney General Freeman held that this operation constituted an illegal private express.[341]

A year later, this ruling was substantially reversed by Congress by adding a new exception to the postal monopoly allowing private carriage of letters to the nearest post office or postal car. The exception was stated as proviso to the appropriations for the First Assistant Postmaster General and read as follows:

> Provided, That nothing contained in section 3982 of the Revised Statutes shall be construed as prohibiting any person from receiving and delivering to the nearest post-office or postal car mail-matter properly stamped. . . .[342]

This exception, the fifth of the six pre-PAEA exceptions to the postal monopoly, is now found in the last sentence of subsection 1696(a) of Title 18.[343]

6.6 End of Private Penny Posts, 1883

In 1883, the Post Office invoked the revised postal monopoly law to eliminate the two remaining private penny posts in New York: Boyd's Dispatch and Hussey's Post.[344] In its defense, Boyd's recalled the argument used by Blood's Dispatch in 1860 that city post routes were not covered by the postal monopoly. On June 4, 1883, in *Blackham v. Gresham*,[345] the court rejected this position, citing the extension of the postal monopoly to post routes in 1861 and the revised language in the postal code of 1872. Hussey's Post, begun in 1854, specialized in

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[341] 1 Op. Sol. P.O.D. 335 (1878) (No. 128).

[342] Act of Mar. 3, 1879, ch. 180, § 1, 20 Stat. 355.

[343] 18 U.S.C. § 1696(a) (2006).

[344] *See* Patton, *Private Local Posts* 52-58, 202-03. William Blackham and his wife bought Boyd's Dispatch from the Boyd family in 1860; Robert Easson became the owner of Hussey's in about 1857.

[345] Blackham v. Gresham, 16 F. 609 (C.C.S.D.N.Y. 1883).

distribution of notices, bills, circulars, and commercial documents among banks and insurance companies. Hussey's urged that its services were lawful because they were not offered "by regular trips or at stated periods," an essential attribute of an illegal private express. On June 22, 1883, in *United States v. Easson*,[346] the court disagreed. The court found that Hussey's made three daily collections of thousands of letters from stores and offices, sorted the letters in a central office, and delivered the letters by messengers proceeding along regular routes. From twenty to forty messengers were kept in constant employment. The court held,

> To constitute regularity it is not essential that the minute or hour of the departures of the messengers should be always the same. Provision for a delivery daily, once, twice, or thrice, as the case may be, over the streets of the city, wherever wanted, is a provision for a delivery by regular trips and at stated periods . . .[347]

6.7 Post Office and Postal Monopoly in the 1880s

By the 1880s, a legal framework for a modern industrial post office had replaced a legal framework based on the premises and processes of a pre-industrial post office. Cheap letter postage was introduced by the acts of 1845 and 1851. Collection and delivery services were enabled by the act of 1851 and, most importantly, by the free city delivery service introduced by the act of 1863. By 1890, the city delivery system included 9,006 carriers operating from 454 post offices.[348] The postal laws were revised and codified in 1872, for the first time since 1825. The first multilateral agreement on international postal laws was adopted in 1874. The modern classification system of mail was added by the act of 1879. National and local delivery services were substantially merged by the adoption of a uniform two-cent stamp for all intercity and local first class letters in 1885, a rate that would last for five decades.[349]

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[346] United States v. Easson, 18 F. 590 (S.D.N.Y. 1883).

[347] *Easson*, 18 F. at 592.

[348] 1890 *Postmaster General Ann. Rept.* 235.

[349] Intercity postage rates were reduced in two steps. The three-cent rate from 1863 rate was reduced to two cents for letters weighing up to one half ounce in 1883. Act of Mar. 3, 1883, ch. 92, 23 Stat. 453, 455. The two-cent rate was extended to letters weighing up to one ounce in 1885, matching the weight step for local letters. Act of Mar. 3, 1885, ch. 342, 23 Stat. 385, 387. The two-cent national rate for letters lasted in 1932 (a one-cent surcharge in the nature of a war tax resulted in a three-cent stamp between 1917 and 1919). Scheele, *Short History of the Mail Service* 105-06 (1970).

During this period, the postal monopoly statutes were reshaped into what is essentially their current form. In 1845, the traditional prohibition against establishing private intercity relay or "postal" services was extended to preclude intercity "private express" services as well. In 1861, postal monopoly provisions were extended to prohibit "penny posts," i.e., private intracity collection and delivery services. In each case, Congressional action followed unsuccessful prosecutions under prior law. In the 1860s, the postal monopoly over inbound international mail was reinforced and its prohibitions extended to cover outbound international mail as well. The postal code of 1872 gathered these changes in the postal monopoly statutes into a set of fifteen statutory provisions. The postal code of 1872 was reenacted as part of the Revised Statutes of 1874, a codification of the entire body of U.S. statutes.

The postal code of 1872 also had the effect of strengthening the postal monopoly statutes in several respects. Most significantly, Revised Statutes section 3982 (section 228 of the 1872 code) of the new code combined several strands of prior postal monopoly laws to become an all-purpose postal monopoly provision. R.S. 3982 applied restrictions on intercity private expresses to intracity messenger services and visa-versa, and restrictions on domestic operations were applied to international commerce. Private carriage was prohibited on any "postal route," a term which Congress had previously declared all to include waterways (1823) and all railroads (1838) in addition to pathways actually served by the Post Office. In 1883, the Post Office's monopoly over local intracity collection and delivery was secured by the judicial closure of the last private penny posts. In 1884, Congress declared, "all public roads and highways while kept up and maintained as such are hereby declared to be post routes."[350] In this manner, R.S. 3982 became a general bar against private carriage of letters and packets on any public road, water way, or railroad in the United States.

In the postal code of 1872, the various phrases used to define the scope of the postal monopoly in prior laws were replaced by a single standard phrase: "letters and packets." In the decade and half following enactment of the 1872, official interpretations of the new postal monopoly law by the Attorney General and the Post Office Department reflected an understanding that the revised postal monopoly covered only "letters" since the term *packet* in

[350] Act of March 1, 1884, ch. 9, 23 Stat.3.

this context was deemed to refer to a packet of letters. The term *letter*, while not clear in all cases, was interpreted to include personal correspondence (or the idea that common usage attaches to the term *letter*) but not to include certain types of commercial documents subject to first class postage, i.e., documents which were "wholly or partly in writing" which but did not, in the words of international postal agreements, "partake of the nature of personal correspondence."

7 Railroad Mail and the Monopoly, 1890s to 1910s

The initial impetus for a broader administrative interpretation of the postal monopoly statutes grew out of long running disputes with the railroads. Relations between the Post Office and the railroads had been contentious since the 1840s when the earliest railroads gave rise to private expresses. By the 1890s, the railroads were coalescing into great national systems of roads with interlocking directorates and cross stock ownership. Integrating a host of smaller companies, railroads represented a new order of organizational complexity. A typical train included not only cars belonging to the company that owned the locomotive but also freight cars operated by express companies, freight cars owned by other railroads, and passenger cars operated by companies such as Pullman. A railroad company operated trains over not only its own tracks but also over tracks belonging to other companies. Railroad operations were closely integrated with other activities. Telegraph companies used railroad rights of way for their lines and provided services for both the railroad and general public, often using joint employees and sharing costs and profits. Hotels and restaurants built along railroad rights of way were integrated with—and often funded by—the railroads and provided alternatives to dining and sleeping car services.[351]

Railroad operations thus generated a constant flow of documents between companies with closely interrelated activities. The railroads were long accustomed to transporting these documents up and down their lines without going through the government mails.[352] In the mid-1890s, the Post Office moved to bring this "railroad mail" within the postal monopoly.

[351] *See* Chandler, *The Visible Hand* 171-87. *See also* Letter from C. Neilson, Second Postmaster General, to J.L. Thomas, Assistant Attorney General (1896), in National Archives (POD), Entry 136, Case No. 26 (providing a detailed account of railroad mail viewed from the Post Office's perspective).

[352] In 1 Op. Sol. P.O.D. 910 (1884) (No. 386), the Assistant Attorney General had held that a railroad may not carry over its own line or forward through connecting lines any letters relating to the interchange of cars. Notwithstanding this opinion, the Post Office long acquiesced in the railroads' carriage of letters and documents relating to their interrelated operations. *See* 3 Op. Sol. P.O.D. 140, 143 (1896) (Op. No. 1111) ("I understand that a tacit agreement or permission exists by reason of custom between the Post-Office Department and the railroad companies for the carrying by the railroad companies of their own letters concerning their own business over their own lines.").

7.1 Disputes over Railroad Mail

In a series of decisions, the Assistant Attorneys General for the Post Office asserted that a railroad violated the monopoly if it transported its own letters to or from other companies[353] or transported another company's letters in connection with operations jointly provided with the railroad, such as telegraph services or hotel and dining facilities.[354] The Post Office ruled that the only letters a railroad could carry out of the mails were letters relating to cargo transported on the same railroad and letters enclosed in stamped envelopes. On July 2, 1896, Postmaster General William L. Wilson brought matters to a head. In Order No. 422, he declared, "I hereby notify all railroad officials and employees that [the postal monopoly law] will be rigidly enforced, and all parties detected in their violation, whether officers of railway companies, conductors on trains, baggage masters, brakemen, or other employees, will be prosecuted for such violation."[355]

Order No. 422 provoked a tremendous reaction among the railroads. On July 29, the Post Office asked Attorney General Judson Harmon to clarify the application of the postal monopoly to railroad mail. When Harmon asked for a precise statement of the issues to be addressed, Second Assistant Postmaster General Charles Neilson,[356] the senior postal official in charge of railroad contracts, responded on behalf of the Postmaster General. Neilson asked the Attorney General to answer three questions:

> 1st. Is it proper that a railroad company should hand, free of charge, first class mail to and from connecting lines?. . .
>
> The second question is, What constitutes "company's business"? Is it the line business of freight lines, livestock companies, hotel companies, though they may be owned by either

[353] 3 Op. Sol. P.O.D. 132 (1895) (No. 1107) (railroad not permitted to carry letter on railroad business from railroad official to outside party); 3 Op. Sol. P.O.D. 140 (1896) (No. 1111) ("carrying by railroads of their own letters concerning their own business over their own lines" held illegal).

[354] 2 Op. Sol. P.O.D. 877 (1890) (No. 956) (telegraph); 3 Op. Sol. P.O.D. 140 (1896) (No. 1111) (hotel).

[355] Postmaster General Order No. 422 (Jul. 2, 1896).

[356] A sense of the intensity of the dispute between the Post Office and the railroads emerges in a letter from Neilson to the Fourth Assistant Postmaster General, whose division included the postal inspectors: "Will you kindly instruct your Inspectors, quietly, to find out what is going on, in connection with the Postmaster General's order 422, between the two branches of the Pennsylvania Railroad at Pittsburgh. . . . My impression is these gentlemen have an idea that they can continue that business right along. You have to get the data on them to stop them." Letter from C. Neilson, Second Assistant Postmaster General, to R.A. Maxwell, Fourth Assistant Postmaster General, Jul. 27, 1896, in National Archives (POD), Entry 136, Case No. 17.

> outsiders or by the same people that the railroad companies are owned by? . . .
>
> The third question is, What rights outside companies have operating over certain lines. For instance, we will take the sleeping car companies, even fast freight line companies, and other organizations that have traffic rights, running rights, or joint agreement as to percentage of earnings, etc., including certain associations, which do the same thing? Have the sleeping car companies a right to send mail by porters? Have express companies a right to do the same thing, or agents? Have the freight companies the right to send train mail or mail by trains without any agents or porters to carry it whatever except as a means of transit.[357]

Attorney General Harmon answered on August 12, 1896. He concluded that the intent of Congress was to prohibit private carriage of letters *for third parties*: "Congress evidently had no thought of interfering with the private methods of carriers on post routes for communicating directly with their own employees or with other persons. It was dealing only with the public business of carrying for others." Therefore, reasoned Harmon, a railroad may "carry letters written and sent by the officers and agents of the railroad company which carries and delivers them, about its business, and these only. They may be letters to others of its officers and agents, to those of connecting lines, or to anyone else, so long as no other carrier intervenes."[358]

On August 20, Neilson, as Acting Postmaster General, replaced Order No. 422 with Order No. 488. Order No. 488 incorporated Harmon's ruling on the right of a railroad to carry its own mail and ordered the railroads to enclose other letters in stamped envelopes. Order No. 488 also relied on Attorney General McVeagh's 1881 opinion to elucidate the term "letters and packets":

> In order to answer numerous questions, collateral to the main questions answered by the Attorney General, which have been submitted to the Department by interested parties, railroad and express companies and others will be guided by the following definitions and rules:
>
> 1. The prohibitions of Section 3965 *supra* extend to "letters and

[357] Letter from C. Neilson, Second Assistant Postmaster General, to Judson Harmon, Attorney General (Aug. 3, 1896), in National Archives (POD), Entry 136, Case No. 8. Neilson was responding to letter from the Attorney General to the Postmaster General, dated August 1, 1896.

[358] 21 Op. Att'y Gen. 394, 398-99 (Aug. 12, 1896).

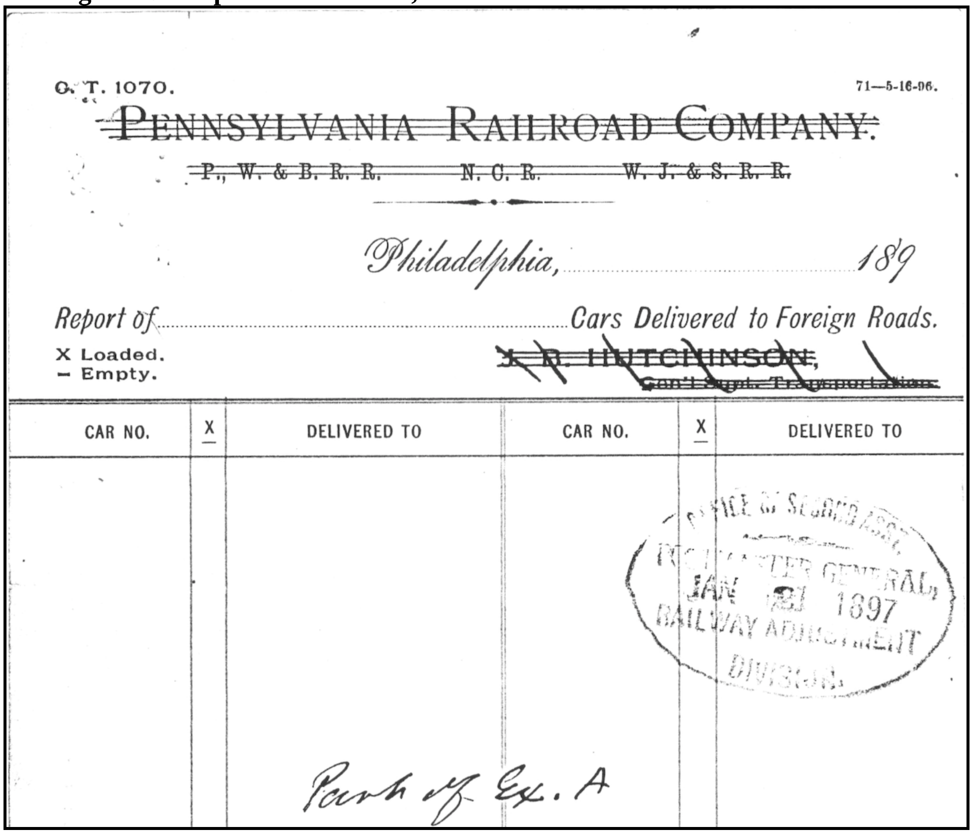
> packets" only. . . . Hence, not only railroads, but others may carry outside the mails anything else, if unaccompanied by matter having the character of personal correspondence. In an opinion given the Postmaster General, June 29, 1881, Attorney General McVeagh, speaking of the meaning of the words "letters" and "packets" as used in Sections 3982 and 3985, R.S., said "What is a 'letter,' I can make no plainer than it is made by the idea which common usage attaches to it. From the connection in which it is used I have not doubt that 'packets' means a package of letters," and these definitions have been adhered to by this Department ever since.[359]

The Post Office's new efforts to enforce the postal monopoly with respect to railroad mail posed a particular problem in the not infrequent situation in which a railroad maintained headquarters in a city that it did not serve directly. Previously, intervening railroads carried correspondence between another railroad's headquarters and its field operations as a business courtesy. On October 7, 1896, in an opinion for Neilson, Assistant Attorney General John Thomas addressed transmission of documents between the Lehigh Valley Railway's field offices and its headquarters in Philadelphia. Lehigh proposed sending a daily messenger, apparently an employee hired for the purpose, over an intervening railroad's line. The messenger was to carry only Lehigh Valley correspondence. Thomas held such an arrangement to be an illegal private express because daily service constituted service "by regular trips."[360]

[359] Postmaster General Order No. 488 (Aug. 20, 1896).

[360] 3 Op. Sol. P.O.D. 146 (1896) (No. 1113). The case file may be found in National Archives (POD), Entry 136, Case No. 25. Specifically, Thomas ruled that letters could be carried by "agents of the companies in connection with their general duties as such" but not by "special agents hired for that specific purpose apart from any other business of their employers." Id., 147. On Apr. 23, 1897, Thomas held that an express company and a railroad could jointly hire a person to act as joint agent, i.e., as a baggageman and express agent, and such person "can carry letters free of postage pertaining wholly to the business of the express." Letter from J.L. Thomas, Assistant Attorney General, to Second Assistant Postmaster General (Apr. 23, 1897), in National Archives (POD), Entry 136, Case No. 42. This opinion was not included in the published opinions of the Assistant Attorney General.

Figure 2. Sample of "car tracer," 1897



C. T. 1070. 71—5-16-96.

PENNSYLVANIA RAILROAD COMPANY.

P., W. & B. R. R. N. C. R. W. J. & S. R. R.

Philadelphia, 189

Report of Cars Delivered to Foreign Roads.

X Loaded.
– Empty.

J. R. HUTCHINSON,
Gen'l Supt. Transportation.

CAR NO.	X	DELIVERED TO	CAR NO.	X	DELIVERED TO

OFFICE OF SECOND ASST. POSTMASTER GENERAL, JAN 1897 RAILWAY ADJUSTMENT DIVISION.

Part of Ex. A

In late 1896, Second Assistant Postmaster General Neilson assumed primary responsibility for application of the postal monopoly to railroad mail.[361] A more subordinate role for the Assistant Attorney General is suggested by the fact that Thomas' October 1896 opinion on the daily messenger of the Lehigh Valley railroad is the last published opinion by the Assistant Attorney General on railroad mail for almost a decade.[362]

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[361] Letter from J. L. Thomas, Assistant Attorney General, to C. Neilson, Second Assistant Postmaster General (Dec. 29, 1896), in National Archives (POD), Entry 136, Case No. 27 ("I hand you herewith papers referred to me by the General Superintendent, Railway Mail Service, in accordance with our arrangement that all rulings in regard to train mail matter should, for the sake of uniformity, emanate from you alone.")

[362] Between Oct. 7, 1896 and May 16, 1904, when Assistant Attorney General Russell Goodwin took office, there are only four published Assistant Attorney General opinions on the postal monopoly: 3 Op. Sol. P.O.D. 162 (1897) (following a 1872 Attorney General's opinion that a private penny post does not violate the postal monopoly if the Post Office has not established free city service); 3 Op. Sol. P.O.D. 211 (1898) (No. 1141) (answered letters are "commercial papers" and not within the postal monopoly even though first class matter); 3 Op. Sol. P.O.D. 314 (1901) (No. 1187) (conveyance of letters by pneumatic tube, operating strictly in response to user's demand, is a private express operating at stated periods); 3 Op. Sol. P.O.D. 359 (1902) (No. 1204) (a "pension voucher" is a "letter" because "it conveys . . . specific information in writing").

In an informal but seminal opinion letter, written on January 7, 1897, Assistant Attorney General Thomas advised Neilson on the definition of *letters* within the scope of the postal monopoly.[363] Thomas' opinion responded to a query from a railroad president who wrote Neilson asking whether certain standard railroad documents could be modified "so as to remove them from the category of letters." Three types of exhibits were attached, presenting examples of "car tracers," "junction reports," and "claims papers." Car tracers and junction reports were standard printed forms listing movements of railroad cars. They were completed in writing but unsigned and addressed impersonally to a position such as "car accountant" at a specific railroad station. In the submitted samples, the railroad proposed striking out some of the printed text to make the documents as impersonal as possible. A typical sample document is shown in Figure 2.

Thomas opined that, notwithstanding the proposed revisions, car tracers and junction reports should be considered "letters." He reasoned that to constitute a letter a document "must be wholly or partly in writing and there must be a sender and an addressee." Thomas dealt with the absence of a sender's name by noting "some person made out the reports and tracers, and that person, whether known or unknown, must be held to be the sender." In regard to the impersonal address by title and station, Thomas stated "this, in my opinion, is sufficiently explicit to make the inclosure a matter for personal attention of the person holding the position of car accountant of the road at the point designated, and so far as he is concerned such inclosure has the characteristics of a personal correspondence and is therefore a letter." In summary, Thomas concluded "the omission of the names of the senders and addressee in the reports and tracers does not change their substance and character." In the same opinion, Thomas held that "claim papers"—packages of documents relating to claims of loss or damage—were not to be considered "letters." Claim papers consisted of accumulated correspondence and documents sent to various parties in the course of investigating a claim for lost freight or baggage. Thomas opined that "a letter which has reached the party for whom it was intended and has served its purpose ceases to be a letter thereafter."

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[363] Letter from J. L. Thomas, Assistant Attorney General, to C. Neilson, Second Assistant Postmaster General (Jan. 7, 1897), in National Archives (POD), Entry 136, Case No. 28. Thomas' letter was reproduced in the Post Office's pamphlet, *Orders and Decisions Relative to Railroad Mail Matter* (see next note). The subject of Thomas' opinion letter was a letter from E.T.D. Myers, president, Richmond, Fredericksburg & Potomac Railroad Co., to C. Neilson, Dec. 31, 1896. Myers' letter and sample documents submitted by Myers may also be found in the file for Case No. 28.

One month later, on February 6, 1897, Neilson published a pamphlet, *Orders and Decisions relative to Railroad Mail Matter compiled by the Second Assistant Postmaster General*.[364] In addition to Postmaster General Orders 422 and 488 and Attorney General Harmon's 1896 opinion on letters of the carrier, the pamphlet reproduced eight administrative decisions on railroad mail, five by Neilson and three by Assistant Attorney General Thomas. All were written between September 11, 1896 and January 7, 1897. They were presented chronologically except for Thomas' car tracer opinion, which was presented first. Thomas' October 1896 opinion on the daily messenger of the Lehigh Valley railroad was the only opinion that cites case authority or offers traditional legal reasoning and the only opinion subsequently included in the published set of Assistant Attorney General's opinions. Nonetheless, for more than a decade, the *Railroad Mail Matter* pamphlet apparently served as the Post Office's standard treatise on the scope of the postal monopoly.[365]

In the end, the Post Office met with only limited success in its efforts to use the postal monopoly statutes to restrict railroad mail. Several key legal interpretations did not stand the test of time. As noted, the Post Office's argument that a railroad was not allowed to transport its own letters was rejected by Attorney General Harmon. On similar grounds, Thomas' October 1896 opinion on the daily messenger of the Lehigh Valley railroad reversed in 1915 by Assistant Attorney General Lamar; in essence, Lamar concluded that an employee may always transport the letters of his employer.[366] The question of whether a railroad may carry letters of a joint venture partner to the Supreme Court. In *United States v. Erie Railroad Co.*,[367] the Court held that a railroad may carry out of the mail letters sent from a telegraph superintendent to a telegraph agent where the railroad and the telegraph jointly operated the telegraph service. Thus,

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[364] *Orders and Decisions relative to Railroad Mail Matter compiled by the Second Assistant Postmaster General* (Feb. 6, 1897). Two of the rulings are signed by G.F. Stone as Acting Second Postmaster General. One rulings, asserting application of the postal monopoly to correspondence of eating houses operated by Fred Harvey in joint venture with a railroad, was authored by Neilson even though unsigned. *See* National Archives (POD), Entry 136, Case No. 33.

[365] The 1897 pamphlet on railroad mail was cited by Assistant Attorneys General as authority for opinions on the scope of the postal monopoly as late as 1911. *See, e.g.*, 4 Op. Sol. P.O.D. 604 (1907) (No. 1532); 5 Op. Sol. P.O.D. 163 (1909); 5 Op. Sol. P.O.D. 193 (1909); 5 Op. Sol. P.O.D. 402 (1911).

[366] 6 Op. Sol. P.O.D. 293 (1915) (public utility may regularly deliver invoices by its employees to customers).

[367] United States v. Erie Railroad Co., 235 U.S. 513 (1915).

the railroads were ultimately allowed to transport a large portion of "railroad mail" outside the mails.

Nonetheless, the broad approach to the definition of "letter" adopted in *Railroad Mail Matter* was applied to additional types of documents. In 1901, the Second Assistant Postmaster General cited *Railroad Mail Matter*, and specifically Thomas' junction car opinion, in advising a railroad attorney that "tissue copies" (later called "carbon copies") of waybills were "letters."[368] In 1902, an attorney in the office of the Assistant Attorney General held that "pension vouchers" were "letters" because "[i]t seems to be settled that the ordinary receipt, or receipted bill, acknowledging the payment of money, when sent by the payee to the party making the payment, is a 'letter,' for the reason that it conveys to the latter specific information in writing."[369] In 1905, "bills, statements, and notes" were held to be "letters."[370] In 1910, postal cards bearing market quotations were held to be "letters."[371]

On other occasions, however, the Assistant Attorney General appeared to employ a narrower definition of "letter" in interpreting the postal monopoly statutes. For instance, in 1909, a U.S. attorney asked the Assistant Attorney General whether a manufacturing company could forward by private express letters mailed to one branch of the company that should have been mailed to another branch. Assistant Attorney General Russell Goodwin replied:

> As to what is a "letter," it has never, so far as I have been able to learn, been defined other than the common, ordinary acceptation of the term. As to whether reports, invoices, etc., would constitute "letters" within the meaning of the statute, it would seem to me depends somewhat upon the circumstances of each case. If they partake of the nature of personal correspondence, the conveying of written information from one to another, I am inclined to think that

[368] Letter from the Second Assistant Postmaster General to J.D.B. DeBox, Assistant General Counsel, Nashville, Chattanooga & St. Louis Ry. (Jul. 13, 1901), in National Archives (POD), Entry 136, Case No. 61. In 1896, Neilson apparently ruled "'tissue' copies, made either by impression or manifolding of waybills or other business papers wholly or partly in writing (which term comprehends type writing) are subject, when mailed, to postage of the letter rate, but unless they have the characteristics of a personal correspondence they are not letters and hence may be carried out of the mails." National Archives (POD), Entry 136, Case No. 26½. The file includes a draft of this letter in Neilson's distinctive handwriting, written in response to an Oct. 2, 1896 inquiry from a railroad, and an indication that the answering letter was sent Oct. 9, 1896. No copy of the final letter has been found.

[369] 3 Op. Sol. P.O.D. 359 (Jan. 9, 1902) (No. 1204).

[370] Opinion of Aug. 9, 1905, *cited in* 5 Op. Sol. P.O.D. 386 (1910) (unpublished and not found).

[371] 5 Op. Sol. P.O.D. 386 (1910).

> they should be construed as coming within the definition of "letters." However, this question is not free from doubt, and as the question is still an open one, so far as I am advised, I should be glad to see it raised in this case . . . .[372]

Other opinions indicate or imply that "the monopoly established by the government as to carrying mail applies only to first class matter."[373]

7.2 Corruption in the Office of the Assistant Attorney General

In late 1903, it transpired that high officials of the Post Office Department had been engaged in widespread corruption since at least 1897. Guilty parties included Assistant Attorney General James N. Tyner and his nephew and assistant, Harrison J. Barrett, as well as the general superintendent of the free-delivery system, the general superintendent of salaries, a former First Assistant Postmaster General, and several others. An historian of the period has summarized their activities as follows:

> These men and others operated principally in the fraudulent purchase of postal supplies, in the illegal appointment of political favorites, and in the sale of promotions. In collusion with contractors, they purchased quantities of unnecessary, expensive, and faulty equipment, at times wantonly destroying supplies in order to purchase replacements. They blackmailed contractors and took bribes from them. They arbitrarily increased rental of post office quarters, often at the suggestion of Congressmen. They conspired with proprietors of swindling, get-rich-quick schemes for the uninterrupted use of the mails. Unnecessary clerks were loaded upon reluctant postmasters as a favor to prominent politicians. Promotions went by favor and at times for money.[374]

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[372] 5 Op. Sol. P.O.D. 193, 194 (1909).

[373] Letter from W.A. Milliken, Acting Assistant Attorney General, to W.S. Shallenberger, Second Assistant Postmaster General (May 15, 1897), in National Archives (POD), Entry 136, Case No. 47 ("baggage checks in envelopes are not first class matter and they may be properly carried by the railroads outside the mails without payment of postage"). *See also*, letter from Second Assistant Postmaster General to W.W. Dudely, Central R.R. Co. of N.J. (Sep. 8, 1896), in National Archives (POD), Entry 136, Case No. 17 (printed "weather cards" may be carried outside of the mails); letter from Second Assistant Postmaster General to C.P. Biles, Cincinnati, New Orleans & Texas Pacific Railway Company (May 15, 1901), in National Archives (POD), Entry 136, Case No. 60 (pamphlets by state railroad commission giving reports of its work may be carried out the mails).

[374] White, *The Republican Era* 272-73. *See generally* H.R. Doc. No. 383, 58th Cong., 2d Sess. (Jan. 11, 1904).

It is impossible to connect specific interpretations of the postal monopoly statutes with this corruption. Nonetheless, given the seriousness of these offenses, it appears appropriate to use caution in evaluating legal interpretations by the office of the Assistant Attorney General during this period.

7.3 Criminal Code of 1909 and the Letters-of-the-Carrier Exception

In 1909, the Congress consolidated the penal laws of the United States into the first criminal code.[375] Work began on this code in 1897, when Congress established a commission to revise and codify the criminal and penal laws of the United States.[376] In 1899, the Commission recommended inclusion of penal postal monopoly provisions in the projected criminal code.[377] The House Committee on Post Office and Post Roads declared that the Commission's redraft of the penal postal monopoly provisions made "no changes of consequence." In a later review of the entire draft code, the Special Joint Committee on Revision indicated an intention to make only minor stylistic changes in postal monopoly statutes except for revision of penalty provisions to be consistent with the code as a whole.[378] Nine postal monopoly provisions of the Revised Statutes were considered penal in nature and reenacted as part of the 1909 criminal code. In 1948, the penal provisions of the postal monopoly were again reenacted in a second criminal code, which enacted the current title 18, United States Code, as positive law.[379] See Table 9.

Reenactment of these postal monopoly provisions in the criminal code moderately increased penalties associated with violation of the postal monopoly. The possibility of one month's imprisonment was added as an additional penalty for carriage of letters on board any vessel. The main postal monopoly statute, R.S. 3982, was reenacted as section 181, and the

[375] Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088.

[376] Act of Jun. 4, 1897, ch. 2, 30 Stat. 11, 58.

[377] H.R. Doc. No. 55-256 (3d Sess. 1899).

[378] H.R. Rep. No. 56-551, at 2 (1st Sess. 1900); S. Rept. No. 60-10, Part 1, at 20-21, 196-203 (1st 1908).

[379] Act of Jun. 25, 1948, ch. 654, 62 Stat. 683. The 1948 reenactment introduced minor rewording and rearrangement but no substantive changes in the postal monopoly statutes. In addition to these two reenactments, the criminal provisions of the postal monopoly statutes have been amended in minor respects since 1909; these amendments are described in appropriate sections below.

Table 9. Criminal postal monopoly statutes: from Revised Statutes to current law

Revised Statutes 1874	Criminal Code 1909	Criminal Code 1948 (current Title 18)
3977	200	1698
3981	180	1693
3982	181	1696(a)
3983	182	1697
3984	183	1696(b)
3985	184	1694
3986	185	1695
3988	204	1699
3992	186	1696(c)

penalty for violation was increased from $150 with no imprisonment to $500 and/or six months' imprisonment. As revised, this provision read:

> Sec. 181. Whoever shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place, to any other city, town, or place, between which the mail is regularly carried, or whoever shall aid or assist therein shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both: *Provided*, That nothing contained in this section shall be construed as prohibiting any person from receiving and delivering to the nearest post-office, postal car, or other authorized depository for mail matter, any mail matter properly stamped.[380]

The 1909 criminal code also created a new statutory exception from the postal monopoly for letters of the carrier. This was the sixth and last of the traditional statutory exceptions to the postal monopoly. The new letters-of-the-carrier exception was intended to codify the interpretation of the postal monopoly statutes announced by Attorney General Harmon in 1896.[381] This result was accomplished by adding the phrase "to the current business of the carrier" to section 184, the prohibition against carriage of letters and packets by common carriers. As revised, this section read,

> Sec. 184. Whoever, being the owner, driver, conductor,

[380] Act of Mar. 4, 1909, ch. 321, § 181, 35 Stat. 1088, 1123.

[381] *See* H.R. Rept. No. 60-2319, at 6-7 (2d Sess. 1909)(conference committee report).

> master, or other person having charge of any stage-coach, railway car, steamboat, or conveyance of any kind which regularly performs trips at stated periods on any post route, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried, and which shall carry, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, *to the current business of the carrier*, or to some article carried at the same time by the same stage-coach, railway car, or other vehicle, except as otherwise provided by law, shall be fined not more than fifty dollars.[382]

7.4 Williams v. Well Fargo, 1910

In *Williams v. Wells Fargo & Co. Express*, decided in 1910, a federal circuit court held that the term *packet* as used in the postal monopoly statutes refers to "communications composed of four or more sheets" and cannot include an "packet of merchandise."[383] This is the last occasion in which a court has considered the definition of "packet" as used in the postal monopoly statutes.

In *Williams*, an informer accused Wells Fargo of transporting a "packet of merchandise" in violation of the prohibition against the establishment of a private express. The court first reviewed the postal laws of the United States and concluded:

> The expression ‘letters‘ or ‘packets‘ occurs in the postal laws of our county from the beginning and was intended to include communications in writing conveyed from one person to another. Thus a correspondence limited to a single sheet was formerly called a single letter; two sheets a double letter; and three sheets a triple letter. *All such communications composed of four or more sheets were called a packet*[384].

The court then reviewed English and American postal monopoly cases and concluded that there was no indication the postal monopoly was ever intended to apply to packages of merchandise:

> [T]he entire history of the legislation on this subject from the beginning, and the many adjudicated cases as well, show the

[382] Act of Mar. 4, 1909, ch. 321, § 184, 35 Stat. 1088, 1124 (emphasis added). The legislative history of this amendment is reviewed in *Regents of Univ. of Cal. v. Pub. Employment Relations Bd.*, 485 U.S. 589, 595-96 (1988).

[383] Williams v. Wells Fargo & Co. Express, 177 F. 352 (8th Cir. 1910).

[384] Williams v. Wells Fargo & Co. Express, 177 F. 352, 357 (8th Cir. 1910) (emphasis added).

> legislative intent to have been to maintain for the government a monopoly only of the carriage of its mails, *consisting of letters and packets of letters, and the like mailable matter*. While it is true parcels or packages of merchandise weighing not to exceed four pounds in weight and not in nature such as liable to injure the contents of the mail sacks of the government may be received and carried through the mails, yet that the government has neither attempted to reserve to its Post Office Department a monopoly of the transportation of merchandise in parcels or packages weighing less than four pounds, nor has prohibited private express companies or others making regular trips over established post roads or between cities where mails are regularly carried, from engaging in the business of carrying such parcels of merchandise for hire, is evident from the language employed in the opinion of the Supreme Court in Express Cases, 117 U.S. 1, 6 Sup.Ct. 542, 628,29 L.Ed. 791.[385]

On this basis, the charge against Wells Fargo of violating the postal monopoly was dismissed.

7.5 U.S. v. Erie Railroad, 1915

The scope of letters-of-the-carrier exemption was tested before the Supreme Court. In *United States v. Erie Railroad Co.*,[386] a railroad was charged with violating the postal monopoly provision relating to common carriers (1909 Criminal Code § 184). The railroad conveyed letters of a telegraph company with whom it had a close business relationship. Under the contract between the two companies, the telegraph company operated the telegraph line of the railroad company and had the right to build new lines along the rights of way of the railroad. The railroad supplied operators and facilities for telegraph offices at the railroad's stations. The railroad was entitled to 25 percent of the revenues from the telegraph business. Apparently neither company had an ownership interest in the other.

The Court concluded that the two companies had a sufficiently close relationship that the letters relating to the business of the telegraph company related to the "current business" of the railroad.

> It will be observed that, while the companies in many respects are independent, they are also, in some respects at least, dependent.

[385] Williams v. Wells Fargo & Co. Express, 177 F. 352, 357 (8th Cir. 1910) (emphasis added).

[386] United States v. Erie Railroad Co., 235 U.S. 513 (1915).

> The telegraph is a facility of the railroad company, and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement, and, but for the agreement with the telegraph company, would have to do. The railroad company has an interest in the receipts of the other company, and is concerned in their amount and the maintenance and increase of the telegraph business. The control of the telegraph company's instrumentalities and its offices and operators is in a "competent joint superintendent of telegraph," in whose appointment the railroad company has a voice, and whom it also may discharge. It is, however, not possible, and keep this opinion within a reasonable length, to detail the many ways in which the two companies are related, and while it may be said that there is a railroad business in which the telegraph company has no concern , that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is "current."[387]

On this basis the Supreme Court affirmed the judgement of the district court, which had found the letters qualified for the letters-of-the-carrier exception from the postal monopoly.

[387] United States v. Erie Railroad Co., 235 U.S. 513, 520 (1915) (emphasis added).

8 Evolution of Administrative Interpretation, 1910s to 1960s

In the first half of the twentieth century, the Post Office Department gradually developed a more expansive interpretation of the postal monopoly statutes and the conviction that it was empowered to administer the monopoly. The intellectual basis for a broader interpretation of the monopoly laws was laid, for the most part, by Post Office Solicitor William Lamar in the 1910s. In the 1930s, the Post Office Department synthesized favorable monopoly opinions and precedents into an informal pamphlet that, for the first time, presented a public position on the correct interpretation of the postal monopoly law. As it evolved through five editions, the monopoly pamphlet acquired footnotes, legal citations, and an increasingly authoritative tone. In 1954, the pamphlet was transmuted into postal monopoly regulations. These developments laid the groundwork for the far more advanced postal monopoly regulations of 1974, the Postal Service's current regulations on the postal monopoly.

The Depression Era also spawned statutory developments. The mailbox monopoly law was adopted in 1934 to protect the Post Office Department better from the delivery of bills by local utilities and department stores.. Three tweaks to the postal monopoly law were also enacted.

8.1 Consolidation of Administrative and Judicial Rulings

In 1905, the Post Office published the first formal compilation of judicial decisions on the postal laws.[388] The *Digest of Decisions of United States and Other Courts Affecting the Post-Office Department and Postal Service* was authorized by Congress as part of the 1902 edition of Postal Laws and Regulations. It took the Post Office three years to complete with the assistance of leading legal publishers of the day. The *Digest* contains summaries of "all important cases" pertaining to the Post Office arranged by subject matter. In 1925, the *Digest* was revised, updated, and issued as a separate book.[389] A second supplemental volume was published in

[388] *Digest of Decisions of United States and Other Courts Affecting the Post-Office Department and Postal Service* (1905), Appendix 2 to *Postal Laws and Regulations 1902*.

[389] *Digest of Decisions of United States and Other Courts Affecting the Post Office Department and the Postal Service* (1925).

1928.[390] Neither of these volumes included citations to opinions of the Assistant Attorneys General or Solicitors for the Post Office.

Table 7. Postal monopoly opinions of the Assistant Attorneys General and Solicitors of the Post Office Department by office-holder, 1873-1951

	Name	Appointed	Monopoly Opinions	Published
1	Thomas A. Spence	3/20/1873	2	1905
2	Alfred A. Freeman	5/1/1877	8	1905
3	Edwin E. Bryant	3/31/1885	10	1905
4	James N. Tyner	3/21/1889	6	1905
5	John L. Thomas	5/27/1893	6	1905
6	James N. Tyner	5/6/1897	4	1909
8	Russell P. Goodwin	5/4/1904	13	1909, 1928
9	William H. Lamar	5/5/1913	18	1928
10	John H. Edwards	6/1/1921	6	1929
11	Edgar M Blessing	9/29/1923	2	1929
12	Horace J. Donnelly	9/16/1925	24	1929, 1936
13	Karl A. Crowley	4/21/1933	54	1936
14	Vincent M. Miles	10/5/1938	14	1952
15	Frank J. Delany	7/22/1946	51	1952
16	Roy C. Frank	4/1/1951	4	1952

In 1905, the Post Office also published, for the first time, the legal opinions of the Assistant Attorneys General. Publication represented the first step in the direction of establishing a body of administrative law created by the Post Office. Altogether, the legal office of the Post Office Department published 222 legal opinions construing the postal monopoly statutes between 1872 and 1952. In most cases, publication following the issues of the legal opinions by many years. During this period, fifteen individuals served as the Assistant Attorney General or the Solicitor, as the office was termed after mid-1914.[391] One, James N. Tyner, served twice (and was a leading figure the postal corruption scandals of the early twentieth century). Table 7 provides a list of all Assistant Attorneys General and Solicitors of the Post Office Department

[390] *Digest of Decisions of United States and Other Courts Affecting the Post Office Department and the Postal Service*, Volume 2 (1928).

[391] Act of Jul. 16, 1914, ch. 141, §1, 38 Stat. 454, 455.

and indicates the number of postal monopoly opinions issued the tenure of each and the dates of publication.

Table 8. Postal monopoly opinions of the Assistant Attorney General and Solicitor by year, 1873-1951

		1890	3	1910	1	1930		1950	18
		1891	1	1911	1	1931	4	1951	6
		1892		1912	2	1932	12		
1873	1	1893	2	1913	1	1933	5		
1874	1	1894		1914		1934	7		
1875		1895	3	1915	3	1935	41		
1876		1896	2	1916	10	1936	2		
1877		1897	1	1917	1	1937			
1878	1	1898	1	1918	3	1938			
1879	1	1899		1919		1939			
1880	2	1900		1920		1940			
1881	1	1901	1	1921	2	1941			
1882		1902	1	1922	4	1942			
1883	1	1903		1923	1	1943	5		
1884	1	1904		1924	2	1944	8		
1885	4	1905	2	1925		1945			
1886	2	1906	1	1926		1946	4		
1887	4	1907	1	1927	1	1947			
1888	1	1908		1928	5	1948	16		
1889	1	1909	4	1929		1949	13		

Table 8 shows the number of published postal monopoly opinions by year. Most of the opinions were issued in three periods, by Solicitor William Lamar in the mid-1910s, by Solicitor Karl Crowley during the Depression of the mid-1930s, and by Solicitor Frank Delany in the years after the end of World War II. The first two periods are especially important in the evolution of the Post Office's administrative interpretation of the postal monopoly statutes.

8.2 Development of Statutory Interpretation: Solicitor William Lamar, 1913–1921

William Harmong Lamar Jr. was appointed Assistant Attorney General for the Post Office Department in May 1913, after the election of President Woodrow Wilson, and

redesignated as "Solicitor" in 1914 when the name of the office was changed.[392] He left office in June 1921 after the election of President Warren Harding. Between 1913 to 1921 Lamar issued numerous legal opinions interpreting the postal monopoly statutes; seventeen of these were included in volumes of the *Official Opinions of the Solicitor* published in 1928 and 1929.

Lamar's immediate predecessor was Russell P. Goodwin. Goodwin was appointed Assistant Attorney General in 1904 and served for nine years, until the Democrats succeeded the Republicans with the election of Woodrow Wilson as president. In interpreting the postal monopoly statutes, Goodwin tended towards caution. His approach is exemplified by a letter of advice to a U.S. attorney written in 1913:

> It thus appears that, while by the act of March 3, 1845, it was unlawful to carry outside the mails "any letter or letters, packet or packages of letters, or other mailable matter whatsoever," except "newspapers, pamphlets, magazines, and periodicals," this prohibition was limited by the act of 1872 to "letters and packets," and such limitation was repeated in the Criminal Code now in force.
>
> "There can be no question that, from the inception of the Postal Service, the Government monopoly of mail transportation has extended to "letters." Since the act of 1872, however, the inclusion within such monopoly of other mailable matter has depended upon the meaning of the term "packets." In an opinion of Attorney General Wayne MacVeagh to Postmaster General Thomas L. James, dated June 29, 1881, he stated:
>
> "From the connection in which it is used, I have no doubt that 'packets' means a package of letters."
>
> There have been repeated efforts, both before the department and Congress, to show that the term "packets" included also "packages" of mailable matter; but in view of the opinion of the Attorney General as to its meaning, the long continued construction of the department in compliance therewith, and the failure of Congress to manifest a different legislative intent, the enforcement of the private express statutes has been directed only

[392] Son of prominent southern family, Lamar, 54, had previously been a member of the Maryland legislature, a captain in the Army Signal Corps during the Spanish American War, and an attorney in the Department of Justice. His wife, a distant cousin, was the daughter of a Supreme Court Justice and prominent politician, Lucius Quintus Cincinnatus Lamar Jr. As Post Office Solicitor, Lamar's proudest accomplishment was denying use of the mails to the Nation's enemies during World War I. Lamar's biography may be found in National Archives (POD), Entry 47, Box 2. Entry 47 consists of office files of Lamar.

to those cases where "letters" were carried outside the mails.[393]

As Assistant Attorney General and Solicitor, Lamar was more of an advocate and activist than Goodwin. On February 2, 1916, Lamar considered the scope of the letters-of-the-carrier exception, which the Supreme Court had addressed in *Erie Railroad* case the year before, and held that the letters-of-the-carrier exception did not permit a company to convey the letters of a wholly-owned subsidiary.[394] In this case, railroad A owned 100 percent of railroad B and sought to transport a "daily abstract of interline waybills received" from one office of railroad B to another office of railroad B. Lamar ruled that the items were "letters" because "reports of this character have uniformly been held by this office to be letters within the meaning of the law." He then concluded that the letters-of-the-carrier exception did not allow railroad A to convey letters of its wholly-owned subsidiary railroad B. To support his conclusion, Lamar quoted a single sentence from a 1910 opinion by Attorney General Wickersham and observed Wickersham's opinion "was not overruled by" the Supreme Court's decision in the *Erie Railroad* case. Lamar's reasoning was difficult to follow. The *Erie Railroad* case did not overrule Wickersham's opinion because it did not mention it at all. On the merits, the facts in Wickersham's opinion bore little relation to the facts before Lamar.[395] The interest of a parent company in the business of a wholly-owned subsidiary (the case before Lamar) is significantly different than that of a member company in an association (the case before Wickersham) or that of a railroad in a telegraph business which it conducts jointly with an independent telegraph company (the case before the Supreme Court).[396]

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[393] 5 Op. Sol. P.O.D. 614, 616 (1913)

[394] 6 Op. Sol. P.O.D. 362, 363 (Feb. 2, 1916). This opinion was presaged by two others: 6 Op. Sol. P.O.D. 293 (Oct. 5, 1915) (discussion of Wickersham's opinion in light of *Erie*) and 6 Op. Sol. P.O.D. 325 (Nov. 20, 1915) (railroad *A* may not carry letters written by railroad *B* even if railroad *A* has a controlling interest in railroad *B*).

[395] Attorney General Wickersham's opinion addressed a situation in which several independent railroads formed an association having no corporate or distinct legal existence. He held that letters of the association could not be carried by the individual railroads under the letters-of-the-carrier exception because "Congress did not mean to do more than to permit carriers themselves to carry their own messages, and particularly corporate carriers to carry *their own messages*, which would necessarily be limited to their business." 28 Op. Att'y Gen. 537, 542 (1910) (emphasis original). In United States v. Erie Railroad Co., 235 U.S. 513 (1915), five years later, the Supreme Court held that a railroad could convey letters of an independent telegraph company where the contractual relationship between the railroad and the telegraph company was sufficiently close to render the letters related to the "current business" of the railroad. The Supreme Court did not mention Wickersham's opinion in the *Erie Railroad* decision and so, technically, did not overrule it. Nonetheless, the Court's decision casts doubt on Wickersham's rationale, although not necessarily on his conclusion.

[396] In United States v. Southern Pac. Co., 29 F.2d 433 (D. Ariz. 1928), a district court likewise concluded

On March 10, 1916, in the *Chicago Board of Underwriters* opinion,[397] Solicitor Lamar ruled that the monopoly over "letters" covered all types of first class matter, including "fire insurance policies, bills of debits and credits, and other insurance data" —precisely the sorts of commercial papers found to excluded from the postal monopoly by Attorney General MacVeagh in 1881. The case involved conveyance of such documents between insurance companies, agents, brokers, and a common clearing house called the Chicago Board of Underwriters all located within a single building. In analyzing whether insurance documents are "letters" within the ambit of the postal monopoly law, Lamar quoted a open-ended definition of *letter* from a legal dictionary[398] and brief discussions of the term *letter* culled from three federal cases. In the first case, *United States v. Denicke*, 35 F. 407 (C.C.S.D. Ga. 1888), a district court dealt with postal fraud, discussing the meaning of *letter* in a context wholly different from the postal monopoly.[399] In the second case, *United States v. Gaylord*, 17 F. 438 (C.C.S.D. Ill., 1883), a district court was concerned with the mailability of obscene "letters." The court's decision not only bore no relation to the postal monopoly but suffered from the further defect of having been overruled by the Supreme Court sub silentio.[400] The third case was the Supreme Court's 1851 decision in *Bromley*. As discussed above, in that case the Supreme Court held that an order for

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that a railroad may not transport letters of wholly-owned subsidiary railroad. In that case, however, the Court specifically examined the Supreme Court's holding in *Erie Railroad* and distinguished the corporate interdependency in that case from the lack of corporate interdependency in the case at bar.

[397] 6 Op. Sol. P.O.D. 373 (Mar. 10, 1916). In addition to considering the issues discussed in the text, Lamar addressed two other issues in his opinion. First, each insurance agent is a separate business, precluding resort to the letters-of-the-carrier exception. *Id*. 377-78. Second, Lamar made the unprecedented determination that the corridors of public building served by letter carriers are postal routes. *Id*. 381.

[398] "A letter is defined by Bouvier (Rawles Rev.) (vol. 2, page 185) as follows: 'a written message, usually on paper, folded up and sealed, sent by one person to another.'" 6 Op. Sol. P.O.D. 373, 380 (Mar. 10, 1916).

[399] In *Denicke*, a postal agent was accused of embezzling a letter. The letter was a phony application for insurance, with money enclosed, prepared by a postal inspector and addressed to a nonexistent company. The defendant argued that a letter with a nonexistent address could not have been "intended to be conveyed by mail." The court agreed: "[C]an a letter with an impossible address, which can never be delivered . . . be a letter intended to be conveyed by mail? . . . A letter is a written or printed message. Now, there can be no message to that which is not in existence." 35 F. at 409.

[400] *Gaylord* was one of a line of cases on whether an obscene "letter" was within the scope of a postal law provision that made obscene "writings" nonmailable. *Gaylord* held that a "letter" is a "writing" within the meaning of this provision. The Supreme Court disagreed and upheld another line of cases reaching the opposite conclusion. *United States v. Chase*, 135 U.S. 255 (1890). The history of the two lines of cases is recapitulated in *United States v. Wilson*, 58 F. 769 (N.D. Cal. 1893). *Gaylord* was thus implicitly overruled.

goods was "clearly mailable matter" while skirting the issue of whether an order for goods was a "letter." After these references, Lamar declared:

> Pursuing the thought of the Supreme Court expressed in the language just quote [from Bromley], it seems to me that it can with equal truth be said that a bill is a common form of correspondence and constitutes a considerable number of the "letters" handled by the postal establishment. *Insurance policies as documents and bills, receipts, etc., as such, are acceptable in the mails and acceptable only as first-class matter. If deposited for handling by the Postal Service they become "letters,*" and when they are handled by private concerns or parties they are none the less so within the meaning of section 181 of the Penal Code.[401]

This conclusion seems to have no logical relationship to the cases cited. At the same time, it fails to address prior decisions by the Post Office and the Attorney General finding that at least some first class matter falls outside the postal monopoly.[402] Lamar then ruled that messengers which collect and distribute letters every 20 or 30 minutes operate "by regular trips and stated periods." Lamar concluded, "it is my opinion that the messenger service herein treated of is operated in violation of law and should be required to be discontinued."[403]

On May 5, 1916, in the *Erie Employees' Relief Association* opinion,[404] Lamar extended the claim of monopoly to third class matter. He concluded that the postal monopoly over "letters" also applied to printed circulars. The circulars were prepared by the Erie Employee's Relief Association in connection with a union election. They were transmitted over the lines of the Erie Railroad.[405] Retracing his analysis in *Chicago Board of Underwriters*, Lamar recalled the

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[401] 6 Op. Sol. P.O.D. 373, 380-81 (Mar. 10, 1916) (emphasis added).

[402] Lamar likewise ignored the United States v. Chaloner, 25 F. Cas. 392 (D. Me. 1831) and United States v. Thompson. 28 F. Cas. 97, 98 (D. Mass. 1846), cases which implied that at least some first class matter was outside the scope of the 1872 postal monopoly.

[403] 6 Op. Sol. P.O.D. 373, 382 (Mar. 10, 1916).

[404] 6 Op. Sol. P.O.D. 397 (May 5, 1916).

[405] In an earlier opinion, 6 Op Sol. P.O.D. 372 (Mar. 2, 1916), Lamar held that "the transmission in 'railroad mail' of these circulars . . . constitutes, in my opinion, a violation of section 183 of the Penal Code," but he does not offer any rationale to support this conclusion. He merely listed citations to opinions of the Attorney General dealing with the letters-of-the-carriers exception to the postal monopoly: 29 Op. Att'y Gen. 418 (1912) (letters of the Erie Employees' Relief Association cannot be transported by Erie Railroad under the letters-of-the-carrier exception) and two opinions discussed above, 21 Op. Att'y Gen. 394 (1896) and 28 Op. Att'y Gen. 537 (1910).

dictionary definition of *letter* and the case law cited there. He noted that circulars were third class rather than first class matter and declared,

> While for some purposes a distinction is observed between "letters" and "circulars," for example, the act of March 3, 1879 (20 Stat. 260), placing *written* letters in matter of the first-class and "circulars" in the third-class as "miscellaneous printed matter," yet *as respects the postal monopoly the term "letters" has a broader signification and embraces "circulars."* Indeed, section 18 . . . of the [1879] act classifying mail matter, above cited, expressly states:
>
> "The term 'circular' is defined to be a printed letter, which, according to internal evidence, is being sent in identical terms to several persons."
>
> And the act of March 2, 1899 . . . is another recognition of the fact that it is not necessary to constitute a letter that it be "written" in the usual sense of the word. This act provides:
>
> "All letters written in point print or raised characters used by the blind, when unsealed, shall be transmitted through the mails as third-class matter. . . ."
>
> Thus, the Postal Service transports and delivers written "letters" and printed "letters" at different rates, but its monopoly covers both equally.[406]

In this manner, Lamar inappropriately relies upon phrases from two post-1872 acts as an aid in interpreting the 1872 postal monopoly. Lamar then concludes, "The circular of the 'Campaign Manager' of the Erie Employees' Relief Association is a printed communication or letter addressed to the members of the association, and its transmission over the lines of the Erie Railroad Company outside of the mails infringes upon the post-office monopoly."[407]

The *Chicago Board of Underwriters* and *Erie Employee's Relief Association* opinions are central to the development of Post Office's administrative interpretation of the postal monopoly statutes. Careful analysis, however, raises questions about the quality of the underlying legal analysis. Further questions are presented by subsequent events.

Unwilling to yield to the claims of postal monopoly, the Chicago Board of Underwriters offered to change the operations of its messengers to avoid service "by regular trips or at stated

[406] 6 Op. Sol. P.O.D. 397, 398 (May 5, 1916) (emphasis added).

[407] *Id*. at 398.

periods." Rather than schedule collections every twenty minutes, the Board proposed collections initiated by an "enunciator" system that connected each insurance office to the clearing house and summoned the messengers. Under the new arrangement, messengers would continue to sort documents centrally in the clearing house and make consolidated deliveries to addressees, at least in some cases.[408] Lamar approved this scheme without analysis or reference to prior rulings by the Assistant Attorney General which had declared a stricter interpretation of service "by regular trips or at stated periods."[409] Indeed, one week before approving the enunciator system for calling messengers of the Chicago Board of Underwriters, presumably on a more or less half-hourly basis, Lamar himself had summarily declared a *daily* messenger service to be in violation of the postal monopoly.[410] In October 1916, Lamar ruled *monthly* delivery of telephone bills "as near the first of each month as practicable" would an illegal private express service because it operated "at stated periods."[411]

There was roughly similar sequel to the *Erie Employee's Relief Association* opinion. Three days after issuing that opinion, Lamar was confronted in his office by Congressman C.N. McArthur (Rep., OR), who asked why a postmaster objected to the Oregon Employers' Association's use of Western Union to deliver circulars in the city of Portland. The next day, Lamar ruled that private delivery of the Oregon Employers' Association's circulars was permissible because "from the sample circular . . . I gather that such matter is not distributed by him with any regularity, but as occasion may demand or as to him may seem advisable."[412] It is

[408] 6 Op. Sol. P.O.D. 403, 404 (May 22, 1916). The attorney for the Board claimed that other local messenger systems operated in the same manner: "As I understand the plan of the messenger service of the telegraph companies and other messenger service companies as operated in the city of Chicago, our plan as laid out above is substantially the same as theirs so far as the questions are concerned which are raised in your opinion." *Id*.

[409] *See* 3 Op. Sol. P.O.D. 137 (1895) (No. 1109) (pneumatic tube company in Chicago that proposes to convey letters "at irregular intervals, as they happen to be brought to the stations of the pneumatic tube system" is an illegal private express); 3 Op. Sol. P.O.D. 314 (May 22, 1901) (No. 1187) (holding pneumatic tube to be an illegal private express because "to send letters immediately when presented shows the intention to be to make the carrying of letters a regular, continuous business, and that is all the law covers").

[410] 6 Op. Sol. P.O.D. 400 (May 15, 1916) (1st opinion) ("With reference to your letters of April 28 and May 11, 1916, reporting that Wells Fargo Express Company is carrying daily a sack of mail consisting of correspondence, daily reports, etc. of the Public Service Company . . . I have to advise you that this practice seems to be a clear violation of section 181 of the Penal Code.").

[411] 6 Op. Sol. P.O.D. 461 (Oct. 24, 1916).

[412] 6 Op. Sol. P.O.D. 399 (May 9, 1916).

unclear how circulars of the Oregon Employers' Association could be inherently more episodic than the campaign literature of Erie Employee's Relief Association.[413]

On August 14, 1919, the Chairman of the House Committee on Post Office and Post Roads directly questioned Lamar's assertion that the postal monopoly included third class printed matter. Congressman Halver Steenerson (Rep., MN) asked the Postmaster General "does the term 'letters and packets,' in the [postal monopoly] statutes include postal cards and post cards, and does it include any of the mailable matter now mailable as third-class matter, such as letters and circulars?"[414] In a letter drafted by Lamar, Acting Postmaster General J.G. Koons replied as follows:

> [T]his Department has construed all matters within the weight limit for first class matter, in the nature of communications, whether written or printed matter and sealed or unsealed, as "letters" within the meaning of the law (See U.S. v. Denicke, 35 Fed. 407-409; U.S. Gaylord, 17 Feb. 438-440; U.S. v. Bromley, 53 U.S. 88-97).
>
> There is a species of third class matter, however, the status of which with respect to the "private express" statute is not so clearly settled as would be desirable; that is to say, pamphlets, magazines, newspapers and the like; for, while an opinion to the President rendered by Attorney General Nelson dated November 13, 1843 (IV Op. 276) held that newspapers, magazines and pamphlets were embraced in the phrase "letters or packets," yet, the Circuit Court of Appeals for the Eight Circuit, in an opinion by District Judge Pollock, in the case of Williams vs. Wells Fargo Company, 177 Fed. 353 [parallel cites omitted] interpreted "packet" to mean a letter containing more than three sheets, stating that to have been the original and historical definition of "packet."
>
> An examination of this case, however, will show that newspapers, magazines and pamphlets were not involved in the decision, but that the definition of "letters and packets" was given for the purpose of demonstrating that parcels of merchandise were not embraced thereby, so that it may be looked upon to some extent as *obiter dicta*.

[413] The two cases are not completely comparable because the printed circulars of the Erie Employees' Relief Association were being conveyed by railroad (Criminal Code of 1909 § 184) while the letters of the Employers' Association of Oregon were conveyed by messenger (§ 181). Lamar's analysis, however, did not turn on this distinction.

[414] Letter from Halver Steenerson, chairman, House Comm. on the Post Office and Post Roads, to Postmaster General (Aug. 14, 1919), in National Archives (POD), Entry 36. Office of the Solicitor, General Records 1905-1921. Entry 36 consists of general records of the Office of the Solicitor, 1905-1921.

> This Department has not attempted to assert a monopoly in the carriage of mail matter other than that of the first class, included unquestionably in the phrase "letters and packets," but inasmuch as the statute referred to is a criminal one, its construction is within the province of the courts and the Department of Justice.[415]

Koons' letter avoids giving an explicit answer to Steenerson's question about whether the postal monopoly includes third class circulars. It does, however, indicate that the issue of whether or not the postal monopoly includes third class matter such as "pamphlets, magazines, newspapers and the like" depends on whether the term *packet* can be interpreted to include nonletters. Koons takes the position that this an open legal question, so that the postal monopoly might be interpreted to include such third class matter. Koons' 1919 letter seems to be the only occasion after 1845 in which the Post Office raised the possibility that term *packet* may be interpreted to include nonletters. After the Koons letter, the 1924 edition of the *Postal Laws and Regulations*, the first edition since 1913, declared that *packet* referred only to a packet of letters.[416]

In later published opinions, Lamar focused on the *purpose* for transmission to determine whether documents were "letters" within the scope of the postal monopoly. On October 13, 1916, Lamar ruled that the postal monopoly prohibited daily private carriage of insurance documents transmitted in bulk shipments averaging twelve pounds. He held such shipments were "letters" because they were transmitted "for the purpose of detecting any discrepancies that may exist in rates, form, or details."[417] In 1918, Lamar held that "carbon copies" of business documents were "letters" if sent "not merely for filing purposes but for [the addressee's] information and perhaps, where necessary, attention. So far as the [recipient] is concerned, therefore, these letters constitute communications."[418]

At the same time, some of Lamar's unpublished opinions suggest a more limited view of the postal monopoly. On March 6, 1917, Lamar's assistant, J. J. Southernland, replied to an

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[415] Letter from J.C. Koons, Acting Postmaster General, to Halver Steenerson, Chairman, House Comm. on Post Office and Post Roads (Aug. 18, 1919), in National Archives (POD), Entry 36 (emphasis added).

[416] 1924 *Postal Laws and Regulations* § 1256 ("The term 'packet' as used in this and following statutes means a packet of letters: therefore, the Government monopoly does not extend to all matter admitted to the mails, but only to letters.").

[417] 6 Op. Sol. P.O.D. 457 (1916).

[418] 6 Op. Sol. P.O.D. 606 (1918).

inquiry from a postmaster about documents of the California State Life Insurance Company. Southernland wrote "when unaccompanied by any other matter in the nature of personal correspondence the insurance policies referred to may be transmitted by private express."[419] Southernland cites as authority the earlier opinions of Assistant Attorneys General finding that neither "certificates of tax sales" nor "old letters" are "letters."[420] On March 16, 1917, in a letter to another postmaster, Lamar made a similar declaration with respect to "commercial papers such as insurance policies and abstracts" citing the same authorities.[421] On July 20, 1917, Lamar was asked whether the postal monopoly covered some documents of an insurance company including a card on which was recorded in writing the name, number, and amount, apparently of an insured party. Lamar replied, "the Department does not claim a monopoly with respect to the transmission of commercial papers."[422] On December 6, 1917, Lamar ruled that subscription orders, once acted upon, could be shipped to another location by private express "for filing or record purposes."[423] It is not known who decided which of Lamar's opinions would be published and which would not.

Lamar's published opinions comprise substantially all of the legal reasoning presented by Solicitors of the Post Office in support of the broad interpretation of the postal monopoly law adopted after 1916. In July 1921, Solicitor John H. Edwards, referred to the *Chicago Board of Underwriters* opinion to support a definition of the term *letters* as "live communications."[424] In 1924, Solicitor Edgar E. Blessing ruled that shipments of "proof of loss" files by an insurance companies were *letters* "where the matter transmitted conveys intelligence or information between the writer and the recipient, upon which the recipient may rely, act, or refrain from

[419] Letter from J. J. Southernland, Acting Solicitor, to Postmaster, San Francisco, California (Mar. 8, 1917) in National Archives (POD), Entry 36.

[420] 2 Op. Sol. P.O.D. 2 (1885) (No. 438) and 3 Op. Sol. P.O.D. 211 (1898) (No. 1141), respectively.

[421] Letter from W.H. Lamar, Solicitor, to Postmaster, Le Mars, Iowa (Mar. 17, 1917) in National Archives (POD), Entry 36.

[422] Letter from W.H. Lamar, Solicitor, to Postmaster, Hartford, Connecticut (Jul. 20, 1917) in National Archives (POD), Entry 36.

[423] Letter from W.H. Lamar, Solicitor, to Postmaster, New York, New York (Dec. 6, 1917) in National Archives (POD), Entry 36.

[424] 7 Op. Sol. P.O.D. 131 (1921).

acting, the matter answers the definition of 'letter.'"[425] While Solicitor Blessing gave no source for this definition of letter, his conceptual analysis seems derived from Lamar. In 1929, Solicitor Horace J. Donnelly cited Lamar's *Erie Employee's Relief Association* opinion to support a claim of monopoly over the transportation of bulk shipments of "Hollerith cards"—cards with punched holes used to enter data into a computer, later known as "IBM cards"—noting such cards would be considered either third or fourth class matter depending on weight.[426] In 1934, Solicitor Karl Crowley held, also without citation, that various records, reports, ledger sheets, and files were "letters" because they conveyed "live, current intelligence upon which the addressee acts, relies, or refrains from acting."

After about 1929, almost all opinions by Post Office Solicitors omit legal authorities in defining the scope of the postal monopoly.[427] Typically, these opinions declare that a "letter" is a "live communication" or "live, current intelligence" or information upon which the addressee may "rely, act, or refrain from acting" and then rule whether the item under consideration is or is not a "letter." At the same time, notwithstanding this broad definition of "letter," Solicitors continued to hold certain types of communications not to be "letters," including checks, insurance policies, legal documents, official records, maps and drawings, newspaper copy, and telegrams.[428]

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[425] 7 Op. Sol. P.O.D. 496, 498 (1924). Other opinions that implicitly follow Lamar's approach include 7 Op. Sol. P.O.D. 391 (1923) (closely following the analysis in the Chicago Board of Underwriters opinion and holding "freight bills" are not letters because the are not "being sent for the purpose of communications"); 7 Op. Sol. P.O.D. 500 (1924) (no monopoly over carbon copies "which no longer possess the quality of a present communication"); 8 Op. Sol. P.O.D. 128 (1931) ("transit records" are "letters" because they "convey information").

[426] 7 Op. Sol. P.O.D. 699 (1929). Solicitor Donnelly also updated the analysis of the railroad union circular opinion by citing mail classification statutes after 1916 in order to support a broad construction of the 1872 monopoly. Finally, Mr. Donnelly cites his own, unsupported opinion letter, claiming a monopoly over carriage of "cards punched to give certain information." 7 Op. Sol. P.O.D. 622 (1927).

[427] An exception is 8 Op. Sol. P.O.D. 500 (1935) in which Solicitor Karl Crowley provides a laundry list of definitions of "letter" culled from pre-1872 postal monopoly cases, obscenity cases, lottery cases, dictionary definitions, and Assistant Attorney General opinions. While the list seems to be derived from the approach of Lamar, Crowley does not use these sources to justify a particular legal conclusion in the manner of Lamar.

[428] *See, e.g.,* 7 Op. Sol. P.O.D. 391 (1923) ("freight bills"); 7 Op. Sol. P.O.D. 499 (1924) (correspondence sent "for filing or storage"); 7 Op. Sol. P.O.D. 622 (1927) (maps, cancelled checks); 8 Op. Sol. P.O.D. 137 (1931) (checks sent "for payment or collection"); 8 Op. Sol. P.O.D. 200 (1932) (files sent for "statistical purposes"); 8 Op. Sol. P.O.D. 341 (1934) (summary of sales sent "for auditing") 8 Op. Sol. P.O.D. 409 (1935) (2d opinion) (examination on penmanship, drafting, or mathematics); 8 Op. Sol. P.O.D. 425 (1935) ("catalogs, ordinary handbills, and circulars advertising the goods of a concern"); 8 Op. Sol. P.O.D. 447 (1935) ("meter books and charts . . . sent solely for the purpose of having customers' statements prepared therefrom"); 8 Op. Sol. P.O.D. 462 (1935)

8.3 Development of Administrative Authority: Solicitor Karl Crowley, 1933–38

Karl A. Crowley from Texas was appointed Solicitor of the Post Office Department on April 21, 1933, by President Franklin Roosevelt's Postmaster General, James A. Farley. Crowley served as Solicitor until October 1938. His service coincided with the Great Depression and a major increase in first class mail rates in 1932. First class mail dropped 37 percent from 1930 to 1933, and total mail was down 29 percent.[429] Total mail volume did not exceed the 1929 level (28.0 billion) level until 1941 (29.2 billion). At the same time, the Post Office was challenged by competition in local delivery markets. Utilities, department stores, and other companies turned to telegraph companies and messenger services—and their own under-utilized employees—to deliver statements of accounts, circulars, bills, or other matter. Under Crowley's leadership, the office of the Office of the Solicitor adopted a more public and authoritative stance in defending the postal monopoly.

Prior to the 1930s, legal opinions issued by the Solicitor were rarely addressed to the members of the public or cited as legal authority. In 1916, in the Chicago Board of Underwriters case, Solicitor Lamar told to the postmaster "please advise counsel for the clearing house that this office may give opinions and advice only to the Postmaster General and officers of the Postal Service upon questions of law arising from the service and is precluded by regulation from giving opinions or advice to the public generally."[430] In 1922, Solicitor Donnelly wrote a mailer that "this office may give opinions and advice only to the Postmaster General and officers of the Postal Service."[431] On several occasions, the Solicitor declared that the postal monopoly "being a penal statute, an authoritative construction cannot be furnished by this department and this must be regarded merely as an exposition of the Department’s attitude with respect to the

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(insurance policy); 8 Op. Sol. P.O.D. 469 (1935) (manuscript intended for publication and "mere news matter"); 8 Op. Sol. P.O.D. 618 (1936) (measurements and specifications, illustrated by diagrams").

[429] Carter et al., *Historical Statistics of the United States*, Tables Dg189, Dg192.

[430] 6 Op. Sol. P.O.D. 373, 382 (Mar. 10, 1916). Notwithstanding this statement, Lamar addressed the followup opinion to the attorney for the Chicago Board of Underwrites, 6 Op. Sol. P.O.D. 403 (May 22, 1916). This seems to be the first occasion in which a published Solicitor's opinion was directed to a mailer.

[431] 7 Op. Sol. P.O.D. 349, 350 (1922) (2d opinion). Notwithstanding this statement, Donnelly directed one legal opinion to the attorney for railroad. 8 Op. Sol. P.O.D. 188 (1932). In 7 Op. Sol. P.O.D. 360 (1922), Solicitor John H. Edwards also advised the attorney for a railroad. The four opinions listed in this note and the previous note appear to be the only published opinions directed to mailers prior to Solicitor Crowley's tenure.

subject of your inquiry."[432] Opinions of the Solicitor achieved the status of regulation only in the limited sense of being included in explanatory notes in the *Postal Laws and Regulations*.

Under Crowley, the Office of the Solicitor began to dispense legal advice to the general public. In July 1934, Office of the Solicitor published a pamphlet on the scope of the postal monopoly for public consumption called *The Private Express Statutes*. This pamphlet was less than twenty pages in length and included no legal citations. In addition to reproducing the text of the postal monopoly laws, it presented an interpretation of the postal monopoly reflected in court opinions and Solicitor's legal opinions most supportive of the monopoly. For example, the 1934 edition of *The Private Express Statutes* opens with a section entitled, "What are Letters" that proceeds as follows:

> I. What are "Letters"
>
> Where matter in fact constitutes a message from the sender to the addressee for the purpose of informing the addressee concerning any particular transaction or transactions, such message is a "letter" within the meaning of the private express statutes. Thus, the substance and not the form is determinative. Whether the message is sent in English, in a foreign language, by code, or by system of checking from a list of printed statements, or punching holes, or point print, or raised characters used by the blind, the message is construed to be a "letter."
>
> A "'letter" is a message, notice, or other expression of thought sent by one person to another. It is just as much a letter if sent in an envelope from one to another unsealed as if sealed, or whether in an envelope at all, if it is directed as a letter.
>
> If the matter conveys live, individual current information between the sender and the addressee, upon which the latter may act, rely or refrain from acting, such matter is a "letter" within the meaning of the private express statutes.
>
> While for some purposes a distinction is observed between letters and circulars, as respects postage payable, under the private express statutes the term "letters" has a broader significance and may embrace circulars. The term "circular" is defined to be a "printed letter" which, according to internal evidence, is being sent to several persons in identical terms. It is not unnecessary to

[432] 7 Op. Sol. P.O.D. 360, 362 (1922). *See* 4 Op. Sol. P.O.D. 300 (1906) (No. 1443) ("The question, however, is properly not one for determination by this office, as it depends upon the interpretation of the penal statutes. Its character should be submitted to the United States Attorney").

> constitute a letter that it is written.
>
> The classification of mail matter as matter of the first, second, third, or fourth classes has no bearing upon question whether such matter falls within the category of letters as that term is used in the private express statutes. Whether a given specimen is a letter within the meaning of these statutes is determinable only after an examination of same in light of the sender's reason for forwarding it and the use proposed to be made by the addressee of the information contained therein.[433]

The Private Express Statutes was revised and republished in 1937 and 1940.

In a second publication, also issued in 1934, Solicitor Crowley initiated the practice of citing opinions of the Assistant Attorneys General and Solicitors as legal authority. In September 1934, the Post Office published a third volume of the *Digest of Decisions of United States and Other Courts Affecting the Post Office Department and the Postal Service.*[434] In this volume, the section on the private express was rewritten to include "decisions" of the Solicitor. In 1939, a final, revised and updated, version of the *Digest* was published.[435]

Solicitor Crowley also expanded use of the official legal opinion as a means of defending the postal monopoly. Between April 1933 and January 1936, Crowley issued 53 published legal opinions on the postal monopoly statutes, far more than another other Solicitor. Twelve of these opinions were addressed to mailers. All were published in 1936 in Volume 8 of the *Official Opinions of the Solicitor*. Few of these opinions included legal reasoning or citations. Typically, these opinions state a general rule— such as, "The question of whether or not a meter book is a 'letter' within the meaning of the private express statutes depends upon the purpose of forwarding and the use or action taken upon it by the addressee"[436]—and then declare whether or not the item in question is covered or not covered by the postal monopoly statute.

In addition to transforming the Office of the Solicitor into a more public and authoritative defender of the postal monopoly, Crowley also guided the Post Office's first requests for

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[433] The Private Express Statutes 3-4 (1934).

[434] *Digest of Decisions of United States and Other Courts Affecting the Post Office Department and the Postal Service,* Volume 3 (1934).

[435] *Postal Decisions of the United States and Other Courts Affecting the Post Office Department and the Postal Service* (1939).

[436] 8 Op. Sol. P.O.D. 447 (Apr. 10, 1935).

extension of the postal monopoly statutes since 1872. The Post Office sought to curb private delivery of system of accounts, circulars, and other matter in two ways. First, by restricting access to private mailboxes, the Post Office sought to limit opportunities for contract delivery by messenger companies and self-delivery by employees of utility companies. Second, by limiting the number of letters that could be carried under the special messenger exception and repealing the rule that a private express is illegal only if operating by "regular trips or at stated periods," the Post Office tried to restrict the business of irregularly scheduled competition. These statutory initiatives are described in the following sections.

8.4 Mailbox Monopoly Statute, 1934

In 1934 Congress adopted a mailbox monopoly statute which prohibits any person other the Postal Service from depositing mailable matter in private mailboxes. Although adopted during the tenure of Solicitor Crowley, the roots of this statute go back to the decline in mail volumes in first years of the Depression and the decision of Congress to increase in letter rates from 2¢ to 3¢ in 1932.

In his annual report in November 1930, Postmaster General Walter Brown noted the increasing gap between postal expenditures and revenues and urged Congress to increase letter postage. Brown reported that the Post Office had lost about $59 million (after allowance for extraordinary items) on revenues of about $7054 million. He then made a strong argument the Post Office should be self-sufficient and urged Congress to take advantage of the postal monopoly as the best means of raising revenues without driving business to competitors.

> *It is my judgment that the Post Office Department should conduct its strictly postal operations without financial loss*; that its rates of charge to the public should be so adjusted as to provide an income sufficient in the aggregate to pay the cost of all its strictly postal services. It is no more logical to expect the Government to transport and deliver private mail for less than cost than it would be to ask a telegraph or telephone company to furnish communication service at less than cost. I believe that there should be a revision of postal rates calculated to make the Postal Service self-sustaining so far as its strictly postal functions are concerned.
>
> The difficulty is to determine which rates should be increased. The Postal Service carries letter mail, newspapers, and other periodical publications, circular matter, and parcel post., all at different rates. It provides money-order service, collect-on-delivery

> service, and registry service, for which it charges varying fees. Obviously, Some of these rates or fees must be increased if the service as a whole is to be made self-supporting. In considering this question it must be remembered that *the Post Office Department has keen competition with respect. to all of its services except letter mail. Railroads, express companies, steamship lines, motor busses, and other common carriers and private conveyances afford facilities for the transportation of newspapers, magazines, circulars, printed advertising matter, and merchandise of every kind*. Banks, express companies, and telegraph companies offer easy means for the transfer of funds. A horizontal increase of postal rates and fees would unquestionably drive much of the present business to privately owned facilities, leaving the postal establishment with substantially the same organization, the same plant, and the same overhead but with a greatly diminished volume of business and revenue. Such an attempted remedy would, of course, increase rather than reduce the loss incurred in postal operations.
>
> *The only practical solution appears to be an increase in the rate on first·class mail,* where the Government has a monopoly and therefore would run no risk of driving business to competitors.[437]

Specifically, Brown urged Congress to increase rates for *non-local* letters from 2 cents to 2½ cents.[438]

While pondering the first rate increase in 50 years, Congress also considered several other provisions intended to enhance postal revenues. One was a House proposal to restrict access to residential letter boxes by anyone other the Post Office.[439] In debate, the Chairman of the House Committee on Post Office and Post Roads, James Mead of New York, implied that the proposed restriction was merely an extension of existing law with respect to the deposit of mailable matter in rural letter boxes.[440]

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[437] *Postmaster General Annual Report 1930* at 3.

[438] The next year, Brown suggested careful consideration for a 3-cent nonlocal letter rate. *Postmaster General Annual Report 1931* at viii.

[439] H.R. 9262, 72nd Cong., 1st Sess. (1932). The bill was introduced by Representative Glover H. Cary from Kentucky. 75 Cong. Rec. 3845 (Feb. 12, 1932). He did not speak during House consideration of the bill.

[440] 75 Cong. Rec. 5576 (Mar. 9, 1932) (remarks of Mr. Mead: "We have sufficient law now to prevent that practice on rural routes, and we aim to apply the law to city mail boxes").

The 1924 edition of the *Postal Laws and Regulations* ordered rural letter carriers to remove mailable matter from mailboxes if it was found without postage applied. The regulation provided:

> 3. Mail boxes erected on rural routes are intended exclusively for the reception of matter regularly in the mails, and any mailable matter, such as circulars, sale bills, etc., deposited therein is subject to the rules governing the mails, including proper addressing and payment of postage at the regular rate.
>
> 4. When a rural carrier finds deposited in a box mailable matter on which postage has not been paid, addressed to or intended for the person in whose box it is deposited, the carrier shall take such matter to the distributing post office to be held for postage an treated as prescribed by section 529.[441]

This administrative restriction on access to rural mailboxes was apparently first introduced in 1907 as part of a set of regulations prepared for the rural free delivery service under the authority of the Postmaster General. The *Postal Laws and Regulations* do not cite specific statutory authority for restricting access to the mailbox, and it seems evident that there was none. From context, it appears that the reason for this regulation was to simplify and regularize the work of the rural carrier, which included collection of money left in the mailbox and the application of postage to outgoing mail. Since rural free delivery was originally a discretionary service for which rural residents had to petition the Post Office, a rural resident would be unlikely to challenge this rule even if so inclined.

The House bill went much further than the Post Office's regulation on access to rural mailboxes. While the Post Office's rule required only payment of postage by the addressee, the House bill proposed to penalize the carrier by a fine up to $1000 and imprisonment of up to three years. The Postmaster General himself expressed concerns that House bill may encroach on the rights of householders to an unreasonable or illegal degree. He wrote the committee:

> The purpose of this bill is to curb the practice of depositing statements of account, circulars, sale bills, etc., in letter boxes or

[441] 1924 *Postal Laws and Regulations* § 733. The first version of this was apparently the similar section 120 in "The Rural Delivery Service: Instructions for the Guidance of Postmasters and Carriers in the Conduct of the Rural Postal Service" appended to "Rules and Regulations Governing the Post Office Department in Its Various Branches," S. Doc. No. 394, 59th Cong., 2d Sess. (1907). This was a supplement to 1902 *Postal Laws and Regulations*.

> other receptacles established (or the receipt or delivery of mail without payment of postage thereon, by making this a criminal offense.
>
> Much matter of this kind is of course now deposited in private mail boxes, thus depriving the Postal Service of considerable revenue which it would receive if the matter were sent through the mails.
>
> While the department is in sympathy with the objects of the bill, since it would probably bring in additional revenue of more than $4,000,000 a year, it is necessary to call attention to the questionable legality of such a measure. The mail receptacles involved are private property and under the control of the owners, some of whom doubtless are willing to receive therein, without postage, matter of the character covered by the bill.[442]

Nonetheless, in March 1932, the House Committee on Post Office and Post Roads was more favorably impressed with the prospect of gaining $ 4 million in additional revenues and recommended passage of the bill after reducing the penalty to a fine of up to $300. In the floor debate, Congressional sponsors assured nervous colleagues that the likely result of violating this provision would be not prosecution but only a demand for postage. On March 9, 1932, the House passed the bill.[443] The Senate committee, however, did not consider the bill, and it died with the expiration of the 72nd Congress in March 1933.

Meanwhile, in July 1932, as part of a general tax bill, Congress increased the rates for all letters, local as well as nonlocal, to 3 cents.[444] By November 1932, an alarmed Postmaster General Brown was reporting "a diminished use of the mails by utility companies, municipalities, department stores, and similar establishments in sending bills and other communications to local patrons who can conveniently be reached by private messenger." Brown urged Congress to return to a 2-cent rate for local letters.[445]

On June 16, 1933, Congress repealed the rate increase for local letters, citing concern for diversion of such mail to private messengers.[446] In his annual report in November 1933,

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[442] H.R. Rep. No. 747, 72d Cong. 1s Sess.(Mar. 8, 1932) at 2.

[443] 75 Cong. Rec. 5574-79 (Mar. 9, 1932).

[444] Revenue Act of 1932, ch. 209, § 1001, 47 Stat. 169, 285.

[445] *Postmaster General Annual Report 1932* at x.

[446] Act of Jun. 15, 1933, Ch. 96, § 3, 48 Stat. 254. *See* H.R. Rep. No. 45, 73d Cong., 1st Sess. (Apr. 18,

however, incoming Postmaster General James Farley did not report a positive response from re-introduction of the 2-cent local rate. Indeed, he suggested that the Depression was as much a factor in the loss of business as the rates:

> There can be no doubt that the interruption of this decline in 1933 was the direct result of the higher postage rate on letter mail which became effective at the beginning of the year. Unquestionably the increase in the rate drove considerable matter out of the mails altogether and diverted other matter to the cheaper classifications. Some business concerns turned to the use of post or postal cards in sending out statements and advertisements. *Public utility companies and department stores arranged for the delivery of bills by meter readers or other employees, but in these diversions the low wage scales generally prevailing and the desire of the companies to find ways to utilize their surplus employees were probably factors of no less importance than the increase in the postage rate.*[447]

On January 3, 1934, Farley ordered letter carriers to remove circulars, handbills, and the like from private mailboxes and to hold it at post offices until postage was paid.[448] The legality of this order was doubtful, however, and the Post Office urged Congress to enact legislation.[449] On February 13, 1934, the House Committee on Post Office and Post Roads favorably reported a bill to restrict access to mailboxes, H.R. 3845, that had languished in the committee for the past year.[450] The committee explained the purpose of the bill as follows:

> The purpose of this bill is to curb the practice of depositing statements of account, circulars, sale bills, etc., in letter boxes established and approved by the Postmaster General for the receipt or delivery of mail matter without payment of postage thereon, by making this a criminal offense.
>
> Business concerns, particularly utility companies, have within the last few years adopted the practice of having their circulars,

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1933) at 2.

[447] *Postmaster General Annual Report 1933* at ix (emphasis added).

[448] "Farley Bars Handbills From Private Mail Boxes," New York Times, Jan 3, 1934, p. 15. According to the story, "It was explained that post boxes in millions of home often have been so jammed with circulars that mail matter had to be left by postmen stuck in doors."

[449] 78 Cong. Rec. 2780 (Feb. 19, 1934) (remarks of Mr. Kelly: "there is grave doubt as to whether the Postmaster General's orders can be maintained without the passage of this act").

[450] H.R. 3845, 73d Cong., 1st Sess. (1933). The bill was introduced by Arthur Lemneck of New York. 77 Cong. Rec. 647 (Mar. 20, 1933). He did not speak during House consideration of the bill.

> statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the purpose of holding mail matter and approved by the Post Office Department for such purpose. *This practice is depriving the Post Office Department of considerable revenue on matter* which would otherwise go through the mails, and at the same time is resulting in the stuffing of letter boxes with extraneous matter.[451]

This bill was passed by the House and the Senate with virtually no debate[452] and signed by the President Franklin Roosevelt on May 7, 1934. The final act stated:

> Whoever shall knowingly or willfully deposit any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postmaster General for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon; or shall willfully aid or assist in any of the aforementioned offenses, shall for every such offense be punished by a fine of not more than $ 300.[453]

In sum, it appears clear that the purpose of the mailbox monopoly statute was to protect the revenues of the Post Office by inhibiting the ability of private companies to compete in the business of transporting and delivering " statements of accounts, circulars, sale bills, or other like matter" sent out by public utility companies, department stores, and other (primarily local) business concerns. Although the mailbox monopoly was portrayed by Congressional sponsors as similar to an earlier Post Office rule relating rural mailboxes, in fact it represented a substantially different and more restrictive approach. When the idea was first considered in 1932, it was not enthusiastically embraced by either the Post Office or Congress. However, in early 1934, in the face of a large decline in mail volume and the failure of lower rates to remedy the situation, a restriction on mailbox access was first adopted by the Post Office with doubtful legal authority and then quickly ratified by Congress without significant debate. It seems fair to surmise that, in adopting the mailbox monopoly, Congress was significantly influenced by the unusual economic and legislative developments of the period.

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[451] H.R. Rep. No. 709, 73d Cong., 2d Sess. (Feb. 13, 1934) (emphasis added). The Senate committee report is substantially the same. S. Rep. No. 742, 73d Cong., 2d Sess. (Apr. 17, 1934).

[452] 78 Cong. Rec. 2780 (Feb. 19, 1934, passed House); id. 7290 (Apr. 25, 1934, passed Senate). In each chamber, consideration occupies less than a half page in the Congressional Record.

[453] Act of May 7, 1934, ch. 220, § 2, 48 Stat. 667.

Development of the mailbox monopoly also raises questions about scope of the postal monopoly. In his 1930 annual report, Postmaster General Brown refers to widespread competition in the carriage of "newspapers, magazines, circulars, printed advertising matter, and merchandise of every kind." Congressional reports and Post Office documents refer repeatedly to private delivery of such documents. The final legislation explicitly denies private carriers access to the mailbox for delivery of "statements of accounts, circulars, sale bills, or other like matter" while pointedly stopping short of prohibiting outright the private carriage of such items. Yet, according to the legal opinions of Solicitor Lamar and his successors, the Post Office had, since at least the 1910s, interpreted the statutory monopoly over carriage of "letters and packets" to include a significant portion of the items being conveyed by the Post Office's competitors in the 1930s. Why did not the government not prosecute these competitors? Why did not Congressional supporters of the Post Office demand prosecution in order to protect postal revenues in a period of precipitous decline in mail volume? In a Congressional hearing on the postal appropriations bill for 1932, Postmaster General addressed these questions as follows:

> Mr. Brown. As you understand, we *have a monopoly only of first-class mail. That is the trouble*. If Congress gave the Post Office Department a monopoly of the first, second, third, and fourth classes, then we would get all of the business, but *we have a monopoly of only sealed-letter mail. We have to come into competition with every sort of carrier on everything else . . . .*
>
> [Rep.] Thatcher. You do not think that Congress could or would undertake to enact legislation to give the Post Office Department a monopoly on second and third class mail matter?
>
> Mr. Brown. No; I do not think that would be good public policy. . . .
>
> The Post Office Department has been set up primarily and essentially for the purpose of carrying first-class mail. That is what it is for. The Congress of the country believed that in carrying the private correspondence of the Government and individuals, the Government itself should have charge of the whole operation . . . .[454]

The testimony of Postmaster General Brown and the history of the development of the mailbox monopoly appear to call in question the extent to which the legal interpretations of the

[454] *Hearings on H.R. 14246, the Post Office Appropriation bill for 1932, before a Subcomm. of the House Comm. on Appropriations*, 71st Cong., 3d Sess., at 227-28, 230 (1930) (emphasis added).

postal monopoly embodied in the opinions of the Solicitor of the Post Office were in fact accepted by, or even known to, Congress and the general public. It must be kept in mind that the opinions of the Solicitor regarding the scope of the postal monopoly were not published until many years after they were rendered and were not tested in court.[455]

8.5 Limitation of Special Messenger Exception, 1934

On June 22, 1934, a month and a half after adopting the mailbox monopoly statute, Congress amended the special messenger exception to the postal monopoly statute to similar purpose. The gist of the amendment was to limit special messengers to carriage of no more than twenty-five letters per occasion.[456]

In the House, the Committee on the Post Office and Post Roads proposed to limit special messengers to the carriage of five letters.[457] The committee explained that the purpose of the bill was to increase the revenues of the Post Office:

> This provision of a law [permitting special messengers] enacted in Colonial days, and obviously without any conception of the present day development of the country is providing a loophole whereby the Government is annually losing hundreds of thousands of dollars in revenue which should be received by the Post Office Department.
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> Investigation by post-office inspectors discloses that private corporations, firms, and individuals are delivering for other private corporations, firms, and individuals great quantities of letters without payment of postage.[458]

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[455] The only postal monopoly cases between 1915 and 1970 appear to be United States v. Southern Pac. Co., 29 F.2d 433 (D. Ariz. 1928) (scope of the letters-of-the-carrier exception) and Goldman v. American Dealers Service, Inc. (2d Cir. 1943) (search and seizure authority of postal inspectors).

[456] Act of Jun. 22, 1934, ch. 716, 48 Stat. 1207. The legislative history of this act was as follows: H.R. 7670, 73d Cong., 2d Sess. 78 Cong. Rec.: *in House*, referred to committee, 1978 (Feb. 5, 1934), reported back, 7376 (Apr. 25, 1934) (H. Rept. No. 1328), debated, 8230 (May 2), amended and passed House, 8783-84 (May 14); *in Senate*, referred to committee, 8842 (May 15), reported back, 9554 (May 25) (S. Rept. No. 1171), passed Senate, 11265 (Jun. 13). Examined and signed in House, 11617 (Jun. 15), and Senate, 11811 (Jun. 15). Presented to President, 12258 (Jun. 16) and approved, 12454 (Jun. 18) (Pub. L. 455).

[457] H.R. 7679, 73d Cong., 2nd Sess. (1935). The bill was introduced by William Brunner of New York. 78 Cong. Rec. 1978 (Feb. 5, 1934). He did not speak during House consideration of the bill.

[458] H.R. Rept. No. 1328, 73d Cong., 2d Sess., at 1 (Apr. 25, 1934). The Senate report is less than a page but makes similar points. S. Rep. No. 1171, 73d Cong., 2d Sess., at 1 (May 10, 1934).

During the House debate, a manager of the bill, Representative D. C. Dobbins of Illinois answered a question whether the bill would interfere with the distribution of "handbills." Mr. Dobbins stated,

> This does not change the law as to what may be sent outside of mail matter. The limitation relates only to first-class mail. The telegraph companies and those who furnish messenger service have been coming and taking the cream out of the Postal Service by the inexpensive handling of local delivery letters, and the Post Office Department estimates that this deprives the Department of our hundred or five hundred thousand dollars of revenue a year.[459]

To satisfy some concerns that the bill would hinder small business, Dobbins amended the bill to raise limit on special messengers to 25 letters. As amended the bill was approved by the House on May 14. On June 13, the Senate approved with no debate. President Roosevelt signed the bill into law on June 22, 1934.

8.6 Proposal to Eliminate "Regular Trips or Stated Periods," 1935

The limitation on special messengers apparently was not as efficacious as the Post Office had hoped. Private delivery companies continued to delivery of large numbers of bills and statements. They argued such delivery services were not prohibited by the postal monopoly because they were not provided "by regular trips or at stated periods." If such delivery services did not come within the postal monopoly proscription, they were unaffected by a limitation on the special messenger exception. On July 9, 1935, the Post Office and Department of Justice asked Congress to delete the reference to service "by regular trips or at stated periods" in the all-purpose postal monopoly statute, section 181 of the Criminal Code of 1909. If amended in this manner, the postal monopoly law would prohibit all private express service, irregular as well as regular. The government also asked Congress to limit the special messenger exception to conveyance of 25 letters per day for each sender.

The proposal to expand the scope of the postal monopoly by striking the words "by regular trips or at stated periods" was approved by both houses of Congress but at different times. The House quickly approved the government's request. A bill was introduced on July 15,

[459] 78 Cong. Rec. 8230 (May 7, 1934).

reported on July 23, and approved on August 8, 1935, by a vote of 97 to 2.[460] The Senate committee, however, did not report the bill, and the 74th Congress adjourned in June 1936 without approving the measure. In the 75th Congress, in February 1937, a similar bill was introduced in the Senate and passed without debate in April, but it was never reported by the House committee.[461] The legislative record offers no explanation why this bill was never enacted.

The report of the Senate committee included a letter from Acting Postmaster General William Howes explaining the Post Office's support for measure. Howes first declared that there was "widespread delivery of letters without payment of postage thereon by telegraph companies." He then recounted the interpretation placed upon the words "by regular trips or at stated periods" by a telegraph company by quoting from a letter from management to its employees:

> To the extent that it involves the delivery of what is commonly called letters our messenger service is more and more coming under the scrutiny of the Post Office Department and its inspectors . . . our service is available to anyone at any time for the delivery of communications . . . if the customer uses our service for the delivery of letters . . . and desires to use it again . . . he may do so provided he specifically requests the service on each particular occasion as and when he requires it. If the individual applications of a patron should occur at regular intervals, it is possible the Post Office Department may claim that the law has been violated and demand payment of a fine or reimbursement to the extent of the amount of postage lost . . . Our position is that we stand ready to deliver communications on any particular occasion but we do not

[460] H.R. 8869, 74th Cong., 1st Sess. (1935). 79 Cong. Rec.: introduced and referred to House committee, 11197 (Jul. 15, 1935), reported by House committee, 11741 (Jul. 23, 1935) (H. Rept. No. 1613), debated, amended, and passed House, 12682-83 (Aug. 7); referred to Senate committee, 12716 (Aug. 8). In the House, the vote on passage was 97 yeas, 2 nays. The House committee held a hearing on July 23. *Conveyance of Letters by Special Messenger: Hearings on H.R. 8869 Before a Subcomm. of the House Comm. on the Post Office and Post Roads*, 74th Cong., 1st Sess. (1935). During the hearing, Post Office Solicitor W. E. Kelly was asked to give an example of a third class item that would be considered a "letter" within the scope of the postal monopoly. He answered, "A jeweler might put on a sale and multigraph some sort of personal invitation to come in and take advantage of it, they would type the person's name in, sign it personally, and put it in an envelope and type a particular address on the outside and then not seal it." *Id*. at 9. He also stated that Post Office interpreted "packet" to refer to a letter of four or more sheets.

[461] S. 1426, 75th Cong., 1st Sess., at 81 Cong. Rec.: introduced and referred to Senate committee, 957 (Feb. 8, 1937), reported by Senate committee, 2865 (Mar. 30) (S. Rept. No. 271), passed Senate, 3226 (Apr. 7) (no debate); referred to House committee, 3358 (Apr. 9).

> solicit or make arrangements for service by regular trips or at stated periods.[462]

Howes makes clear that the Post Office and Department of Justice supported legislative clarification because they felt the statute did not rule out such an interpretation, at least with sufficient clarity.

8.7 Expansion of the Stamped Envelope Exception, 1938

In March 1936, the Post Office asked Congress to extend the stamped envelope exception to permit private carriage of envelopes on which postage had been paid by means of postage stamps or metered indicia,[463] in addition to letters enclosed in government stamped, i.e., envelopes issued by the Post Office embossed with stamps.[464] Congress was apparently in no hurry to act on this proposal. Although a bill was introduced in April 1936, no action was taken in the 74th Congress. In April 1937, the bill was reintroduced in the 75th Congress.[465] On June 16, 1938, the final day of the 75th Congress, the bill was abruptly reported by the House committee, passed the House, reported by the Senate committee, and passed the Senate. There was no debate or amendment in either house.[466] President Franklin Roosevelt signed the bill into law on June 29, 1938.[467]

The 1938 act amended section 239 of the postal code of 1872 so that it read as follows:

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[462] S. Rep. No. 271, 75th Cong., 1st Sess. (Mar. 29, 1937) (quoting letter from Acting Postmaster General Hows dated Mar. 9, 1937) (omissions in original).

[463] *See* Letter from H. Branch, Acting Postmaster General, to Daniel Bell, Acting Director, Bureau of the Budget (Feb. 20, 1937), in National Archives (POD), Entry 2 (attached draft letter to Congress refers to an earlier letter of Mar. 21, 1939). The Post Office's bill was introduced in the 74th Cong., 2d Sess., as H.R. 12223 on Apr. 8, 1936, 80 Cong. Rec. 5219 (1936), but was not reported by the House committee.

[464] Solicitors for the Post Office had interpreted the exception to apply to government stamped envelopes only. 4 Op. Sol. P.O.D. 25 (1905) (No. 1365) (ship cannot carry letters with postage paid by adhesive stamps); 5 Op. Sol. P.O.D. 614 (1913) ("requires the use of 'stamped envelopes' and not 'postage stamps'"). *Contra* 8 Op. Sol. P.O.D. 395 (1935) (postage stamps may be used to add postage to government stamped envelope).

[465] H.R. 6168, 75th Cong., 1st Sess. (1837). 81 Cong. Rec.: introduced and referred to House committee, 3206 (Apr. 6, 1937).

[466] H.R. 6168, 75th Cong., 3d Sess. (1838). 83 Cong. Rec.: reported and passed House, 9665 (Jun. 16, 1938) (H. Rept. No. 2785); passed Senate, 9570 (Jun. 16); examined and signed in Senate, 9614 (Jun. 16), and House, 9699 (Jun. 16); presented to President, 9701 (Jun. 16), and approved, 9706 (Jun. 16). The Senate adopted the House bill rather than an identical bill, S. 4179, introduced in the Senate. 83 Cong. Rec. 9570 (1938).

[467] Act of Jun. 29, 1938, ch. 805, 52 Stat. 1231.

> All letters enclosed in stamped envelopes, if the postage-stamp is of a denomination sufficient to cover the postage that would be chargeable thereon if the same were sent by mail *envelopes with embossed postage thereon, or with postage stamp or stamps affixed thereto, by the sender, or with the metered indicia showing that the postage has been prepaid, if the postage thereon is of an amount sufficient to cover the postage that would be chargeable thereon if the same were sent by mail*, may be sent, conveyed, and delivered otherwise than by mail, provided such envelope shall be duly directed and properly sealed, so that the letter cannot be taken therefrom without defacing the envelope, and the date of the letter or of the transmission or receipt thereof shall be written or stamped upon the envelope, *and that where stamps are affixed they be canceled with ink by the sender*. But the Postmaster General may suspend the operation of this section *or any part thereof* upon any mail route where the public interest may require such suspension.[468]

The only significant statement of purpose is provided by House committee report. The bulk of the report is a copy of a letter from the Post Office requesting the amendment:

> The purpose of this measure is to liberalize the conditions under which letters may be transported out of the mails upon payment of proper postage.
>
> If letters be sent outside the mails . . ., they may be forwarded only in Government-stamped envelopes. This Department has received many communications from persons and concerns inquiring whether they may forward letters occasionally in commercial envelopes with the proper postage stamps affixed thereto, or with the metered indicia showing that the postage has been prepaid. Letter under the provisions of this section are usually carried outside the mails by truck and bus operators where time can be saved, in lieu of the delivery thereof through the mails. Especially is this true in small towns and communities, without direct rail connections. Also, many letters are forwarded under this section by banks along with a shipment of checks by express, or by merchants who send along a letter of advice or instructions, etc., with a shipment of merchandise by express.
>
> It is the view of the Department that section 239 of the act of June 8, 1872, should be amended so as to permit letters to be sent in envelopes with postage stamps affixed thereto or with the

[468] *Compare* Act of Jun. 29, 1938, ch. 805, 52 Stat. 1231, 1231-32 with Revised Statutes (1878) § 3993. Technically, it seems that the 1938 act should be stated as an amendment to the Revised Statutes rather than the 1872 act.

metered indicia showing that postage has been prepaid.[469]

In a three-sentence discussion of the Post Office proposal, the House committee summarized the proposal as one "to permit the sending of letters outside of the mails, but with the postage prepaid, in envelopes which are run through a metering machine, or in ordinary envelopes with stamps attached."[470] This sentence seems to summarize the purpose of this amendment. In sum, the amendment established three methods for paying postage on envelopes carried out of the mails where previously there had been only one method.

It must be noted that the Post Office proposal also added the words "or any part thereof" to the delineation of the Postmaster General's authority to suspend the stamped envelope exception, originally granted in 1864. As amended by the Post Office, the suspension provision read: "But the Postmaster General may suspend the operation of this section *or any part thereof* upon any mail route where the public interest may require such suspension." The Post Office letter did not specifically explain this element of its proposal. The obvious interpretation is that it would allow the Postmaster General flexibility to suspend one of the methods of paying postage—thus reapplying the postal monopoly—without suspending the others. For example, the Postmaster General might conclude that payment of postage by means of postage stamps was resulting in fraud due to reuse of stamps but that payment of postage other means did not present this risk. In the 1970s, the Postal Service adopted a wholly different interpretation of this phrase. The Postal Service argued that the phrase "or any part thereof" authorized the Postmaster General to suspend not a portion of the exception for stamped envelopes but the sender's obligation to pay postage on letters carried out of the mail. In other words, the phrase "or any part of" language allowed the Postal Service to create wholly new exceptions to the postal monopoly. The legislative history of this amendment does not seem to support this interpretation.

8.8 From Pamphlets to the Postal Monopoly Regulations of 1954

The *Code of Federal Regulations* was an outgrowth of the proliferation of federal agencies during the 1930s. The first edition of the C.F.R. appeared in 1938. The postal service was the subject of title 39. Part 19 addressed the transportation of mail. It included a short

[469] H.R. Rep. No. 2785, 75th Cong., 3d Sess., at 1 (Jun. 16, 1938).

[470] *Id*. at 2.

section on the postal monopoly aimed primarily at the carriage of letters by common carriers such as railroads and cited the 1932 *Postal Laws and Regulations* as well as the postal monopoly statutes as authority.

> *Section 19.1 Letters delivered to post offices in bulk by freight, express.* Postmasters may accept for mailing letters delivered to them in bulk by freight, express, mail, or messenger: Provided, each of such letters bears the return card of a person or firm located within the delivery limits of their offices: And provided further, That each of such letters is duly directed and properly sealed and bears the proper postage, which should be purchased at the office of mailing.[††] (R.S. 3982, sec. 1, 20 Stat. 356, sec. 181, 35 Stat. 1123; 18 U.S.C. 304) [Sec. 1710].
>
> [††] The source of §§ 19.1 to 19.4, inclusive, (except for amendments noted in the text,) is Postal Laws and Regulations, Postmaster General, 1932.
>
> *19.2 Letters which may be carried by common carriers outside mail.* (a) A railroad or steamboat company or other common carrier may carry outside of the mails letters written and sent by its officers and agents which relate to its business only, without inclosing the same in stamped envelopes. Such letters may be to other of such carriers' officers and agents, to those of connecting lines, or to anyone else, so long as no other carrier intervenes.
>
> (b) Letters of a company or carrier addressed to officers or agents of a connecting line on business relating to such company or carrier and delivered to an agent of the latter at the point of connection may be carried, and such carriage continued by the connecting company or carrier.
>
> (c) Letters written by a railroad company and addressed to the manager of an eating house operated by such company, or written by him and addressed to the company, may be carried.
>
> (d) No company or carrier, or any officer or employee thereof, may carry outside of the mails letters which are neither written by the company or carrier nor addressed to it. The fact that letters' relate to through business over the lines of all companies or carriers transporting the same shall not warrant a company in carrying such letters from one of its connecting lines to another.
>
> (e) Where companies or corporations operating railroads are united as a system of railways, the right to carry letters outside of the mail without payment of postage shall remain as an appurtenant of the individual companies or corporations composing the system, and shall not by reason of the union into a

> system become the right of the system. (R.S. 3985, sec. 184, 35 Stat. 1124; 18 U.S.C. 307) [Sec. 1715][471]

In the second edition of the C.F.R., published in 1949, the entire 1948 edition of the Postal Laws and Regulations was reprinted as title 39. Regulations relating to the postal monopoly appeared as section 91. As in previous editions of the *Postal Laws and Regulations*, the postal monopoly regulations of the 1949 edition of C.F.R. consisted of a repetition of statutory provisions. The only significant additional explanatory text was the following:

> Note: The Congress, under authority of the Constitution (sec. 1), has vested in the Post Office Department an absolute monopoly of the transportation of letters and packets by regular trips or at stated periods over all post routes. The above proviso and section make certain exceptions to the general statute. The term "packet" now has only historical significance. At one time a correspondence limited to a single sheet was called a single letter; two sheets a double letter; and three sheets a triple letter. All such communications composed of four or more sheets were called a packet. (Williams v. Wells Fargo &, Co. Express, 177 Fed. 352.) The Government monopoly does not extend to all matter admitted to the mails but only to letters. Letter- carrier routes are post routes.[472]

In January 1952, Solicitor Roy Frank published a fourth edition of the postal monopoly pamphlet, *The Private Express Statutes*, this time retitled *Restrictions on Transportation of Letters*. Although *Restrictions on Transportation* followed the conceptual approach of earlier editions, the style was more formal and authoritative. The text now included citations to case law and Solicitors's opinions drawn from the last edition of the *Digest*. As revised, the opening text read as follows:

> A. GENERAL STATEMENT
>
> *Sec. 1. In General*. The intent of The Private Express Statutes is to confer a monopoly, with stated exceptions, on the Post Office Department over the transportation of letters for others. This monopoly was created prior to the adoption of the Constitution and has existed with varying provisions continuously in the United States from that time to the present. The types of matter which are subject to the monopoly are discussed in sections

[471] 39 C.F.R. §§ 19.1-19.2 (1938).

[472] 39 C.F.R. § 91.1(b) (1949).

> 2 through 13 of this pamphlet. The types of transportation which are covered by the statutes are discussed in sections 14 and 15. Exceptions to the monopoly are discussed in sections 16 through 23. Sections 24 through 28 embrace miscellaneous problems related to The Private Express Statutes.
>
> B. MATTER SUBJECT TO THE MONOPOLY
>
> *Sec. 2. Letters and Packets*. The Private Express Statues, by their terms, apply both to letters and to packets. The word "packets" now has only historical significance. "Packet" as used in The Private Express Statutes means either a letter consisting of several sheets of paper or as two or more letters under one cover. As used in The Private Express Statutes, the word "packet" does not include a parcel or bundle of merchandise. For practical purposes, therefore, the Government monopoly may be said to extend only to "letters."
>
> *Sec. 3. Letters in General.* A "letter" is generally defined as a message in writing and may be written in English, in a foreign language, or in a code. To be written it need not be in handwriting but may be written by a system of checking from a list of printed statements, or punching holes, or by point print, or in raised characters used by the blind. A letter may be in a sealed envelope, in an unsealed envelope, or not in an envelope at all. However, a writing is not a leter [sic] unless addressed to or intended for some particular person or concern. In addition to communications of a purely personal nature, the word "letter" includes any matter conveying live, current information between the sender and the addressee. If the sender expects or intends the addressee to act, rely, or refrain from acting on the information, the information is live and current. While a distinction is observed for other purposes between letters and circulars, the term "letters" under The Private Express Statutes may embrace circulars inasmuch as the term "circular" is defined to be a printed letter which, according to internal evidence, is being sent to several persons in identical terms.[473] The fifth and final edition of this publication was issued in 1967 and known to many as "Publication 111."[474]

On December 1, 1954, the Post Office announced a complete revision of its regulations.[475] Regulations relating to the postal monopoly became Part 42. For the first time, the

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[473] Post Office Department, *Restrictions on the Transportation of Letters: The Private Express Statutes and Interpretations* (4th ed. 1955).

[474] Post Office Department, *Restrictions on Transportation of Letters: The Private Express Statutes and Interpretations* (5th ed., 1967) (Publication 111).

[475] 19 Fed. Reg. 7765 (Dec. 1, 1954).

postal monopoly regulations departed from a simple repetition of statutory text. Instead, the new regulations closely followed the broad, normative interpretation of the postal monopoly statutes reflected in *Restrictions on Transportation of Letter.* For example, sections 42.1 and 42.2 declare positively what is and is not a "letter"

> §42.1 *Postal service monopoly*. The Post Office Department has a monopoly over the transportation of letters for others over post routes. This monopoly was created prior to the Constitution and has existed, with varying provisions, continuously from that time to the present. This subchapter defines the types of matters which constitute letters and hence which are subject to the monopoly. It sets forth the types of transportation covered under the monopoly. It also prescribes exceptions to the monopoly.
>
> § 42.2 *What are letters—(a) Definition of letters*. (1) A letter is a message in writing and may be written in any language, or in code. It need not be in handwriting but may be written by a system of checking from a list of printed statements or punching holes or by point print or in raised characters used by the blind.
>
> (2) For purposes of the exercise of the postal monopoly, the term letters may include circulars, as the term circular is defined to be a printed letter which is being sent to several persons in identical terms. . . .
>
> (4) In addition to communications of a purely personal nature, the word letter includes any matter conveying live, current information between sender and the addressee. If the sender expects or intends the addressee to act, rely or refrain from acting on the information, the information is live and current. . . .
>
> (b) *Rulings on letters*. The examples set forth in this part do not comprise every type of matter which would fall either within or without the scope of the letters covered by the Postal monopoly. The sender or carrier of a matter who has any doubt as to whether such matter is or is not a letter may obtain, upon request, a specific ruling from the Solicitor of the Post Office Department.[476]

It appears open to question whether the 1954 postal monopoly regulations were consistent the Post Office's regulatory authority. The Post Office's historic position was that the postal monopoly statutes were penal laws which could not be authoritatively construed by the Post Office.[477] In promulgating new regulations, in addition to the postal monopoly statutes

[476] 19 Fed. Reg. 7765, 7801 (Dec. 1, 1954), *codified at* 39 C.F.R. §§ 42.1-42.2 (1955).

[477] 7 Op. Sol. P.O.D. 360, 362 (1922)

themselves, the Post Office relied to two general provisions as a legal basis for the regulations. Section § 161 of the Revised Statutes authorized the head of every government department "to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers the clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."[478] Section 396 of the Revised Statutes stated that, "It shall be the duty of the Postmaster General: . . . To superintend generally the business of the department, and execute all laws relative to the postal service."[479] It both cases, the authority of the Postmaster General seems to be limited to that needed to govern the Post Office Department. These provisions do not seem to undercut the conclusions of earlier postal lawyers that the Post Office lacks authority to administer the criminal provisions establishing the postal monopoly.

The 1955 postal monopoly regulations were modified only in minor respects prior to enactment of the Postal Reorganization Act of 1970. In 1958, the Post Office deleted examples of checks and draft that were interpreted to be letters and the description of checks and drafts not interpreted to be letters was revised.[480] In 1966, Part 42 was renumbered as Part 152.[481] In 1968, the description of bills and statements of account interpreted to be letters was revised.[482] Also in 1968, the requirements for payment of postage on mail forwarded by express after transportation by the Post Office were revised.[483]

Remarkably, in December 1970, after enactment of the Postal Reorganization Act but before establishment of the Postal Service, the Post Office seemed to confirm that the postal monopoly regulations and the postal monopoly pamphlets had become virtually substitutable. In a revised version of its regulations, the Post Office withdrew the postal monopoly regulations and declared as follows:

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[478] Revised Statutes (1878) § 161, *codified at* 5 U.S.C. § 22 (1952).

[479] Revised Statutes (1878) § 396, *codified at* 5 U.S.C. § 369 (1952).

[480] 23 Fed. Reg. 2423 (Apr. 15, 1958).

[481] 31 Fed. Reg. 15530 (Dec. 8, 1966). Thus, the postal monopoly regulations became 39 C.F.R. § 152.1-2.3 (1967). In 1961, the address of the office in the Post Office to which postal monopoly inquiries should be directed was changed. 26 Fed. Reg. 12125 (Dec. 19, 1961).

[482] 33 Fed. Reg. 17243 (Nov. 21, 1968).

[483] 33 Fed. Reg. 18237 (Dec. 7, 1968).

> The Postal Service has a monopoly over the transportation of letters for others over post routes. For detailed information, information, refer to Publication 111, Restrictions on Transportation of Letters. A sender or carrier of matter who has any doubt as to whether such matter is or is not a letter may obtain on request a specific ruling from the General Counsel of the Postal Service. Address inquiries to the Assistant General Counsel, Opinions Division.[484]

An introductory note stated that the former Part 152 was one of several parts that "are removed from the Code of Federal Regulations and are retained in force as uncodified regulations of the Post Office Department."[485]

8.9 Postal Code of 1960 and Rulemaking Authority

In 1960, the 86th Congress codified the postal laws as Title 39 of the United States Code.[486] This was the first codification of the postal laws since the postal code of 1872, reenacted in 1874 as title 9 and 46 of the Revised Statutes. Provisions of the postal monopoly statutes in the Revised Statutes that were not moved to the criminal code in 1909 were codified as chapter 9 of the postal code of 1960. Chapter 9 of the 1960 code was renumbered but otherwise reenacted without change as chapter 6 of the Postal Reorganization Act of 1970. See Table 10.

Table 10. Civil postal monopoly provisions: from Revised Statutes to current law

Revised Statutes 1874	Postal Code 1960	Postal Reorganization Act 1970
3987	902	602
3989	905	605
3990	904	604
3991	906	606
3993	901	601
4026	903	603

[484] 35 Fed. Reg. 19456 (Dec. 23, 1970).

[485] 35 Fed. Reg. 19399 (Dec. 23, 1970).

[486] Act of Sep. 2, 1960, Pub. L. 86-682, 74 Stat. 578.

The overall purpose of the 1960 codification was to restate pre-existing law without change. The House committee, which originated the bill, stated in its report:

> The object of the new title is to restate existing law, not to make new law. Consistently with the general plan of the United States Code, the pertinent provisions of law have been reworded and rearranged, subject to every precaution against making changes in the substance or disturbing existing rights, privileges, duties, or functions.
>
> *It is sometimes feared that mere changes in terminology and style will result in changes in substance* or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight were this the usual kind of amendatory legislation. . . . In a codification statute, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged.[487]

Nonetheless, the postal code of 1960 may have crucially expanded the rulemaking authority of the Post Office with respect to the postal monopoly statutes. In the new code, the general rulemaking authority of the Postmaster General was set out more broadly than in the Revised Statutes. Section 501(1) provides, "In addition to his other duties, the Postmaster General shall—(1) prescribe rules and regulations he deems necessary *to accomplish the objectives of this title*."[488] Historically, the postal monopoly statutes were intended to serve the "objectives of this title" since they were part of the postal code in 1872. It is at least arguable, therefore, that the 1960 postal code granted the Postmaster General rulemaking authority over the postal monopoly statutes that was not granted in the Revised Statutes. With respect to the rephrasing of the rulemaking power of the Postmaster General, the House committee report explained:

> Based on title 5, U. S. C., 1952 ed., §§ 22, 311a, 369 (R. S. 161, 396, Aug. 31, 1954, ch. 114 31, 68 Stat. 998. This section, paragraph (1), bring into title 39 the general authority given to all departments to prescribe regulations for the government of their departments (sec. 22 of title 5). Paragraph (1) is also based on the many sections of title 39, which authorize the Postmaster General to issue rules and regulations to implement acts of Congress. In each instance the authority to do so is omitted and the revision

[487] H.R. Rep. No. 36, 86th Cong., 1st Sess., at 3 (1959).

[488] Act of Sep. 2, 1960, § 501(1), Pub. L. 86-682, 74 Stat. 578, 580.

> notes indicate that this section, paragraph (1), is intended to convey authority to prescribe the regulations.[489]

In this report there appears to no specific indication that the consolidation of the diverse grants of rulemaking authority in the postal laws was intended to grant the Post Office new authority over the criminal postal monopoly statutes. In 1976, however, the court of appeals in the important *ATCMU* case[490] relied upon section 401(2) of the Postal Reorganization Act—the reenactment of section 501(1) of the 1960 code—in recognizing the Post Office's rulemaking authority over the postal monopoly.

8.10 NALC v. Independent Postal System, 1971

The first case in the twentieth century—indeed, apparently the first case ever—to turn on the meaning of the term *letter* as used in the postal monopoly statutes was *National Association of Letter Carriers v. Independent Postal Systems*.[491] In this case, in 1971, a federal district court, on application of a postal union, enjoined a private company from delivering bulk printed Christmas cards bearing no personal written message and distributed in unsealed envelopes. The court concluded that such cards were "letters" because "a letter within the meaning of the Governmental letter monopoly is a message in writing, printed or otherwise, in whole or in part, addressed to a particular person ro concern and may be in a sealed or unsealed envelope or not in an envelope at all."[492] The court's conclusion was based the 1970 postal monopoly regulations of Post Office Department, dictionary definitions, and brief definitions of the word "letter" culled from four cases (three from the nineteenth century). None of the four cases offered strong authority for the court's conclusion. In the only federal case cited, the court relied upon a lottery law decision that had been overruled sub silentio by the Supreme Court.[493]

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[489] H.R. Rep. No. 36, 86th Cong., 1st Sess., at A4 (1959).

[490] Associated Third Class Mail Users v. United States Postal Service, 600 F.2d 824 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 837 (1979). In coming to this conclusion, the court did not reexamine the history of the rulemaking provision of the 1960 postal code).This case is discussed in detail below.

[491] National Ass'n of Letter Carriers v. Independent Postal Systems, 336 F. Supp. 804 (W.D. Okla. 1971), *aff'd* 470 F. 2d 265 (10th Cir. 1972).

[492] National Ass'n of Letter Carriers v. Independent Postal Systems, 336 F. Supp. 804, 809 (W.D. Okla. 1971), *aff'd* 470 F. 2d 265 (10th Cir. 1972).

[493] Id. The four cases were as follows. In *United States v. Britton*, 17 F. 731 (D. Ohio 1883), the court had concluded that a "letter" was a "writing" within the meaning of a prohibition against the mailing of obscene

On review, the Tenth Circuit Court of Appeal upheld the district court's finding on the meaning of the term letter without discussion.[494]

8.11 Summary of the Evolution of Post Office Administration of the Monopoly

By the 1960s, the Post Office had grown into a universal national service that delivered letters, periodicals, advertisements, and parcels to every address in the nation, usually five or six days per week. The legal framework for the Post Office had been modified and enlarged but not fundamentally changed. Only in 1960 were the amendments to the postal law since 1872 collected into a new postal code.

Over this period, the fifteen postal monopoly provisions of the Revised Statutes were consolidated into thirteen provisions. Seven were included in the first criminal code, adopted in 1909, and reenacted in the second criminal code, Title 18 of the United States Code, adopted in 1948. Six of the postal monopoly statutes of Revised Statutes were incorporated into the codification of the postal laws in 1960. In the process, these provisions were reworded but not substantively changed. Only three relatively minor substantive changes were made in the postal monopoly statutes between the 1890s and 1960s. First, in 1909, Congress clarified the right of a company to carry letters relating to its "current business" (confirming an interpretation of prior law by the Attorney General). Second, in 1934 Congress limited to twenty-five the number of letters that a special messenger may carry out of the mail. Third, in 1938, Congress widened the exception from the postal monopoly for government stamped envelopes to include envelopes with postage stamps or metered indicia affixed and cancelled.

During this period, the most significant changes in the postal monopoly law were administrative in nature. In broad terms, the administrative position of the Post Office towards the postal monopoly statutes evolved in three phases.

"writings." On this point, however, the *Britton* court had been overruled sub silentio by the Supreme Court. *See* United States v. Chase, 135 U.S. 255 (1890); United States v. Wilson, 58 F. 769 (N.D. Cal. 1893). In addition, the court referred to two state cases construing the federal postal monopoly statutes: Dwight v. Brewster, 18 Mass. (1 Pick.) 50 (1822) and Chouteau v. Steamboat St. Anthony, 11 Mo. 226 (1847). In each case, the court concluded that bank notes are not within the scope of the "letter" monopoly; neither case considered whether printed matter such as advertisements was covered by the postal monopoly. Finally, the *NALC* court also referred to a state case not involving the postal monopoly, Buchwald v. Buchwald, 175 Md. 103, 199 A. 795 (1938).

[494] National Ass'n of Letter Carriers v. Independent Postal Systems, 470 F. 2d 265 (10th Cir. 1972).

The first phase was the development of a more expansive interpretation of the postal monopoly statutes. In 1890s, the Post Office interpreted the postal monopoly statutes broadly to curb the practice of railroads which routinely transported out of the mails large volumes of documents exchanged among different railroads and associated companies. Although the right of the railroads to transport a substantial portion of "railroad mail" was ultimately recognized by Congress and the courts, legal disputes with the railroads provided the initial basis for a broader definition of the crucial term "letter." In the 1910s, Post Office Solicitor William Lamar issued a series of opinions that set out a legal rationale for interpreting the "letter" monopoly to include transmission of all "live, current communications," an approach that he argued included all of first class mail and at least some third class mail. Opinions by later Solicitors applied Lamar's analysis to classify various types of items as in or out of the postal monopoly, usually without identifying any specific legal basis for doing so.

The second phase was the assumption by Solicitor Karl Crowley, during the Great Depression of the 1930s, of a capacity to expound upon the scope of the postal monopoly authoritatively. Previous Solicitors had taken the position that the Post Office could not interpret the postal monopoly statutes authoritatively since they were penal in nature and therefore administered by the Attorney General. In this view, the proper role of the Solicitor was to advise officers of the Post Office but not the general public. Faced with large declines in mail volume and rising competition, Solicitor Crowley published a pamphlet for the general public, *The Private Express Statutes*, that normatively described a broad interpretation of the postal monopoly statutes. He also claimed a broad monopoly for the Post Office in numerous legal opinions addressed directly to mailers, another innovation. Bolstering the authoritativeness of the Post Office's administration of the law, Solicitor Crowley began the practice of citing earlier Solicitors' opinions as legal authority for rulings on the scope of the postal monopoly.

The third phase was the transcription into federal regulations of the broad view of the postal monopoly statutes espoused in the postal monopoly pamphlets and selected Solicitors' opinions. Since early in the nineteenth century, Post Office regulations had provided little guidance on the postal monopoly beyond a repetition of Congressional statutes. However, in 1952 Solicitor Roy Frank gave the postal monopoly pamphlet a more formal style, added legal citations, and retitled the pamphlet, *Restrictions on the Transportation of Letters*. This revised pamphlet then served as the basis for regulations on the postal monopoly issued in 1954 as part

of a general revision of Post Office regulations. A revision of the rulemaking authority of the Postmaster General in the postal code of 1960 apparently strengthened, seemingly inadvertently, the Post Office's claim to legal authority to adopt substantive regulations defining the scope of the postal monopoly.

Thus, by the 1960s, the Post Office had assumed the authority to issue legally binding interpretations of the postal monopoly statutes by means of regulations and legal opinions. The Post Office's interpretation of the postal monopoly statutes was based on the premise that the term *letter* as used in the postal monopoly statutes included anything conveying live, current information between sender and the addressee. At the same time, the Post Office also interpreted the "letter" monopoly to exclude several types of items which conveyed live, current information including contracts, bonds and some other commercial papers, legal papers, governmental documents like birth certificates, catalogs, newspapers, books, drawings and maps, unaddressed circulars, and data used for the preparation of bills.

In retrospect, it appears possible for reasonable persons to question the soundness of the Post Office's elaboration of the postal monopoly statutes during this period. Solicitors' opinions grounded in questionable legal analysis were prepared with little transparency and then cited as legal authority years—often decades—after they were written, long after the possibility of meaningful judicial or congressional scrutiny. In this process, inconsistent Solicitors' opinions were largely ignored. Pamphlets that presented a simplified view of the postal monopoly to discourage competition in a time of economic emergency were ultimately promulgated as federal regulations. Although initially reluctant to rule authoritatively on the postal monopoly statutes because of their penal nature, Post Office lawyers gradually drifted from the Supreme Court's maxim that "where the charge is crime, it must have clear legislative basis."[495]

In 1973, the Postal Service would suggest that the administrative interpretation of the postal monopoly statutes that had evolved over this period "contains inconsistencies and is not easily understandable."[496]

[495] United States v. George, 228 U.S. 14, 22 (1913).

[496] 38 Fed. Reg. 17512 (Jul. 2, 1973).

9 Postal Reorganization and the Monopoly, 1970–1974

In 1970, the Postal Reorganization Act[497] revised the basic legal framework for national postal services for the first time the reforms of the last nineteenth century. The Post Office Department was replaced by an independent federal agency, the United States Postal Service, and enjoined to operate in a more business-like manner. A second independent federal agency, the Postal Rate Commission, was simultaneously established to regulate certain features of the national postal service, primarily the allocation of costs and relationships between rates.

The 1970 act did not modify either the postal monopoly statutes or the mailbox monopoly statute. Congress directed the Board of Governors of the Postal Service to review the need for the postal monopoly. In 1973, the Board of Governors concluded that prior regulations dealing with the postal monopoly should be replaced by a new set of more comprehensive regulations setting standards for permissible private carriage. The postal monopoly regulations of 1974 represented a fundamental departure from prior administration. In essence, the scope of the postal monopoly was untethered from its statutory mooring and defined administrative rule. The 1974 postal monopoly regulations remained in effect, with minor amendments, through enactment of the Postal Accountability and Enhancement Act in 2006.

9.1 Board of Governors Report, 1973

Section 7 of the Postal Reorganization Act required the Board of Governors to prepare a "complete study and thorough reevaluation" of the postal monopoly law as follows:

> The Congress finds that advances in communication technology, data processing, and the needs of mail users require a complete study and thorough reevaluation of the restrictions on the private carriage of letters and packets contained in chapter 6 of title 39, United States Code (as enacted by section 2 of this Act) [this chapter] and sections 1694-1696 of title 18, United States Code, and the regulations established and administered under these laws. The Board of Governors of the United States Postal Service shall submit to the President and the Congress within 2 years after the effective date of this section a report and recommendation for the modernization of these provisions of law, and such regulations and

[497] Postal Reorganization Act, Pub. L. 91-375, 84 Stat. 727. *See generally*, Tierney, *Postal Reorganization*.

administrative practices.[498]

On June 29, 1973, the Board of Governors submitted to Congress its report, *Restrictions on the Private Carriage of Mail*. The Board advised against changes in the postal monopoly statutes but recommended that postal monopoly regulations be revised "to make the applicability of the Private Express Statutes much more clear."[499] The body of the report was "deliberately brief," about ten and half double-spaced pages because, because, as the Board explained, "In our judgment, the case for retaining the existing restrictions on the private carriage of mail is so clear that we see no need for extensive elaboration."[500] A 185-page appendix included copies of the postal monopoly statutes, the most recent version of the Post Office's postal monopoly pamphlet (*Restrictions on Transportation of Letters*), proposed new postal monopoly regulations as well as short surveys of the history of the postal monopoly, monopoly laws in other countries, and the state of competition in the United States.

The Governors' report was seemingly first extended analysis of need for a postal monopoly offered by the national post office since the 1840s.[501] The following quotation reproduces virtually all of the substantive exposition in the report:

> The Postal Reorganization Act provided the most thorough-going change in the structure and powers of the postal establishment ever enacted by Congress. Nonetheless, the new Postal Service is still charged with the same basic mission: [quoting 39 U.S.C. § 101(a)]
>
> Except for limited periods of "local" rates around the times of the World Wars, the United States has had, since 1863, a basic postage rate for letter mail that has not varied with the distance traveled. This policy is continued in the Postal Reorganization Act: [quoting former 39 U.S.C. § 3623(d), now § 404(c)]
>
> *A prohibition on rates varying with distance creates competitive opportunities for skimming the cream* of those postal operations that are most attractive from a business standpoint. It

[498] Postal Reorganization Act of 1970, P.L. 91-375, § 7, 84 Stat. 719, 783.

[499] Postal Service, Board of Governors, *Restrictions on the Private Carriage of Mail*.

[500] Postal Service, Board of Governors, *Restrictions on the Private Carriage of Mail* 2.

[501] Reports of the Postmaster General and Congressional committees in the 1840s analyzed the need for a monopoly on the intercity transportation of mail. In its report, the Governors proposed regulations that would permit private express companies to provide intercity transportation of mail prior to posting, thus effectively limiting the postal monopoly to the delivery function. Postal Service, *Restrictions on the Private Carriage of Mail* 196.

would make little sense to allow letter mail competition without simultaneously authorizing variable rates on letters so that the Postal Service may compete equitably in the marketplace. But *uniform nationwide rates for letter mail should not be lightly discarded*. Rates varying with distance would be complicated and confusing for many citizens, would point to increases in regulatory red tape, and could lead to untoward political pressures for changes in zone limits and the like.

The law requires that the Postal Service serve all the nation [quoting 39 U.S.C. 101(b)].

This is a key requirement—perhaps the key requirement —if the Postal Service is to discharge its basic function to "provide prompt, reliable, and efficient service to patrons in all areas . . . and render postal service to all communities." This means that the Postal Service must serve those areas and customers for which operating costs are not recoverable under a uniform pricing policy. *If the Private Express Statutes were repealed, private enterprise, unlike the Postal Service, would be free to move into the most economically attractive markets* while avoiding markets that are less attractive from a business standpoint.

In addition, the Act contemplates that the Postal Service will become virtually self-sufficient and the Service is committed to achieving this self-sufficiency as soon as practicable. Without abandoning the policy of self-sufficiency and reintroducing massive subsidies, *it is hard to see how the Postal Service could meet rate and service objectives in the face of cream-skimming competition against its major product.* But abandonment of this policy would impose an unjustifiable burden of costs on the tax-paying public and might lead to the erosion of universal postal service.

We believe that the uniform rate and nationwide service requirements are sound. In addition, the self-sufficiency objective provides the discipline essential to more effective postal operations. Accordingly, the service and financial policies that are rightly embodied in the Postal Reorganization Act require the restrictions on private letter-mail carriage be maintained.

The service, rate, and financial policy provisions of the Postal Reorganization Act are not the only provisions of law supporting a continuation of the Statutes. Congress has used its authority, for example, *to insure the safety of the mails and to protect the public frm undesirable mail matter*. Constitutional provisions, reinforced by statue and regulation, establish the sanctity of letters "sealed against inspection." Both from a financial and an operating point of view, protecting the mails and the mailing public would be

> difficult if restrictions were relaxed. Under competition, *funds for Inspection Service enforcement of the postal laws might be severely limited* and made available strictly in accordance with a business justification, thus eliminating much of the service it provides to protect the general public. . . .
>
> *International mail reciprocity agreements would also suffer if the Statues were relaxed.* Foreign governments would have a problem of whether to deal with several, rather than one, originating mail suppliers. The Postal Service would remain under the obligation of delivering all incoming international mail with less than total compensation for outgoing first-class mail.
>
> The Postal Service has an immense value, both as a network through which the mailer can send material, secure in the knowledge that it will arrive at any destination he chooses, and as the presence of the United States Government in cities, towns and villages throughout the land. Retention of the Private Express restrictions is essential to this national system.[502]

In sum, the report concludes that the postal monopoly is justified by several considerations. The primary consideration is a legal requirement to maintain geographically uniform rates for letters. Without monopoly protection, the geographically uniform rate rule would led to cream-skimming competition that would make it impossible for the Postal Service to maintain nationwide service without a public subsidy. Subsequent events appear to raise questions about the primary justification for the postal monopoly posited by the Governors. In 1978, the Postal Rate Commission concluded that the postal law does not prohibit the Postal Service from introducing rates for letters that vary with distance.[503] Moreover, the Postal Service's interpretation of its "letter" monopoly extended well beyond the scope of the statutory rule relating to uniformity of rates for letters.

Other considerations supporting the postal monopoly cited by the Board of Governors include: (i) safety of the mail would be more difficult to ensure without the postal monopoly; (ii) funds for postal inspectors program would be limited; and (iii) foreign post offices would have a problem dealing with several U.S. carriers instead of a single Postal Service.

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[502] Postal Service, Board of Governors, *Restrictions on the Private Carriage of Mail* 3-8.

[503] Postal Rate Commission, Opinion and Recommended Decision, Docket R77-1 at 416-19 (1978). Although the Commission was addressing only rates for letters transported by express mail service, there is no evident basis for interpreting the same provision of law, now 39 U.S.C. § 404(c), differently if the letters are transported by first class mail services.

The economic justification for the postal monopoly statutes springing from the need to maintain geographically uniform rates for letters is detailed in Appendix F. Appendix F includes a paper explaining the economic theory justifying the postal monopoly and an economic analysis of the potential for cream-skimming by McKinsey and Company. In brief, the economic analysis[504] sought to demonstrate that the Postal Service is a natural monopoly that would be unable to prevent competition

> in either of two broad classes of cases: (i) where the dominant firm is not in a position to bring its cost advantage to bear with price reductions and (ii) where the products of the dominant firm and of some of its competitors appear sufficiently different to some buyers to reduce the effectiveness of any price reductions that the dominant firm may use.[505]

In its study,[506] McKinsey foresaw two types of private companies that could successfully compete against a Postal Service bound by a universal service/uniform rate requirement but not protected by a postal monopoly. The first "cream skimmer" could divert substantial traffic from the Postal Service by providing lower rates for bulk presorted mail from large business mailers. The second "cream skimmer" could divert substantial traffic from the Postal Service by providing collection, sorting, and transportation services for mail ultimately delivered by the Postal Service at a discount from the uniform rate.

9.2 Postal Monopoly Regulations of 1974

On June 29, 1973, the same day that the Board of Governors submitted its report on the postal monopoly statutes to Congress, the Postal Service formally proposed a complete revision of its postal monopoly regulations.[507] The proposed regulations were refined in a second notice of proposed rulemaking published on January 31, 1974 and adopted in final form on September 13, 1974, as parts 310, 320, and 959 of title 39, Code of Federal Regulations.[508] The three

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[504] Postal Service, Board of Governors, *Restrictions on the Private Carriage of Mail* Appendix F, 93-117. The author of the economic analysis is not identified, but it was apparently written by the staff of the Postal Service.

[505] Postal Service, Board of Governors, *Restrictions on the Private Carriage of Mail* 108-09.

[506] Postal Service, Board of Governors, *Restrictions on the Private Carriage of Mail* Appendix F-II, 119-183.

[507] 38 Fed. Reg. 17512 (Jul. 2, 1973).

[508] 39 Fed. Reg. 3968 (Jan. 31, 1974); 39 Fed. Reg. 33209 (Sep. 16, 1974).

rulemaking notices in 1973 and 1974 explain the legal rationale underlying the new postal monopoly regulations.

In the proposed regulations, the Postal Service adopted a new approach towards defining the scope of the postal monopoly. The Post Office Department had interpreted the postal monopoly statutes to create a monopoly over the carriage of "letters" but not over the carriage of other items. The basic scope of the monopoly was thus determined by the definition of the term *letters* as used in the postal monopoly laws. In the draft regulations, the Postal Service proposed to employ a more expansive interpretation of the statutory term *letter* than used by the Post Office Department and to "suspend" the monopoly for certain types of letters or carriage under certain circumstances. Ultimately, *letter* was defined to mean, "a message directed to a specific person or address and recorded in or on a tangible object" as further elaborated in several secondary definitions.[509] The Postal Service then proposed to "suspend" certain provisions of the monopoly for many items traditionally considered to be nonletters so they would be outside the scope of the postal monopoly restrictions. Under this new approach, the scope of the effective monopoly was determined by the bounds of administrative suspensions rather than by the definition of the term *letter*.

The preamble of the first notice began by explaining why a new interpretation of *letters* was necessary and appropriate:

> The body of precedents resulting from the administrative and judicial precedents contains inconsistencies and is not easily understandable. . . . *The [proposed] regulations establish a broad . . . definition of "letter" that continues the basic coverage of the Statutes as to messages transmitted in corporeal form. Although the definition of "letter" includes some new matter—most notably, checks—the proposed suspensions (Part 320), together with existing exceptions continue to maintain much of such matter outside the scope of the restrictions*. New matter is included within the scope of the restrictions only where analysis has indicated that

[509] 39 C.F.R. § 310.1(a) (2006).A *packet* is defined as a packet of letters, i.e., "two or more letters, under one cover or otherwise bound." 39 C.F.R. § 310.1(a)(5) (2006). The postal monopoly regulations changed little from 1974 to 2006, the year the Postal Accountability and Enhancement Act was adopted. For simplicity, this paper will refer to the postal monopoly regulations as they appear in the 2006 edition of title 39 of the Code of Federal Regulations unless it is necessary to refer to an earlier version to support an historical reference.

its exception was legally erroneous.[510]

The basis for the new interpretation of "letter" was declared to be a "traditional and objective standard" adopted "when the Statutes were first enacted." The term *letter*, the Postal Service declared, referred to "all means of corporeal message communication":

> The new definition of "letter" is based on a traditional and objective standard: a message sent to a specific address. When the Statutes were first enacted in the United States, *the definition of "letter" included all means of corporeal message communication then in use, and the present definition is intended to perform the same function*. Considerations, based on format, intent of the sender, utility to the addressee, and type of information conveyed are eliminated, because these requirements do not further the statutory purpose and they have given rise to administrative and interpretative problems.[511]

The first notice of proposed rulemaking conceded that the new interpretation of *letter* departed from earlier administrative interpretations. By equating the term *letter* to any addressed message, the new definition included within the scope of the monopoly matter previously considered to be "commercial papers." The notice of proposed regulations explained this extension in the definition of *letter* as follows:

> Examples of materials formerly determined not to be letters which are now included in the definitions are listed below. . . .
>
> (b) *Checks and other commercial papers*. These were declared not to be letters on the theory that they are evidence of rights of the holder rather than written messages. Such a theory is inconsistent with the original general definitions of "letter" because such documents are in fact messages, conveying information of several kinds. Since checks (and presumably other commercial papers) were held to be letters in that information "extraneous" to them appeared with or on them, interpretative problems have resulted. . . .
>
> (c) *Legal papers and documents*. These were declared not to be letters, apparently for reasons similar to those for commercial papers. . . .
>
> (e) *Matter sent for filing or storage*. The exclusion of this information was also based upon the "act, rely, or refrain from

[510] 38 Fed. Reg. 17512 (Jul. 2, 1973) (emphasis added).

[511] 38 Fed. Reg. 17513 (Jul. 2, 1973) (emphasis added).

> acting" language. The rationale for the exclusion was that there was no purpose of communication with the addressee when information was sent for filing or storage. The definition proved unworkable because it depended on a determination whether files being sent would ever be used again. It must be assumed that files not destroyed are kept because of an ultimate purpose of communication.[512]

The new definition of *letter* also expanded the concept to include all printed matter. In the second notice of proposed rulemaking, the Postal Service responded to skeptical commenters who maintained that certain types of printed matter, as well as checks, could not possibly be considered "letters":

> A number of comments indicated that checks, newspapers, and periodicals should be excepted from the definition of the word "letter." Yet checks are messages in writing, intended for particular persons or concerns; they convey live, current information between sender and addressee upon which the sender expects or intends the addressee to act, rely or refrain from acting. As such, checks clearly meet the tests that have been used in the past to determine whether particular matter constitutes letters. . . . Similarly, although to a lesser extent, newspapers and periodicals also meet the tests in past guidelines for determining what are letters. Moreover, from the point of view of the language, purposes, and legislative history of the Private Express Statutes, an exclusion—by administrative definition—of checks from the definition of "letters" seems unjustified and an exclusion of newspapers and periodicals seems of doubtful validity. Definitional exclusion would not, moreover, guarantee that a redefinition to eliminate the exclusion might not be attempted at a later time.[513]

The apparent effect of the administrative suspensions proposed in the new regulations was to permit private carriage.[514] The first and second notices of proposed rulemaking indicated that administrative suspensions were intended to replace definitional limits to the monopoly

[512] Id. The source for the Postal Service's statement that commercial papers "were declared not to be letters on theory that they are evidence of rights of the holder rather than written messages" is unknown.

[513] 39 Fed. Reg. 3968-69 (Jan. 31, 1974) (emphasis added).

[514] *See, e.g.,* 38 Fed. Reg. 17512 (Jul. 2, 1973) ("The suspensions are thus intended, in part, to continue preexisting practices; in the case of intra-company messages and certain data processing materials, *they will permit firms to contract with private firms* rather than utilize their own employees or the Postal Service, if that seems more efficient for them.") (emphasis added).

previously considered inherent in the meaning of the word *letter*.[515] In the first notice, the Postal Service proposed to suspend the monopoly for four types of items: urgent interoffice communications, urgent data processing materials, checks and financial instruments, and newspapers and periodicals. The second notice added suspensions for four additional categories of documents: legal papers such as abstracts of title, catalogs and telephone directories, identical letters sent by a printer, and files sent for storage.

The final notice eliminated the proposed suspension for intra-company matter and adopted the other seven suspensions. Of these, six—checks and financial instruments, newspapers and periodicals, legal papers such as abstracts of title, catalogs and telephone directories, identical letters sent by a printer, and files sent for storage—were moved from the explicit suspension section, part 320, to the definition section, part 310. This shift was explained in the following passage from the notice adopting the final rules:

> A number of comments reflected continuing objections to the proposed suspension of the statutory restrictions so as to provide for the private carriage of newspapers and periodicals. Similar comments raised the same point in respect to certain other mailable matter—principally checks. Although, as previously explained, the proposed suspensions may provide the firmest possible support for the conclusion that the matter in question (newspapers, periodicals, checks, certain legal papers, etc.) should be permitted carriage outside of the mails, *we have largely met the point of these objections* (i.e., that suspensions might be revoked in the future) *by relocating the provisions* permitting carriage of the matter in question, placing them in the definitional section of the regulations, § 310.1). However, *our suspension authority in 39 U.S.C. 601(b) has been relied upon to the extent it is required as a predicate for establishing these exceptions* to the prohibitions on the private carriage of letters.[516]

[515] Some commenters objected to substituting administrative suspensions for limits grounded in the meaning of statutory provisions. In the second notice of proposed rulemaking, the Postal Service responded that it regarded the meanings of statutory terms as less fixed than administrative suspensions: "A number of comments contained objections that our definition of 'letter' was overly broad. . . . The premise for this concern seems to be that exclusion based on administrative interpretation is more secure than exclusion by affirmative suspension. But the premise might prove flimsy. Interpretations are subject to revision and reversal—particularly where they are not firmly anchored to judicial case law. They represent especially weak reeds to lean on where they are little more than ipse dixit utterances that find scanty support in either the text or the legislative history of the Statutes being interpreted. In our view forthright suspensions provide firmer ground on which to rest the exclusions." 39 Fed. Reg. 3968 (Jan. 31, 1974).

[516] 39 Fed. Reg. 33209 (Sep. 16, 1974) (emphasis added). In the final rule, these six categories of items

Since relocating these provisions from one section of the regulations to another implied no substantive legal change, the Postal Service apparently retained its position that carriage of "newspapers, periodicals, checks, certain legal papers, etc" depended on the Postal Service's suspension authority.

The 1974 regulations also introduced at least four other notable innovations into the postal monopoly law.

First, the regulations declared an expanded prior-to-posting exception to the postal monopoly. Paragraph 310.3(e)(1) stated, "The private carriage of letters which enter the mail stream at some point between their origin and their destination is permissible." As noted above, however, the prior-to-posting exception enacted by Congress in 1879 permits private carriage only "to the nearest post-office or postal car."[517] Solicitors of the Post Office held repeatedly that carriage of letters to distant post office prior to posting was prohibited by the postal monopoly statutes unless the letters were enclosed in government stamped envelopes. If letters were transported by private express over long distances and then tendered to a post office for delivery, the Post Office required payment of postage since the use of the government stamped envelope only legitimized private carriage to the post office.[518] The last postal monopoly regulations issued by the Post Office Department forbid carriage prior to posting, permitting only carriage subsequent to posting.[519]

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follow the introductory declaration: "The following are not letters within the meaning of these regulations." *Id*. 33211, *codified at* 39 C.F.R. § 310.1(a)(7) (2006). In a footnote, the Postal Service apparently maintained its position that these items could be considered "letters" but for the Postal Service's suspension of the monopoly: "Several of the items enumerated . . . . do not self- evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended. . . ." To emphasize the point, this footnote is attached to 39 C.F.R. § 320.1 (2006) as well. *Id*. 33212. By comparing the second and third notices, it appears that the only non-administrative exception to the postal monopoly recognized by the Postal Service in § 310.1(a)(7) is the exception for telegrams. *See* 38 Fed. Reg. 3968, 3971 (Jan. 31, 1974) (proposed § 310.1(a)(7)). The non-letter status of telegrams apparently derives from a 1890 ruling by the Attorney General that mail matter did not include telegraphic correspondence. 19 Op. Att'y Gen. 650 (1890).

[517] Act of Mar. 3, 1879, ch. 180, § 1, 20 Stat.355. This provision is now codified in the second paragraph of 18 U.S.C. § 1696(a) (2006).

[518] *See* 1 Op. Sol. P.O.D. 877 (1883) (No. 360); 2 Op. Sol. P.O.D. 967 (1891) (No. 1014); 3 Op. Sol. P.O.D. 66 (1893) (No. 1067); 3 Op. Sol. P.O.D. 128 (1895) (No. 1104); 5 Op. Sol. P.O.D. 536 (1912); 8 Op. Sol. POD. 426 (1935).

[519] See, Post Office Department, *Restrictions on the Transportation of Letters* (5th ed. 1967) at 21 (sec. 21), 23 (sec. 24). (forbidding carriage of letters to a post office unless enclosed in stamped envelopes). *See also* 39

Permitting unlimited private carriage prior to posting is a more significant legal policy than may appear at first glance. It is apparent that, with geographically uniform letter rates, the Postal Service receives the same first class postage whether letters are posted at the post office nearest the mailer or at a more distant post office. An unlimited prior-to-posting exception has no financial affect in such case. However, if the Postal Service introduced discounts for bulk first class letters transported to downstream mail facility, then an expanded prior-to-posting exception could have adverse financial consequences for the Postal Service.[520] From the perspective of legal history, the implications of an unlimited prior-to-posting exception are dramatic. By permitting intercity transportation of letters by private express to a distant post office, the exception effectively limits the postal monopoly to final delivery. Competition is permitted all the way up to the destination post office. An unlimited prior-to-posting exception effectively abnegates the intercity transportation monopoly established by the private express laws of 1845—ironically, the only portion of the postal monopoly statutes that Congress ever approved after thorough debate.

Second, the 1974 postal monopoly regulations established a new civil fine equal to the postage that would have been paid if letters had been posted instead of transmitted by private express. The regulations state:

> Upon discovery of activity made unlawful by the Private Express Statutes, the Postal Service may require any person or persons who engage in, cause, or assist such activity to pay an amount or amounts not exceeding the total postage to which it would have been entitled had it carried the letters between their origin and destination.[521]

The first notice of proposed rulemaking explained the basis for this "back-postage" fine is "an exercise of the Postal Service's authority to prescribe the manner in which postage is to be paid":

C.F.R. § 152.3(e)(4) (1955) ("It is permissible to establish service for collecting for the addressees letters received at the post office, provided the letters remain unopened. Letters received through the mail at one office of a firm may be forwarded by surface means outside the mail without payment of additional postage so long they remain unopened").

[520] Such discounts would appear to be consistent with the "uniform rate" requirement for letters found in current law, 39 U.S.C. § 404(c) (2006). *See* Postal Rate Commission, Opinion and Recommended Decision, Docket R77-1 at 416-19 (1978).

[521] 39 Fed. Reg. 33209, 33212 (Sep. 16, 1974), *codified at* 39 C.F.R. § 310.5(a) (2006) (emphasis added).

> Administrative machinery is provided under which postage owing to the Postal Service because of private carriage in violation of the Statutes can be determined and collected. The process for determining postage owed could include a hearing on the record in cases involving disputed issues of fact. The proposal reflects *an exercise of the Postal Service's authority to prescribe the manner in which postage is to be paid* and is intended to make the administration of the Private Express Statutes more effective. *The availability of a right to collect postage is not intended, however, to affect in any way the exercise of other options available under civil and criminal law* for carrying out the purposes of the Statutes.[522]

It is unclear, however, what could be the legal basis for the Postal Service charging "postage" for letters it does not transport. Both the Attorney General and the Solicitor for the Post Office previously rejected the proposition that the Post Office could demand postage on items illegally transported by private express.[523] Legally, the back-postage charge appears to be a criminal fine established by Postal Service regulation. Indeed, it is a fine that is payable in addition to, not in mitigation of, the penalties established by the criminal law. The Postal Service's notice did not identify a specific legal basis for the back postage fine nor address the points raised by prior legal rulings.

Third, under new regulations, the Postal Service exercised new regulatory authority over the operations of private expresses providing services outside the restrictions of the postal monopoly statutes. Under previous interpretations of the postal monopoly statutes, the Post Office had no authority over private expresses if they provided services were outside the scope of the postal monopoly. In 1974 regulations, the Postal Service conditioned private carriage within the scope of the administrative suspensions on acceptance of certain enforcement provisions. The first and second notices of proposed rulemaking raised the possibility of reporting conditions for private express companies operating within the scope of the intra-company and data processing suspensions; these companies would be required to register with the Postal Service and to provide annual reports of their operations. The second notice also

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[522] 38 Fed. Reg. 17512, 17513 (Jul. 2, 1973) (emphasis added).

[523] *See* 6 Op. Sol. P.O.D. 619 (1918) (Lamar) (no "grounds, statutory or otherwise, upon which the Government may maintain a civil action for postage"). This opinion in turn relied upon an Attorney General's opinion, 4 Op. Att'y Gen. 349 (1844) (no grounds to charge the contents of an illegally carried carpetbag with postage).

provided for affidavits from major customers of private carriers. The final notice of rulemaking abandoned most of these reporting procedures as "unworkable" (and presumably unnecessary since the intra corporate suspension was deleted).[524] The final rule, however, required private carriers operating within the scope of the data processing suspension to register with the Postal Service, to allow postal inspectors access to covers of shipments (which showed delivery times), and to keep records. The regulations further stated that the Postal Service may administratively withdraw the suspension with respect to an individual private carrier if it fails to abide by the terms of the suspension or attached conditions.[525]

Fourth, the 1974 postal monopoly regulations adopted procedural rules for adjudication by Postal Service officials of Postal Service demands for the back postage fine or withdrawals of suspensions as to particular individuals.[526] Previously, penalties for violations of the postal monopoly statutes were decided by the courts. The Postal Service's notice did not explain why the new procedures were necessary or appropriate.

The 1974 postal monopoly regulations provided that the Law Department of the Postal Service would issue "advisory opinions" on the scope of the monopoly. In these opinion letters, the Postal Service has clarified that the "letter" monopoly, as interpreted by the regulations, precludes private carriage of printed matter items, commercial papers, and textual data recorded on media such as microfilm, credit cards, blueprints, and computer tapes.[527]

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[524] 39 Fed. Reg. 33209 (Sep. 16, 1974).

[525] *Id*. 33213, *codified at* 39 C.F.R. § 320.3(d) (2006) ("Failure to comply with the notification requirements of this section and carriage of material or other action in violation of other provisions of this Part and Part 310 are grounds for administrative revocation of the suspension as to a particular carrier for a period of less than one year, in a proceeding instituted by the General Counsel, following a hearing by the Judicial Officer Department in accordance with the rules of procedure set out in Part 959 of this chapter.").

[526] 39 Fed. Reg. 33209, 33213 (Sep. 16, 1974), *codified at* 39 C.F.R. § 959.1 et seq. (2006).

[527] 39 C.F.R. § 310.6 (2006). Pursuant to this section, USPS lawyers have advised that the postal monopoly over "letters" includes items which might be considered, in 1872 or today, to fall outside "the idea which common usage attaches to that term," the test of Attorney General MacVeagh in 1881. *See, e.g.,* PES Letter 74-13 (1974) (advertising circulars and handbills in a plastic bag); PES Letter 74-14 (1974) (blueprints); PES Letter 74-20 (1974) (legal briefs); PES Letter 74-24 (1974) (payroll checks); PES Letter 75-2 (1975) (driver's license); PES Letter 75-5 (1975) (fishing license); PES Letter 75-6 (1975) (motor carrier tariff); PES Letter 75-9 (1975) (merchandise with enclosed advertisement); PES Letter 75-23 (1975) (microfiche records); PES Letter 75-30 (1975) (price stickers for new cars); PES Letter 75-32 (1975) (San Francisco 49er football tickets); PES Letter 76-5 (1976) (Walt Disney poster); PES Letter 76-8 (1976) (gasoline company credit cards); PES Letter 76-25 (1976) (newspaper and magazine clippings); PES Letter 86-5 (1985) (computer tape); PES Letter 87-2 (1987) (airline ticket).

9.3 Commission and the Postal Monopoly

On October 9, 1973, while the Postal Service's rulemaking with respect to the postal monopoly regulations was in progress, a private express company, United Parcel Service (UPS), raised the issue of whether the Postal Rate Commission had jurisdiction over regulations dealing with the postal monopoly. UPS made its point in the context of a mail classification proceeding before an administrative judge of the Postal Rate Commission. On October 22, 1975, the Commission decided to consider its possible jurisdiction over postal monopoly regulations in separate proceeding.[528] On August 6, 1976, however, the Commission concluded that it would not assert jurisdiction over the postal monopoly statutes:

> We thus determine, as a matter of Commission policy, that we will not assert a general jurisdiction over the PES regulations. Should it be demonstrated (under a state of facts we do not now attempt to hypothesize) that exercise of ancillary jurisdiction in that area is required for the effective execution of our statutory duties, it would be our policy to exercise such derivative jurisdiction. The scope of such exercise would be strictly delimited by the fact situation present in the individual case. The necessity of invoking ancillary jurisdiction would have to be demonstrated in each case by the proponent of Commission action.[529]

9.4 Questions about USPS Suspension Authority

As explained above, administrative suspensions were central to the regulatory scheme adopted in the 1974 postal monopoly regulations. In announcing these suspensions, the Postal Service stated that its authority for adopting these administrative suspensions was the suspension provision found in the pre-PAEA version of the stamped envelope exception, i.e., former subsection 601(b) of Title 39.[530] Section 601 as enacted by the Postal Reorganization Act of 1970 provided as follows

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[528] Postal Rate Commission, Docket No. MC73-1, Order No. 61 (Apr. 29, 1975); Docket No. RM 76-4, Notice of Inquiry (Oct. 22, 1975).

[529] Postal Rate Commission, Docket No. RM76-1, Order No. 133 (Aug. 6, 1976).

[530] 38 Fed. Reg. 17512 (Jul. 2, 1973) ("Under 39 U.S.C. § 601(b), the Postal Service proposes suspensions which would exempt four categories of mailable matter because such suspensions appear to be in the public interest."). The version of section 601(b) enacted by the Postal Reorganization Act of 1970, 39 U.S.C. § 601(b) (2006), was repealed by the Postal Accountability and Enhancement Act of 2006 and replaced by a different subsection 601(b).

§ 601. Letters carried out of the mail

(a) A letter may be carried out of the mails when—

(1) it is enclosed in an envelope;

(2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;

(3) the envelope is properly addressed;

(4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;

(5) any stamps on the envelope are canceled in ink by the sender; and

(6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

To recount the antecedents of this section described earlier: the origin of subsection (a) was an 1852 act authorizing carriage of government stamped envelopes out of the mail. Subsection (b) was derived from an 1864 act authorizing the Postmaster General to suspend the stamped envelope exception, a remedy delegated to the Postmaster General in preference to outright appeal of the 1852 act. These two acts were joined into one section in the postal code of 1872 and became section 3993 of the Revised Statutes. The only substantive amendment to R.S. 3993 was adopted in 1938, when Congress extended the exception to envelopes on which postage had been paid with stamps or postage meter indicia and modified he suspension authority to allow the Postmaster General to suspend the exception "or any part thereof."[531]

There appears to be no record of the Postmaster General ever using his 1864 authority to suspend the stamped envelope exception. However, the Post Office invoked the suspension authority of section 901(b) of the 1960 postal code—identical to section 601(b) of the Postal Reorganization Act—in March 1970. In that month, the Postal Service was faced with extraordinary work stoppages in New York City and elsewhere set off primarily by postal union opposition to an Administration proposal to transform the Post Office Department into a

[531] Act of Jun. 29, 1938, ch. 805, 52 Stat. 1231.

government corporation. On March 18, 1970, the Postmaster General issued an order under color of section 901(b) to "suspend the operation of paragraphs (1) through (6) of 39 U.S.C. 901(a)." The order provided in full:

> In view of the work stoppage involving postal employees that is currently impairing mail service in and about New York City and certain outlying areas, and pursuant to the authority vested in me by 39 United States Code 901 (b), I hereby suspend the operation of paragraphs (1) through (6) of 39 U.S.C. 901(a) in respect to any carriage of letters out of the mails that originates in, or is destined for delivery in, New York City and its immediate vicinity and that results from the impairment of mail service by the Post Office Department in and about New York City. This suspension shall remain in effect until further notice.[532]

On March 21, the suspension was extended to other areas affected by the work stoppages.[533] On March 25, the Postmaster General terminated these suspension orders as work stoppages eased.[534] Although not stated explicitly, the purported effect of the orders was apparently to allow the carriage of mail by private carriers during the course of the strike.

The purpose of these unprecedented orders is unclear. At the time, the postal situation in New York City was described in the *New York Times* as "pandemonium."[535] Postal unions were in defiance of back-to-work injunctions issued by two federal courts.[536]The Postal Service had embargoed all mail destined for New York. New York businesses were desperately applying to private companies to circumvent the postal blockade for mail leaving New York. While the purpose of the suspension may have been to try to intimidate postal workers or reassure mailers who using alternative carriers, under the circumstances, it is hard to believe that the orders affected either group appreciably.

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[532] 35 Fed. Reg. 4973 (Mar. 21, 1970). Section 901(b) of Title 39 (1968) was renumbered as 39 U.S.C. § 601(b) (2006) by the Postal Reorganization Act in 1970.

[533] 35 Fed. Reg. 5015 (Mar. 24, 1970).

[534] 35 Fed. Reg. 5187 (Mar. 27, 1970).

[535] "'Tons of Mail Beat the Blockade Despite General 'Pandemonium,'"By Lacey Fosburgh. *New York Times* Mar 20, 1970.

[536] "Mail Service Here Is Paralyzed by Postal System's First Strike; Business Beginning to Feel Pinch" By Homer Bigart. *New York Times* Mar 19, 1970.

In 1974, the one-week strike-induced orders from 1970 were cited as precedents for the Postal Service's reliance on its "suspension authority" in developing the postal monopoly regulations. In July 1974, in the context of the 1973 mail classification case, Norman Schwartz, Assistant General Counsel of the Postal Rate Commission filed with the Commission a detailed legal argument that the Postal Service lacked authority to suspend the postal monopoly statutes. In particular, Schwartz maintained that section 601(b) did not provide such authority. After recounting the legislative history of the original enactment of section 601(b) in 1864, Schwartz concluded:

> Invocation of this section [section 601(b)] has the legal effect of doing exactly the opposite of what the Postal Service intends. A suspension under section 601 prevents private carriage; it does not permit private carriage as the Postal Service believes. Our interpretation of section 601 is fully supported by the language of the section, by the legislative history of section 601 and by the criminal nature of the statute.[537]

In December 1975, in subsequent proceedings, the Postal Service explained its position that section 601(b) provided authority to suspend "any or all of the conditions on private carriage" by citing the Postmaster General's orders suspending the stamped envelope exception in 1970 as precedent:

> The Postal Service has suspension authority with respect to the Private Express Statutes. 39 U.S. C. §60l(b). We have interpreted this authority (which refers to the suspension of "the operation of any part" of section 601) to permit suspension of any or all of the conditions on private carriage otherwise imposed by section 60l(a). This interpretation is not an innovation of the 1974 regulations. The Post Office Department used the suspension authority during the postal work stoppage that played an important part in stimulating postal reorganization shortly thereafter. [footnote 11] The planned use of the suspension authority in the 1974 regulations was outlined in the report of the Board of Governors submitted to Congress under section 7 of the Postal Reorganization Act.[538]

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[537] Postal Rate Commission, Assistant General Counsel (Norman Schwartz),"Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly" (Jul. 31, 1974) at 33, in Postal Rate Commission, Docket No. MC 73-1.

[538] Postal Service, "Comments of the United States Postal Service in Opposition to Postal Rate Commission

The Postal Regulatory Commission did not resolve this question because, as noted above, it determined that it would not assume jurisdiction over the postal monopoly statutes.

In November 1974, two months after adoption of the 1974 regulations, a mailer requested clarification of the legal effect of former section 601(b) suspension on the criminal penalties that create the postal monopoly. A Postal Service lawyer replied by *disclaiming* authority to suspend the criminal statutes underlying the postal monopoly:

> [W]e do not know how we can clarify the status of carriers or users of carriers under the criminal Private Express provisions operating under the suspension for data processing materials promulgated by the Postal Service under the civil Private Express provisions. *No express authority exists in the Postal Service to suspend the provisions of the criminal laws*. We doubt very much, however, that a successful prosecution could be maintained against someone operating in good faith under a suspension of the civil prohibitions on the private carriage of letters. We doubt that anything more we might say on the subject would substantially clarify the situation.[539]

Thus, the Postal Service apparently declared that it lacked statutory authority to suspend the postal monopoly statutes but nonetheless argued that its regulations would effectively frustrate the ability of the Department of Justice to enforce the postal monopoly against persons who believed that the Postal Service had such authority.

In his 1975 study on postal monopoly law, Professor George Priest commented in detail on weaknesses in the Postal Service's interpretation of former section 601(b) ("the regulation" as he calls it):

> In the 1973 Report the Governors announce for the first time that they possess and that they will exercise the authority to suspend the private express statutes at their discretion. No Postmaster General has ever claimed the power to repeal or to "suspend" the private express statutes by administrative order. But the Governors

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Jurisdiction" (Dec. 1, 1975) at 14-15 (footnotes omitted), in Postal Rate Commission, Docket No. MC 73-1. In footnote 11, the Postal Service provided references to the Federal Register notices associated with the Postmaster General's orders suspending the stamped envelope exception in 1970.

[539] Letter from R. P. Craig, Deputy General Counsel, Postal Service, to W. Malone, Vice President, General Telephone and Electronics Corp. (Nov. 22, 1974), *reprinted in Hearings on the Postal Reorganization Act Amendments of 1975, H.R. 2445, before the Subcomm. on Postal Service of the House Comm. on Post Office and Civil Service*, 94th Cong. 1st Sess. 344, 346 (1975) (emphasis added).

> have discovered an obscure postal regulation which will allow them, with sympathetic interpretation, to surrender bits and pieces of their exclusive grant in ways to preserve the substance of the monopoly.
>
> *Congress, of course, has never delegated the power to repeal the private express statutes*; the wording in the regulation the Governors unearthed was the result of poor drafting when the postal laws were recodified in 1960. On its face, the regulation does not apply to the private express sections, nor does it permit suspension of the prohibition for particular *categories* of letters.[Footnote 229]
>
> [Footnote 229 text:] 39 U.S.C. § 601(b) cannot be interpreted as empowering suspension of the private express statutes. The 1852 Act and its amendments were enacted following inventions (embossed envelopes, metered indicia) which enabled a customer to pay postage on his letters without making a special trip to a post office. The legislation acknowledges only that as long as the Post Office's interests are fully protected, as they are when the customer pays postage on all his letters, it makes little difference if the customer arranges another means of conveyance. Neither the 1852 Act nor any of the amendments has even been viewed as a revision of the private express statutes. There was no debate in Congress on any one of them. *39 U.S.C. § 601(b) itself empowers only the suspension of any part "of this section," not of other sections such as the sections establishing the monopoly*: 18 U.S.C. §§ 1693-99, 1724-25. Furthermore, the Postal Service is empowered to suspend "the operation of any part" of the section. Since each of the parts which might be suspended apply to carriage of all letters outside the mail, *the suspension of any part must apply equally to all letters, not to particular categories of letters, such as data transmission, checks, newspapers, etc*.[540]

Despite such questions, the scope of the Postal Service's suspension authority, the keystone to the 1974 postal monopoly regulations, was never subject to judicial review.[541] In the

[540] Priest, "History of the Postal Monopoly" 79-80 & n. 229 (emphasis added, other footnotes omitted).

[541] Although the legality of the Postal Service's administration of section 601(b) was never directly addressed by a court, some opinions assumed the existence of Postal Service authority to suspend the monopoly in while addressing other issues. The most important is in *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991) in which, in its recitation of facts, the Supreme Court stated, "A provision of the PES [private express statutes] allows the Postal Service to 'suspend [the PES restrictions] [preceding bracket by Supreme Court] upon any mail route where the public interest requires the suspension.' 39 U.S.C. §601(b). In 1979, the Postal Service suspended the PES restrictions for 'extremely urgent letters,' thereby allowing overnight delivery of letters by private courier services. "Similarly, in *Regents of Univ. of Cal. v. Pub. Employment Relations Bd.*, 485 U.S. 589, 593 n. 1 (1988), the Court observed, "The Postal Service is authorized to suspend the operation of the

1990s, in the course of hearings on a general postal reform bill, the House Subcommittee on the Postal Service asked the Postal Service for an explanation of its authority to suspend the postal monopoly. The Postal Service responded:

> The principal civil provision of the Private Express Statutes is 39 U.S.C. 601, which enumerates six conditions under which letters may be carried outside the mails, including the payment of postage by affixing stamps. Congress has included in 39 U. S.C. 601(b) authority to suspend "any part of" section 601 where required by the public interest. *The Postal Service has considered that the plain meaning of this language permits it to suspend one or all of the conditions for outside carriage, including the requirement to pay postage.* The section has been applied both in fairly narrow ways, for example, by permitting postage to be paid in bulk by check so that stamps do not have to be placed on letters carried privately, and more generally, by suspending all six conditions for certain categories of items such as those described in the question.[542]

The Postal Service further observed that Congressional committees were aware of the Postal Service proposals to adopt regulations suspending the postal monopoly in 1973 and in 1979 and not objected to these proposals.[543]

9.5 ATCMU v. USPS, 1979

Another feature of the 1974 postal monopoly regulations that was vigorously questioned by some was the enlarged definition of the term *letter*. A major critic was the Associated Third Class Mail Users (ATCMU), an association of direct mailers (later known as the Association for Postal Commerce). ATCMU's position was that the Postal Service had no authority to adopt a regulation that included wholly printed advertisements in a "letter" monopoly. On September 21,

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Private Express Statues when required by the 'public interest,' 39 U.S.C. 601(b)" but noted that no such suspension was at issue in the case at bar. *See also* United States Postal Service v. O'Brien, 644 F. Supp. 140, 143 (D.D.C. 1986) (court assumed the legality of the suspension for urgent letters but held that the defendant did not always deliver urgent letters); UPS Worldwide Forwarding v. United States Postal Service, 66 F.3d 621, 637 (3d Cir. 1995) (court rejected a challenge by private express companies against an international mail service holding held that, in setting international mail rates, the Postal Service did not have to abide by all rate regulations imposed on a "public service" because, inter alia, it had suspended the postal monopoly over international mail).

[542] *General Oversight of the U.S. Postal Service: Hearings Before the Subcomm. on the Postal Service of the House Comm. on Government Reform and Oversight*, 104th Cong., 1st Sess. 651-2 (1997) (emphasis added).

[543] Id.

1976, ATCMU asked the federal district court in the District of Columbia for declaratory judgement to that effect. The district court denied ATCMU's request. On March 9, 1979, the court of appeals agreed with the district court in upholding the authority of the Postal Service to adopt a regulatory definition of the "letter" monopoly that included within its scope wholly printed advertisements.[544] This case provides the only extended judicial scrutiny of the scope of the "letter" monopoly to date. Many of the legal arguments presented in this case remain relevant to interpretation of the scope of the postal monopoly statutes after amendment of the Postal Accountability and Enhancement Act of 2006.

The Postal Service summarized its position on the construction of the postal monopoly statutes as follows: "[ATCMU] makes the novel argument that 'public advertisements' were not covered by the original postal monopoly; that they were not initially made subject to it until 1845; and that they were thereafter removed from the scope of the monopoly statutes in 1872. Plaintiff errs in each of these assertions."[545]

The Postal Service explained its position with an analysis of the development of the postal monopoly statutes that may be summarized in the following four steps:

First, in early postal acts the term *letter* referred to all types of message communications then in use.[546] This conclusion flows from the "other than" language in the early postal acts—in the provision of 1792 act prohibiting private individuals from carrying "any letter or letters, packet or packets, *other than newspapers*" and the provisions in the 1794 and 1799 acts prohibiting horse posts and stagecoaches from carrying "any letter or packet, *other than newspapers, magazines or pamphlets*." With respect to the 1792 act, the Postal Service declared,

> The plain meaning of the statute was that all letters, other than

[544] Associated Third Class Mail Users v. United States Postal Service, 440 F. Supp. 1211 (D.D.C. 1977), *aff'd* 600 F.2d 824 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 837 (1979).

[545] "Memorandum of Points and Authorities in Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, in Opposition to Plaintiff's Motion for Summary Judgment, and in Support of Defendant's Cross-Motion for Summary Judgement" 6, Associated Third Class Mail Users v. United States Postal Service, 440 F. Supp. 1211 (D.D.C. 1977), *aff'd* 600 F.2d, 824 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 837 (1979) (hereafter, "Postal Service Brief"). The legal arguments in this brief are replicated in Craig and Alvis, "The Postal Monopoly: Two Hundred Years of Covering Commercial as well as Personal Messages."

[546] This analysis appears to explain the starting point for the rulemaking that lead to the 1974 postal monopoly regulations. *See* 38 Fed. Reg. 17512 (Jul. 2, 1973) ("When the Statutes were first enacted in the United States, the definition of 'letter' included all means of corporeal message communication then in use").

> newspapers, fell within the scope of the postal monopoly. A reasonable construction of the emphasized portion of the statute [quoted above] is that the word "letter(s)" as used therein was a comprehensive term that included newspapers within its meaning, and would have included them within the monopoly *but for* their specific exclusion."[547]

Likewise, in regard to the 1794 act, "the plain meaning of the quoted language of this amendment is that, without the exclusion, newspapers, pamphlets and magazines would be 'letters' for the purpose of the postal monopoly."[548] Hence, the term *letter* standing was originally used to include all types of messages, including newspapers, pamphlets, magazines, and periodicals.[549]

Second, the Post Office "Instructions" to postmasters. demonstrate that the postal monopoly included all types of messages other than newspapers, pamphlets, magazines, and periodicals. The Instructions declare that letter postage was to be charged on "all kinds of advertisements printed or written" (1817 Instructions) and "handbills, printed or written, proposals for new publications, circulars written or printed, lottery bills and advertisements" (Instructions 1832). The Instructions thus show that such items were present in the mails and within the postal monopoly.

Third, the 1845 act extended the monopoly to private expresses but did not expand the range of items covered by the monopoly. The term "letters and packets" was then understood to include "other matter properly transmittable in the United States mail."

Fourth, the 1872 postal act codified the pre-existing monopoly but "made no substantive revisions in the postal monopoly."[550] The Commissioners to Revise the Statutes of the United States declared their purpose was to "omit nothing which is not obsolete or redundant. Every

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[547] Postal Service Brief at 7 (emphasis original).

[548] *Id.* at 8. The Postal Service also pointed out that Post Office rules in 1810, 1817, and 1832 provided for charging letter postage on advertisements. *Id*. at 9-10.

[549] This interpretation of early postal statutes is slightly different from earlier interpretations. As described above, in the 1840s, the Post Office argued that the phrase "letters and packets" included printed matter such as newspapers and advertisements because such items, although not "letters," could be considered "packets." This broad interpretation of *packet* was apparently never raised by the Post Office after the 1919 letter to Chairman Steenerson.

[550] Postal Service Brief 13.

essential provision of the existing laws must be reproduced."[551] Congressional sponsors of the legislation assured members that the bill represented no more than a codification of existing law.[552] Hence,

> The only credible conclusion is that the 1872 statute was only a revision and consolidation, that meant no change in the scope of the postal monopoly. The revisers of the law apparently understood the word "letter" had come to have a certain meaning for private express purposes, as including certain items and excluding others. It was this understanding that they codified in the 1872 statutes. Indeed, it is clear that by 1872 the "other mailable matter" language of the 1845 law could no longer be used in the monopoly provisions without greatly expanding the list of exceptions, since "mailable matter" in 1872 included many items that were not printed or written (e.g., seeds, cuttings, roots and ore samples).[553]

In short, under the theory of interpretation advanced by the Postal Service, the word *letter* as used in the section 228 of the 1872 act—now codified as section 1696(a) of Title 18—should be read as shorthand for the phrase "any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals" in section 9 of the postal act of 1845.[554]

With respect to the various administrative declarations since 1872, the Postal Service maintained that "private express administration for the last century has consistently included advertising circulars as letters."[555] In this respect, the Postal Service's case largely rested on Solicitor Lamar's 1916 *Erie Employee's Relief Association* opinion as the key supportive administrative declaration prior to the Depression.[556] The Postal Service also suggested that other

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[551] In Postal Service Brief 14, the Postal Service quoted and emphasized this passage from the Commissioners' 1869 report, H.R. Misc. Doc. No. 31, 40th Cong., 3d Sess. 2 (1869). The Postal Service rejected the possibility that the Post Office's draft code of 1863 influenced the work of the Commissioners in drafting of the postal monopoly provisions. Postal Service Brief at 17.

[552] Postal Service Brief 15.

[553] Postal Service Brief at 17.

[554] The theory of statutory interpretation advanced by the Postal Service in the ATCMU case is inconsistent with the position of the Postal Service in the rulemaking resulting in the 1974 postal monopoly regulations. As explained above, in that rulemaking, the Postal Service maintained that "an exclusion of newspapers and periodicals seems of doubtful validity." 39 Fed. Reg. 3968-69 (Jan. 31, 1974).

[555] Postal Service Brief at 20.

[556] Postal Service Brief at 22-23.

rulings, properly interpreted, did not imply the Post Office considered the postal monopoly to be limited to first class mail.[557]

The argument of ATCMU was to the contrary. In particular, ATCMU concluded that the postal code of 1872 reduced the scope of the postal monopoly from "letters, packets, or packages of letters, or other matter properly transmittable in the United States mail"—a phrase that included advertisements—to "letters and packets"—a phrase that did not. ATCMU also pointed to legal opinions of the Post Office that suggested that the postal monopoly was limited first class matter.[558]

In a two-to-one majority opinion, the D.C. Circuit Court upheld the Postal Service's claim of monopoly but was not entirely persuaded by its interpretation of the postal monopoly statutes. The court first agreed with the Postal Service that the postal monopoly statutes were ambiguous enough to warrant looking beyond the plain text.[559] The court deemed "implausible" the notion that newspapers could be considered *letters*.[560] The court was more impressed, but not wholly convinced, by the argument that the 1872 act should be interpreted as not having changed prior postal monopoly law:

> ATCMU argues that the deletion [in the 1872 act] of the "other matter" language [in the 1845 act] reflected a deliberate congressional choice to narrow the postal monopoly, and that by so narrowing it the Congress eliminated any suggestion that it might include addressed advertising materials. As [the District Court] pointed out, however, the legislative history indicates that the 1872 Act was intended to reword and clarify the nation's postal laws *without substantive alteration. . . . ATCMU has been unable to*

[557] For example, the Postal Service argued that the 1873 opinion by Assistant Attorney General Spence referred only to heavy weight shipments and "says nothing about smaller items of second and third-class matter, and does not hold that the monopoly covers only first-class matter." Postal Service Brief 18.

[558] "Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss" 4-21, Associated Third Class Mail Users v. United States Postal Service, 440 F. Supp. 1211 (D.D.C. 1977), *aff'd* 600 F.2d, 824 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 837 (1979). The analysis omits a discussion of ATCMU's constitutional arguments which were rejected by the court. 600 F.2d at 826 n. 7. It should be noted that the author assisted Lewis Rivlin and Charles Work, counsel to amicus curiae, National Mass Retailing Institute, who supported the position of ATCMU in the appellate proceedings.

[559] The circuit court took note of *National Ass'n of Letter Carriers v. Independent Postal Systems*, 336 F. Supp. 804 (W.D. Okla. 1971), as the nearest case on point but did not make use of the court's analysis.

[560] Associated Third Class Mail Users v. United States Postal Service, 600 F.2d 824, 828 n. 13 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 837 (1979).

> *demonstrate that this general intent did not apply with full force to the monopoly provision. And absent some indication that Congress focused on the issue, we are reluctant to find in what purported to be a recodification a deliberate contraction of the postal monopoly.* Accordingly, we are of the opinion that the legislative text and history—while not dispositive of either party's contention—tends to favor the Postal Service.[561]

The court further agreed with the Postal Service that the term *letter* as used in the postal monopoly provisions of the 1872 act need not be interpreted in a manner consistent with other uses of *letter* in the same act.[562] Indeed, the court questioned the lasting significance of the original intent of Congress by noting "even were the legislative intent less opaque, it might be robbed of currency by the not insubstantial developments of the intervening century."[563]

The court then turned to administrative history. The court agreed that early interpretations were "somewhat restrictive."[564] The court noted, but did not examine, Solicitor Lamar's 1916 ruling that the monopoly included circulars. The court also noted later inconclusive Post Office statements on the relationship between the monopoly and advertisements. The court then summarized and largely dismissed the administrative history of the postal monopoly law as follows:

> *While the legislative history of the Private Express Statutes is quietly obscure, the administrative history is noisily so.* Each side is able to point to pronouncements by Postal Solicitors and statements in Service publications which support its view. And each side is able to characterize the pronouncements and statements relied upon by the other as poorly reasoned, ambiguous, or casual. In our judgment, *the most that can be said about the administrative history is that it is something of a muddle*: no single definition emerges as the obvious choice of past administrators, but neither does there appear any clear ground for setting aside the

[561] 600 F.2d at 827-28 (emphasis added).

[562] 600 F.2d at 827 n. 12 ("Nothing in either the private express prohibition or the classification provisions suggests that the latter were intended to supply a definition of general applicability or to freeze the content of the postal monopoly. Indeed, §§ 130 and 131 [of the 1872 act] do not purport to define letter at all. They merely use the term as an introductory label for a category which they go on to define. The result is not to shed a great deal of light on either the introductory label or the category.").

[563] 600 F.2d at 826.

[564] 600 F.2d at 829.

> determination of present ones.[565]

After reviewing the administrative history presented by the litigants, the court concluded ambiguity or inconsistency of administrative interpretation by the Post Office and Postal Service, if any, was not a ground for invalidating the Postal Service's regulatory definition of *letter*.[566]

Lastly, the court then reviewed the Postal Service's 1974 regulatory definition of "letter" to determine if it was "arbitrary and contrary to common sense." The court first concluded that the Postal Service was authorized by the postal law to adopt regulations administering the postal monopoly statutes.

> Appellant asserts that promulgation of these regulations, which have the effect of defining the federal crime of transporting letters outside the mails, was beyond the authority of the Postal Service. We disagree. As the District Court observed, . . . the Service is authorized under 39 U.S.C. § 401(2) (1976) to promulgate regulations to further the objectives of Title 39, which includes provisions concerning the postal monopoly. While 18 U.S.C. § 1696—the private express provision at issue here—is not a part of Title 39, its purpose is intimately connected to that title, and it was only separated from the other private express sections in 1909 when the United States criminal laws were codified into Title 18. Accordingly, a fair reading of the rulemaking authority of 39 U.S.C. § 401(2) is that it extends to § 1696.[567]

The court then concluded that the Postal Service's definition was not so unreasonable that it should be set aside:

> More broadly, we note that any definition is likely to appear arbitrary from some perspective for the simple reason that definitions draw lines they exclude some matters and include others despite similarities between the two classes. *We simply conclude today that the Postal Service has settled upon a reasonable criterion the presence or absence of an address and that its definition suffers from no more than the level of arbitrariness which is inevitable*.[568]

The court expressed its bottom line as follows:

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[565] 600 F.2d at 828 (footnotes omitted, emphasis added).

[566] 600 F.2d at 829-30 ("Even if the Service's reading is not completely accurate, we do not believe that whatever ambiguity or inconsistency existed is grounds to set aside the rule that is argued for today").

[567] 600 F.2d at 826 n. 5.

[568] 600 F.2d at 830.

> In sum, we find that the arguments raised the appellant and amicus curiae do not warrant invalidation of the definition of 'letter' propounded by the Postal Service.[569]

In dissent, Judge Malcolm Wilkey argued that the Postal Service had failed provide any convincing reason why advertising circulars which are distributed outside the mails by newspapers should be treated differently than otherwise identical advertising circulars which ATCMU sought to the right to deliver by private express. More generally, Judge Wilkey expressed unease with the administration of the postal monopoly by the Post Office and Postal Service:

> I dissent from the court's affirmance of the Postal Service's *current* interpretation of the word "letter" because, in my reading of the lengthy details back of the majority opinion's terse summary of 150 years of statute and statutory interpretation, there emerges only one consistent theme from the Postal Service—it has always latched onto whatever interpretation of the word "letter" which would give it the most extensive monopoly power which Congress at that time seemed disposed to allow.
>
> Not only do I find this total lack of any intellectual consistency offensive, especially when coming from a supposed-to-be responsible government agency, but there is a very practical reason why I think this court should refuse to approve the Postal Service's current interpretation. If we decline to include the advertising flyers which the Postal Service is intent upon embracing within the word "letter" so as to give its monopoly the most expansive scope, we may then force the Postal Service to go to Congress to define accurately the desired postal monopoly scope. That definition, the desired scope of the Postal Service's monopoly, is entirely a question of public policy, properly to be determined solely by Congress, and this court should not countenance the Postal Service's power and revenue grabbing simply because the statute, the statutory history, and the agency's own administrative interpretations are conflicting and obscure.[570]

In evaluating the *ATCMU* case, it should be appreciated the litigants did not provide the courts with all of the legal history set out in this study. The courts were not advised that the 1872 postal monopoly provision at issue in the case was derived from the narrowly drawn 1827 act ("letters and packets") as well as from the broadly drawn 1845 act ("any letters, packets, or

[569] 600 F.2d at 830.

[570] 600 F.2d at 830-31 (emphasis original).

packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals"). This dual ancestry appears relevant to the question of whether the 1872 act restricted the scope of prior law.[571] Nor was the court informed about Attorney General MacVeagh's 1881 opinion concluding that the postal monopoly statutes did not cover all first class matter. Nor did the court did have access to the Post Office's ambiguous 1919 letter to Chairman Steenerson on whether the postal monopoly included third class matter.

[571] In 5 Op. Sol. P.O.D. 614, 616 (1913), Solicitor Goodwin observed, "It thus appears that, while by the act of March 3, 1845, it was unlawful to carry outside the mails 'any letter or letters, packet or packages of letters, or other mailable matter whatsoever,' except 'newspapers, pamphlets, magazines, and periodicals,' this prohibition was limited by the act of 1872 to 'letters and packets,' and such limitation was repeated in the Criminal Code now in force. There can be no question that, from the inception of the Postal Service, the Government monopoly of mail transportation has extended to 'letters.' Since the act of 1872, however, the inclusion within such monopoly of other mailable matter has depended upon the meaning of the term 'packets.'" It appears that this opinion was not brought to the attention of the court.

10 USPS Administration of the Monopoly Laws to 2006

Although development of the postal monopoly regulations of 1974 constituted the Postal Service's main administrative innovation, there were a number of other important administrative and judicial developments with respect to the monopoly laws between 1971 and enactment of the PAEA in 2006. The Postal Service adopted several additional suspensions of the postal monopoly, including a suspension for urgent letter letters that allowed development of overnight express document services. The Postal Service also adopted provisions in the Domestic Mail Manual implementing the mailbox monopoly law of 1934. In this period, the monopoly laws were the subject of considerably more litigation than in the entire century preceding 1970. In addition to the ATCMU case, the Postal Service won key victories in support of the mailbox monopoly in *Rockville Reminder* in 1973 and *Council of Greenburg Civic Associations* in 1981.

10.1 Private Express Companies and Suspension for Urgent Letters, 1979

In the late 1960s and early 1970s, a new generation of private express companies developed in a sequence of events remarkably similar to the 1840s. Improvements in transportation (primarily improvements in jet aircraft), telecommunications (falling prices, improved telex service), and improved computers made it possible to provide a specialized collection and delivery service for documents and small parcels that was substantially more rapid and reliable than traditional national and international postal services and, although substantially more expensive, still affordable for modern businesses. Private companies took advantage of these possibilities more quickly than the Postal Service. Some of these "express" and "courier" companies evolved from other types of transportation services (Purolator and Loomis, armored car; United Parcel Service, parcel), but the main innovators were new companies created in answer to the new technologies (Federal Express, DHL).

The Board of Governors 1973 report on the private express statutes conceded the superior performance of the private companies and "serious equitable considerations" posed by enforcing the postal monopoly statutes against them, at least before the Postal Service's new Express Mail service provided a comparable service.

> The largest daily volume of "letters" carried outside the mails without payment of postage is likely handled by courier

> companies. Part of that volume is exempt from the Private Express Statutes because it is conveyed by "special messengers employed for the particular occasion only" (Title 18, U.S. Code, Section 1696). There are undoubtedly many situations in which such service, initiated in compliance with Section 1696, has proved to be so convenient that it has been continued on a more or less regular schedule and thus is now in violation of the Statute.
>
> Other courier service is used daily and in large volume without violation of the Statutes, to transport and deliver commercial papers, legal papers and documents, official records, checks and drafts, and matter sent for auditing or preparation of bills. Situations no doubt exist here also in which, once the avenue of communication has been established, the users transmit prohibited matter along with permissible items.
>
> In addition to the practical problems of detecting such violations and enforcing the statutes, there may be serious equitable considerations. Primary among these is whether a postal service is offered which is comparable to that of the courier in terms of convenience, celerity, certainty and cost. The answer has been negative in numerous investigations. The extent to which the Postal Service can improve that comparison, by the recently announced restoration of late collections and innovations such as Express Mail Service, remains to be seen.[572]

Nonetheless, in the mid-1970s, the Post Office's inspectors and lawyers tried to use the 1974 postal monopoly regulations to suppress development of the new private express companies.[573] Customers of private express companies, led by the National Association of Manufacturers, petitioned Congress for modification of the private express statutes.[574]

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[572] Postal Service, *Restrictions on the Private Carriage of Mail* 83 (Appendix E).

[573] A senior vice president of Purolator summed up the Postal Service campaign as follows: "An overwhelming body of evidence leads to the conclusion that the USPS has used the Private Express Statutes in an *in terrorem* fashion to induce customers away from private expedited carriers and into using Express Mail." *Private Express Statutes: Hearings Before the Subcommittee on Postal Operations and Services of the House Committee on Post Office and Civil Service*, 96th Cong, 1st Sess. (1979) 121, 127 (testimony of John Delany, Senior Vice President and General Counsel, Purolator Courier Corporation). *See also Postal Service Amendments of 1978: Hearings on S 3229 and HR 7700 Before the Subcommittee on Energy, Nuclear Proliferation, and Federal Services of the Senate Committee on Governmental Affairs*, 95th Cong, 2d Sess. (1978) 335 (testimony of Time Critical Shipment Committee); *The U.S. Postal Service and Postal Inspection Service: Market Competition and Law Enforcement in Conflict? Hearing Before the Subcomm. on the Postal Service of the House Comm. on Government Reform*, 106th Cong., 2d Sess. 34-73 (2000) (testimony of James I. Campbell Jr.).

[574] In April 1976, NAM filed a statement with a Senate committee outlining, inter alia, the need for private courier service for important business documents, "The effective functioning of modern business depends to a large degree on the rapid transmission of information. The increased costs that businesses must bear as a result of the Postal Service's regulations are particularly objectionable because the Postal Service cannot provide the rapid and

In fall 1976, Congress established a special study commission, the Commission on Postal Service, to recommend improvements in the postal laws and to consider the role of private express services. The Commission, chaired by Gaylord Freeman, a prominent banker, held hearings throughout the United States. In April l977, the Postal Service Commission issued its report. With respect to the postal monopoly statutes, the Commission concluded:

> The Postal Service sought to control diversion of volume to private carriage by subjecting nearly every message to the statutes and then "suspending" the regulations for letters requiring extremely expedited delivery service which the Postal Service did not provide. . . . The Commission recommends that Congress enact legislation defining the scope of the private express statutes. The legislation should respond to the need of business for expedited delivery of extremely time-sensitive matter. . . . [E]xclusions from the private express statutes should be based not merely on the content of mail, but also in recognition of service requirements which the Postal Service is not prepared to meet.[575]

In January 1977, the Department of Justice contributed to the calls for reform of the postal monopoly statutes. It published a study of the development of of the postal monopoly that concluded, "what is necessary, therefore, is a thoroughgoing, independent analysis to appraise the potential public impact of these longstanding laws."[576]

In late 1978 and early 1979, Congressional hearings into the report of the Commission on Postal Service indicated that the Congress was becoming convinced of the need to all private express companies to carry urgent documents. In August 1978, the Senate Governmental Affairs Committee approved a postal reform bill that included a provision exempting urgent documents from the postal monopoly.[577] Although the 95th Congress adjourned without completing work on this bill, early in the 96th Congress, the House Subcommittee on Postal Operations and Services opened hearings on private delivery of time-sensitive documents and likewise indicated sympathy with the private express companies.[578] Nonetheless, the Postal Service strongly

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dependable service that businesses require." *Postal Reorganization: Hearings on S. 2844 Before the Senate Committee on Post Office and Civil Service*, 94th Cong, 2d Sess, at 247 (1976).

[575] *Report of the Commission on Postal Service* (1977), 1:72-73.

[576] Department of Justice, *Changing the Private Express Laws* 30.

[577] S. Rep No 95-1191, 95th Cong, 2d Sess. (1978).

[578] During the course of these hearings, postal subcommittee chairman Charles H. Wilson of California

opposed a statutory exception for urgent letters on the grounds that it would lead to billions of dollars in losses for the Postal Service.[579]

On July 9, l979, the Postal Service forestalled legislation by publishing a proposal to amend its regulations to "suspend" the postal monopoly insofar as it applied to the carriage of urgent letters.[580] More than 140 comments were received; almost all strongly supported the proposal. On October 24, l979, the Postal Service adopted a slightly revised version of the proposed regulation suspending the postal monopoly to allow private carriage of urgent letters.[581]

The final rule defined urgency by use of two alternative tests. First, a letter would be deemed urgent if the "value or usefulness of the letter would be lost or greatly diminished" by the fact that the letter is not delivered within twelve hours of dispatch or by noon of the addressee's next business day, excluding periods of transportation outside the forty-eight contiguous states. Under the second test, the "double postage" test, a letter would be deemed urgent if the shipper paid the private express company at least twice as much as the otherwise applicable domestic first class postage, or $3.00, whichever is greater.[582]

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urged Louis Cox, general counsel of the Postal Service, to be more flexible with respect to administration of the postal monopoly statutes: ("I am just telling you, Mr. Cox, if you don't become more realistic about the needs of business with their time-sensitive materials and have a more realistic approach toward this interpretation of letter, you are going to lose the whole doggone thing [monopoly]"). *Private Express Statutes: Hearings Before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess., at 22 (1979).

[579] In September 1979, Postmaster General William Bolger advised Congress that "Exploitation of the [proposed] loophole . . . could result in the building of tremendous pressures in the years ahead to pump billions of dollars of additional Federal subsidies into the Postal Service." Letter from Postmaster General William Bolger to Senator Edmund S. Muskie, Sep 26, 1978, at 2. In November 1979, after the suspension for urgent letters was adopted, House postal subcommittee chairman Charles H. Wilson asked Bolger about the effect of the new rule on postal finances. Bolger responded, "I think it has had little or no impact on the volume of the Postal Service." *Private Express Statutes: Hearings Before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess., at 337 (1979).

[580] 44 Fed. Reg. 40076 (1979). The Postal Service's proposal made no reference to the Congressional deliberations. It was ostensibly a response to public comments on amendments to postal monopoly regulations proposed in December 1978.

[581] 44 Fed. Reg. 61178 (1979).

[582] 39 C.F.R. § 320.6 (2006).

10.2 Amendments to Postal Monopoly Regulations, 1979

On December 27, 1978, the Postal Service proposed to a general revision of the 1974 postal monopoly regulations.[583] The notice of proposed rulemaking began by noting that the 1974 definition of letter "appears to have served well and the definition has been approved judicially" by the district court in the *ATCMU* case. In its notice, the Postal Service proposed, inter alia, to exclude from the definition of "letter" certain out-sized or odd-shaped tangible objects bearing messages such as signs, tombstones, and automobile tires and to adopt new suspensions for intra-university letters and letters related to cargo transported by international ships. The proposed rules also included more controversial proposals to

- expand the definition of "letters" by extending the concept of an "address" to situations not previously covered;
- limit the exception for "telegrams" so that it did not exclude other types of hard copy from the postal monopoly;
- limit the exception for "books" to cases involving distribution to twenty-five or more separate persons.
- exclude letters which are transported in bulk before or after their transmission by mail from the exception for carriage prior or subsequent to posting;
- limit the right of printers to sent letters out of the mails in bulk if the printer originated the message in the letter; and
- prohibit a person accused of violating the postal monopoly from challenging the correctness of the postal monopoly regulations in a hearing before the Judicial Officer of the Postal Service.

The proposed revisions of the 1974 postal monopoly regulations provoked a strong reaction. More than one hundred comments were filed. The Department of Justice submitted a 76-page brief which argued that the Postal Service was obliged to ascertain and consider the impact of its regulations on competition, that its definition of "letters and packets" was overly broad in at least some respects; and that the postal monopoly regulations were inconsistent with due process because they "combine the investigatory, prosecutorial, and adjudicative functions in one department."[584]

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[583] 43 Fed. Reg. 60615 (Dec 28, 1978).

[584] "Comments of the United States Department of Justice" in response to amendments to 39 C.F.R. Part 310 proposed at 43 Fed. Reg. 60615 (1978).

On September 11, 1979, the Postal Service adopted the noncontroversial revisions to the postal monopoly regulations. The Postal Service announced that it would provide for a second round of comments on the controversial revisions, but these proposals were later quietly abandoned.[585]

10.3 Suspension for International Remail, 1986

Remail is the practice of using a private carrier to transport mail from one country to another country where it is tendered to the post office for delivery in that country or forwarding to a third country. In 1984, the Postal Service became concerned about the growth of remail competition for outbound American mail. Compared to international postal service from the United States, remail services enjoyed competitive advantages in service and price. In a series of legal rulings, the Postal Service declared use of private express companies to send letters to foreign post offices violated the postal monopoly. In December 1984, the Postal Service asked the Department of Justice to enjoin private expresses from providing remail services. The Department of Justice demurred, suggesting the suspension for urgent letters could be interpreted to permit international remail.

In October 1985 the Postal Service proposed an amendment to the urgent letter suspension to clarify that it did not permit international remail.[586] A wide range of commenters opposed the proposed rule including comments from the Department of Justice, Department of Commerce, Council of Economic Advisors, and dozens of remail customers. The climax came in the form of a presidential letter. On May 1, 1986, President Ronald Reagan signed the acts of the Universal Postal Union negotiated in Hamburg in 1984 but directed Postmaster General Albert Casey to adopt a procompetitive approach in implementing of international postal policies.

> I have signed the Acts of the Nineteenth Congress of the Universal Postal Union, negotiated at Hamburg in 1984, but I want us now to make sure that the Acts, and particularly Article 23, are not used to stifle healthy private competition in the international mail arena. The policy of this Administration is to encourage free enterprise in ways that will improve services and reduce costs to

[585] 44 Fed. Reg. 40899 (Jul 13, 1979) (splitting rulemaking); 44 Fed. Reg. 52832 (Sep 11, 1979) (adopting non-controversial amendments).

[586] 50 Fed. Reg. 41462 (Oct 10, 1985).

> our citizens, and I know I can count on your support to carry out this policy.
>
> Therefore, I am asking that you do all within your power, working closely with the Executive Branch, especially the Secretary of State and the Attorney General, to permit and promote marketplace competition in international mail, and to influence other nations to do likewise.

Following President Reagan's letter, the Postal Service reversed course.[587] On June 17, 1986, the Postal Service proposed a revised rule that would permit international remail.[588] On August 19, 1986, the Postal Service adopted the new rule in final form.[589] In its notice, the Postal Service summarized public comment on the practice of remail as follows:

> The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. . . . Numerous commenters noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that, without faster and cheaper services provided by remailers, it would not be feasible for their businesses to compete in the international markets.

The suspension for outbound international remail permited the "uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside of the United States." It did not permit carriage of letters out of the mails to a foreign country for subsequent delivery to an address within the United States.[590]

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[587] 51 Fed. Reg. 9852 (Mar. 21, 1986) (withdrawal of original proposed rule).

[588] 51 Fed. Reg. 21929 (Jun. 17. 1986). The Postal Service also launched a new service, International Priority Airmail, that offered discounts for bulk international letter mail in direct competition with remail.51 Fed. Reg. 17017 (May 8, 1986).

[589] 51 Fed. Reg. 29636 (Aug 20, 1986).

[590] 39 C.F.R. § 320.8 (2006).

The suspension for outbound international remail precipitated major postal reforms outside the United States. Efforts by European post offices to suppress competition among themselves for the American remail business ultimately led to the adoption of a reformist postal directive in 1997. The European directive was amended in 2008 to require the repeal of most national European postal monopoly laws by the end of 2011. Growth of international remail also forced the UPU Convention to take some steps towards reform of its system for compensating national postal administrations for the delivery of inbound international mail.[591]

10.4 Judicial Interpretation after ATCMU

In the two decades since 1979, the postal monopoly has been considered in seven judicial opinions. None considered the basic scope of the postal monopoly.

In three cases, courts rejected the claim that, under the Constitution, Congress lacked authority to establish a postal monopoly. This argument rested on the observation that, unlike the Articles of Confederation, the Constitution did not expressly empower the federal government to establish a postal monopoly. Noting that the first Congress continued the postal monopoly created by the ordinance of 1782 and that each succeeding Congress has presumed itself capable of establishing a postal monopoly, the courts have upheld the constitutionality of the postal monopoly without hesitation.[592]

In two cases (including one of the foregoing cases), the courts have assumed the validity of the Postal Service's 1974 postal monopoly regulations without questioning their statutory basis. In *American Postal Workers Union v. U.S. Postal Service* in 1989,[593] the D.C. Circuit Court of Appeals agreed with a postal union that the Postal Service regulation suspending the

[591] *See generally*, Campbell, "Evolution of Terminal Dues and Remail Provisions."

[592] United States Postal Service v. Brennan, 574 F.2d 712 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); United States v. Black, 569 F.2d 1111 (10th Cir. 1978); United States Postal Service v. O'Brien, 644 F. Supp. 140 (D.D.C. 1986). In *Brennan*, the court further held that the delegation of rulemaking authority to the Postal Service did not constitute an unconstitutional delegation of legislative authority. 574 F.2d at 716-17. In *O'Brien*, the court rejected the argument that the postal monopoly unconstitutionally limited customers' right of free speech or right to petition congress. 644 F. Supp. at 144-45.

[593] American Postal Workers Union v. United States Postal Service, 891 F.2d 304 (D.C. Cir. 1989), *rev'd on other grounds*, Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991). The Supreme Court vacated the judgment of the court of appeals because it found the postal union lacked standing to present a case for enforcement of the postal monopoly.

postal monopoly for international remail was "arbitrary and capricious." The court did not consider whether the Postal Service was statutorily empowered to suspend the postal monopoly in the first place, and in any case, its decision was ultimately vacated by the Supreme Court on other grounds. In *U.S. Postal Service v. O'Brien* in 1986,[594] a district court enjoined a private carrier that delivered printed matter to congressional offices. Taking the administrative suspension of the monopoly for "urgent letters" as given, the court ruled that the carrier's operation did not fall within the suspension.[595]

In three cases, courts have interpreted statutory exceptions to the postal monopoly with little or no deference to the Postal Service's regulations. In a 1988 Supreme Court case, *Regents of University of California v. Public Employees Relations Board.*,[596] the question was whether a university mail system could lawfully carry the letters of an employees' union. The Court addressed the letters of the carrier and private hand exceptions to the postal monopoly and held that the union's letters generally fell outside the scope of the exception. To interpret the scope of the exceptions, the Court looked first to "the normal meaning of the language chosen by Congress"[597] and then to legislative and statutory history. Since the Court was satisfied that it understood the meaning of the statute based upon this review, it declined to defer to Postal Service regulations.[598] In a 1992 case, *Fort Wayne Community Schools v. Fort Wayne Education Association, Inc.*,[599] a federal appellate court faced a similar factual situation involving somewhat closer questions of law. Although the court expressed a willingness to defer generally to the Postal Service's postal monopoly regulations, it declined to do so in the instant case because it found that regulations interpreting the scope of the "letters-of-the-carrier" exception

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[594] United States Postal Service v. O'Brien, 644 F. Supp. 140 (D.D.C. 1986),

[595] *See also* Walt Disney Music Company, Inc. v. United States Postal Service, D.C.D. Cal., Civ. No. 76-2391-1H (unreported, Nov. 18, 1976) (held the postal monopoly does not bar private carriage of bulk letters permitted by Postal Service regulations; does not consider scope of *letters*).

[596] Regents of Univ. of Cal. v. Pub. Employment Relations Bd., 485 U.S. 589 (1988)

[597] 485 US at 595.

[598] 485 U.S. at 602 ("Appellant and the United States have urged us to defer to these agency constructions of the statute . . . . Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency.").

[599] Fort Wayne Community Schools v. Fort Wayne Education Association, Inc., 977 F.2d 358 (7th Cir. 1992)

were inconsistent with the underlying statute as interpreted by the Supreme Court.[600] In an earlier case, *American Postal Workers Union v. React Postal Services*,[601] decided in 1986, another appellate court had concluded that the postal monopoly law did not prevent a private express from collecting letters and posting them in bulk to a single addressee if proper postage is paid at time of mailing. Its decision was based on an interpretation of the 1879 statutory exception for private carriage of mail to the nearest post office.[602]

10.5 Increase in Criminal Penalties, 1994

The Criminal Fine Improvements Act of 1987[603] prescribed general rules for criminal fines. Fines of up to $10,000 were authorized against corporate offenders for even minor offenses. Alternatively, "if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. . . ."

The 1987 schedule of fines was applied to postal monopoly infractions by the Violent Crime Control and Law Enforcement Act of 1994.[604] As a result, the specific fines historically set out in the postal monopoly statutes were replaced with references to penalties "under this title." As a result, the fine that a corporation could pay for using an illegal private express was increased from $ 50 to $10,000 penalty for each violation.[605] Similarly, the fine that could be imposed on a private express for depositing a letter in a private mailbox was increased from $ 300 to $ 10,000 for each offense.[606] Inexplicably, however, the penalty imposed on a private express company for violation of the all-purpose postal monopoly statute, section 1696(a) of

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[600] 977 F.2d at 367 ("inexplicably, the Postal Service deviates, both in textual language and in rationale, from the statement of the Attorney General and from the interpretative holdings of the Supreme Court.")

[601] American Postal Workers Union v. React Postal Services, 771 F.2d 1375 (10th Cir. 1985),

[602] 18 U.S.C. § 1696(a) (2006). *See* 771 F.2d at 1380. In this case, the Postal Service was in support of the interpretation of the statute confirmed by the court.

[603] Criminal Fine Improvements Act, Pub. L. 100-185, § 6, 101 Stat. 1279, 1280 (1987), *codified* 18 U.S.C. § 3571 (2006).

[604] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 330016, 108 Stat. 1796, 2146.

[605] *Compare* 18 U.S.C. § 1696(b) (1988 & Supp. II) *with* 18 U.S.C. §§ 1696(b), 3571(b)(7) (2006).

[606] *Compare* 18 U.S.C. § 1725 (1988 & Supp. II) *with* 18 U.S.C. §§ 1725, 3571(b)(7) (2006).

Title 18, the prohibition against establishment of a private express, was *not* updated; it remained not more than $ 500 and/or six months imprisonment.[607]

10.6 Mailbox Monopoly Regulations: Rockville Reminder, 1973

The Postal Service has adopted provisions in the Domestic Mail Manual which are intended to implement the mailbox monopoly statute, section 1725 of Title 18.[608] In the edition of the Domestic Mail Manual in force on the date of enactment of the Postal Accountability and Enhancement Act, the following regulations from Part 508 implement the mailbox monopoly as well as other provisions of the Criminal Code.

> 3.1.1 Authorized Depository
>
> Except as excluded by 3.1.2, every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 USC 1702, 1705, 1708, and *1725*.
>
> 3.1.2 Exclusions
>
> Door slots and nonlockable bins or troughs used with apartment house mailboxes are not letterboxes within the meaning of *18 USC 1725* and are not private mail receptacles for the standards for mailable matter not bearing postage found in or on private mail receptacles. The post or other support is not part of the receptacle.
>
> 3.1.3 Use for Mail
>
> Except under 3.2.11, Newspaper Receptacle, *the receptacles described in 3.1.1* may be used only for matter bearing postage. Other than as permitted by 3.2.10, Delivery of Unstamped Newspapers, or 3.2.11, no part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle. Any mailable matter not bearing postage and found as described above is subject to the same postage as would be paid if it were carried by mail.
>
> 3.2.10 Delivery of Unstamped Newspapers
>
> Generally, curbside mailboxes are to be used for mail only.

[607] 18 U.S.C. § 1696(a) (2006).

[608] 18 U.S.C. § 1725 (2006). The Domestic Mail Manual is a regulation of the Postal Service. 39 C.F.R. § 211.2 (2006).

> However, publishers of newspapers regularly mailed as Periodicals may, on Sundays and national holidays only, place copies of the Sunday or holiday issues in the rural route and highway contract route boxes of subscribers if those copies are removed from the boxes before the next scheduled day of mail delivery.
>
> 3.2.11 Newspaper Receptacle
>
> A receptacle for newspaper delivery by private carriers may be attached to the post of a curbside mailbox used by the USPS if the receptacle:
>
> a. Does not touch the mailbox or use any part of the mailbox for support.
>
> b. Does not interfere with the delivery of mail, obstruct the view of the mailbox flag, or present a hazard to carrier or vehicle.
>
> c. Does not extend beyond the front of the mailbox when the box door is closed.
>
> d. Does not display advertising, except the publication title.[609]

These regulations implement the mailbox monopoly statute in the following ways. They (i) designate certain letterboxes or other receptacles to which the criminal prohibitions of section 1725 shall apply (3.1.1), (ii) designate certain letterbox or other receptacles to which the criminal prohibitions of section 1725 shall *not* apply (3.1.2), and (iii) exempt certain concerns (newspapers) from the criminal prohibitions of section 1725 on certain days of the week (Sunday). These regulations *also* declare that "no part of a mail receptacle may be used to deliver any matter not bearing postage" (3.1.3), but it is not clearly stated that this rule is based on or implements section 1725.

The Postal Service mailbox monopoly regulations are given broad support by a 1973 decision of the Second Circuit Court of Appeals. In *Rockville Reminder, Inc. v. United States Postal Service*,[610] the court upheld a challenge to Postal Service regulations regulating the use to which a mailbox may be put. An advertising journal, the *Rockville Reminder*, wanted to attach a two-inch hook to outside of rural mailboxes so that it could effect delivery by reaching out of a car window and hanging a plastic bag on the hook. The Postal Service held that such a hook was

[609] Postal Service, Domestic Mail Manual §§ 508.3, 508.10, 508.11 (Jan. 8, 2006 ed.) (emphasis added).

[610] Rockville Reminder, Inc. v. United States Postal Service, 480 F.2d 4 (2d Cir. 1973).

barred by its regulations. The regulations in question, from the 1972 edition of the Code of Federal Regulations, were similar to current regulations and read as follows:

> § 151.1 Private mail receptacles.
>
> (a) Designation as authorized depository. Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, star route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections 1702, 1705, and 1708.
>
> (b) Use for mail only. Receptacles described in § 151.1(a) shall be used exclusively for mail except as provided in § 156.5(h). Any mailable matter such as circulars, statements of accounts, sale bills, or other similar pieces deposited in such receptacles must bear postage at the applicable rate and a proper address.
>
> [§ 156.5] (h) Unstamped newspapers. Rural boxes are to be used for mail only, except that publishers of newspapers regularly mailed as second-class mail may, on Sundays and national holidays only, place copies of the Sunday or holiday issues in the rural and star route boxes of subscribers, with the understanding that copies will be removed from the boxes before the next day on which mail deliveries are scheduled.

The *Reminder* argued that the Postal Service could only regulate what was put inside the mailbox. The court, however, agreed that the regulations " regulate the uses to which mail receptacles may be put"[611] and thus barred the householder from putting the mailbox to nonpostal use. The court further concluded that the regulations were reasonable and valid because they were consistent with the statutory mandate in section 101 of Title 39 directing the Postal Service to "maintain an efficient system of collection, sorting, and delivery of the mail nationwide."[612]

Neither the regulations at issue nor the court's decision refer to the mailbox monopoly statute, section 1725 of Title 18. The regulations at issue declared a mailbox monopoly without reference to section 1725. The Court of Appeals upheld the regulations as a reasonable and valid means of implementing section 101 of Title 39. In the 2006 edition of the Domestic Mail Manual, the regulations at issue in the *Rockville Reminder* case mention section 1725 but are in

[611] 480 F.2d at 7 (emphasis added), citing 39 U.S.C. § 101 (2006).

[612] 480 F.2d at 8-9.

other respects essentially the same as they were in 1973. Thus, in light of the *Rockville Reminder* decision, it appears that the Domestic Mail Manual prohibition against use of the mailbox for receiving the documents and parcels delivered by the Postal Service's competitors could be interpreted as an implementation of section 101 of Title 39, not an implementation of the mailbox monopoly statute.

10.7 Mailbox Monopoly Statute: USPS v. Council of Greenburg Civic Ass'ns, 1981

The Supreme Court has considered the mailbox monopoly statute[613] only once, in 1981. In *United States Postal Service v. Council of Greenburg Civic Associations,*[614] an association of civic groups sought a declaration that the mailbox monopoly statute is unconstitutional because it violates the free speech guarantees of the First Amendment. The District Court agreed with the Council. The Supreme Court reversed in a 7 to 2 decision that produced five opinions, a five-justice majority opinion (Rehnquist, Burger, Stewart, Blackmun, Powell), two separately concurring opinions (Brennan and White), and two dissenting opinions (Marshall and Stevens). The contrast in philosophies emerging from this decision goes beyond the specific issue of the reach of the First Amendment and illuminates the public policy premises of the mailbox monopoly itself.

The majority opinion, by Justice Rehnquist, concluded that the mailbox was an essential part of the national postal system and the government was free to control its use in the same manner as it would control the use of a military base. Rehnquist pointed out that a householder voluntarily erected a mailbox in front of his house and in so doing voluntarily submitted himself to the control of the Postal Service:

> Nothing in any of the legislation or regulations recited above requires any person to become a postal customer. Anyone is free to live in any part of the country without having letters or packages delivered or received by the Postal Service by simply failing to provide the receptacle for those letters and packages which the statutes and regulations require. Indeed, the provision for "General

[613] 18 U.S.C. § 1725 (2006).

[614] United States Postal Service v. Council of Greenburg Civic Ass'ns, 453 U.S. 114 (1981).

> Delivery" in most post offices enables a person to take advantage of the facilities of the Postal Service without ever having provided a receptacle at or near his premises conforming to the regulations of the Postal Service. What the legislation and regulations do require is that those persons who do wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service.[615]

Since the householder has opted into the national postal system and the mailbox is an essential part of that system, the Congress may regulate access to the mailbox in content-neutral manner without otherwise having to justify the reasonableness of its regulation.

> What is at issue in this case is solely the constitutionality of an Act of Congress which makes it unlawful for persons to use, without payment of a fee, a letterbox which has been designated an "authorized depository" of the mail by the Postal Service. As has been previously explained, when a letterbox is so designated, it becomes an essential part of the Postal Service's nationwide system for the delivery and receipt of mail. *In effect, the postal customer, although he pays for the physical components of the "authorized depository," agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail.*
>
> Appellees' claim is undermined by the fact that a letterbox, once designated an "authorized depository," does not at the same time undergo a transformation into a "public forum" of some limited nature to which the First Amendment guarantees access to all comers. *There is neither historical nor constitutional support for the characterization of a letterbox as a public forum. . .* The underlying rationale of appellees' argument would seem to foreclose Congress or the Postal Service from requiring in the future that all letterboxes contain locks with keys being available only to the homeowner and the mail carrier. Such letterboxes are presently found in many apartment buildings, and we do not think their presence offends the First Amendment to the United States Constitution. Letterboxes which lock, however, have the same effect on civic associations that wish access to them as does the enforcement of § 1725. Such letterboxes also accomplish the same purpose -- that is, they protect mail revenues while at the same time facilitating the secure and efficient delivery of the mails. We do not think the First Amendment prohibits Congress from choosing to accomplish these purposes through legislation, as

[615] 453 U.S. at 125-26.

> opposed to lock and key.
>
> Indeed, it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated the military base . . ., the jail or prison . . ., or the advertising space made available in the city rapid transit cars. . . .
>
> It is thus unnecessary for us to examine § 1725 in the context of a "time, place, and manner" restriction on the use of the traditional "public forums" referred to above. This Court has long recognized the validity of reasonable time, place, and manner regulations on such a forum, so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication.[616]

Justices Brennan and Marshall, however, disagreed with the majority's rejection of the "public forum" nature the mailbox. Justice Brennan argued that recognizing First Amendment rights would not be incompatible with the functioning of mailboxes: "I believe that the mere deposit of mailable matter without postage is not 'basically incompatible' with the 'normal activity' for which a letterbox is used, i.e., deposit of mailable matter with proper postage or mail delivery by the Postal Service."[617] Brennan and Marshall differed, however, on whether the mailbox monopoly rule was a reasonable restraint on the exercise of First Amendment rights. Brennan concluded it was. Justice Marshall disagreed. He noted:

> By traveling door to door to hand-deliver their messages to the homes of community members, appellees employ the method of written expression most accessible to those who are not powerful, established, or well financed. "Door to door distribution of circulars is essential to the poorly financed causes of little people." Moreover, "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." . . . And such freedoms depend on liberty to circulate; "`indeed, without circulation, the publication would be of little value.'"[618]

[616] 453 U.S. at 128-29 (citations omitted, emphasis added).

[617] 453 U.S. at 137.

[618] 453 U.S. at 145 (citations omitted, emphasis added)

Justice Marshall concluded, "I remain troubled by the Court's effort to transform the letterboxes entirely into components of the governmental enterprise despite their private ownership."[619]

This was the starting point for Justice Stevens. In his view, the mailbox is not a public forum but the private property of the householder, and the factual grounds advanced to justify this regulation wholly failed to justify any impediment in the ability of householder to communicate with others.

> My disagreement with the Court and with Justice Marshall can best be illustrated by looking at this case from the point of view of the owner of the mailbox. *The mailbox is private property; it is not a public forum to which the owner must grant access. If the owner does not want to receive any written communications other than stamped mail, he should be permitted to post the equivalent of a "no trespassing" sign on his mailbox.* A statute that protects his privacy by prohibiting unsolicited and unwanted deposits on his property would surely be valid. The Court, however, upholds a statute that interferes with the owner's receipt of information that he may want to receive. *If the owner welcomes messages from his neighbors, from the local community organization, or even from the newly arrived entrepreneur passing out free coupons, it is presumptively unreasonable to interfere with his ability to receive such communications.* The nationwide criminal statute at issue here deprives millions of homeowners of the legal right to make a simple decision affecting their ability to receive communications from others.
>
> The Government seeks to justify the prohibition on three grounds: avoiding the loss of federal revenue, preventing theft from the mails, and maintaining the efficiency of the Postal Service. In my judgment, the first ground is frivolous and the other two, though valid, are insufficient to overcome the presumption that this impediment to communication is invalid.
>
> If a private party—by using volunteer workers or by operating more efficiently—can deliver written communications for less than the cost of postage, the public interest would be well served by transferring that portion of the mail delivery business out of the public domain. I see no reason to prohibit competition simply to prevent any reduction in the size of a subsidized monopoly. In my opinion, that purpose cannot justify any restriction on the interests in free communication that are protected by the First Amendment.

[619] 453 U.S. at 151.

> To the extent that the statute aids in the prevention of theft, that incidental benefit was not a factor that motivated Congress. The District Court noted that the testimony indicated that § 1725 "was marginally useful" in the enforcement of the statutes relating to theft of mail. . . . It concluded, however, that the Government had failed to introduce evidence sufficient to justify the interference with First Amendment interests. The Court does not quarrel with any of the District Court's findings of fact, and I would not disturb the conclusion derived from those findings. Mailboxes cluttered with large quantities of written matter would impede the efficient performance of the mail carrier's duties. Sorting through papers for mail to be picked up or having no space in which to leave mail that should be delivered can unquestionably consume valuable time. Without the statute that has been in place for decades, what may now appear to be merely a minor or occasional problem might grow like the proverbial beanstalk. Rather than take that risk, Congress has decided that the wiser course is a total prohibition that will protect the free flow of mail.
>
> But as Justice Marshall has noted, the problem is susceptible of a much less drastic solution. . . . There are probably many overstuffed mailboxes now—and if this statute were repealed, there would be many more—but the record indicates that the relatively empty boxes far outnumber the crowded ones. If the statute allowed the homeowner to decide whether or not to receive unstamped communications—and to have his option plainly indicated on the exterior of the mailbox—a simple requirement that overstuffed boxes be replaced with larger ones should provide the answer to most of the Government's concern.
>
> . . . Conceivably, the invalidation of this law would unleash a flow of communication that would sink the mail service in a sea of paper. *But were that to happen, it would merely demonstrate that this law is a much greater impediment to the free flow of communication than is presently assumed. To the extent that the law prevents mailbox clutter, it also impedes the delivery of written messages that would otherwise take place.*[620]

Finally, Justice White joined the majority opinion is rejecting the First Amendment challenge, but for him the public forum debate was largely irrelevant. In his view, postage constituted a reasonable user fee for access to the postal system and that was that: ". . . the only

[620] 453 U.S. at 153-56 (footnotes and citations omitted, emphasis added).

question is whether a user fee may be charged, as a general proposition and in the circumstances of this case. Because I am quite sure that the fee is a valid charge, I concur in the judgment."[621]

10.8 Postal Service and Postal Monopoly in 2006

Between 1970 and 2006, the Postal Service became a more business-like, commercial organization as envisioned in the Postal Reorganization Act. Mail volume increased substantially and advertisements became an increasingly important component of the mail.

In this period the nature and scope of the postal monopoly law changed significantly by virtue of the adoption of new postal monopoly regulations in 1974. The 1974 regulations effectively extended the scope of the postal monopoly statute to include all types of correspondence, commercial papers, newspapers and magazines, addressed advertisements, books, and other tangible objects bearing textual information except for items or mailers or types of carriage excluded from the monopoly by administrative regulation. The legal keystone to these regulations was the Postal Service's questionable interpretation of a statutory provision originating the nineteenth century that authorized the Postmaster General to suspend the stamped envelope exception to the postal monopoly. The Postal Service's interpretation of this provision was not reviewed by the courts. In the only substantial judicial review of the legitimacy of the 1974 postal monopoly regulations, the 1979 *ATCMU* case, a federal appellate court—armed with a less than complete history of the evolution of the postal monopoly law—sustained the regulations as a valid exercise of the Postal Service's rulemaking authority insofar as they included advertisements in the definition of "letter."

After the *ATCMU* decision, the Postal Service extended its administrative suspensions of the postal monopoly in several instances, the most important of which were the suspension for urgent letters in 1979 and for international remail in 1986. These suspensions paved the way for development of private express document services and, ultimately, for postal reform in Europe. Although there were several postal monopoly court cases after *ATCMU*, none touched on the fundamental foundations of the postal monopoly statute or regulations.

[621] 453 U.S. at 142.

The mailbox monopoly became more economically significant because the Postal Service increasingly shifted from door delivery to mailbox and clusterbox delivery. In the 1973 *Rockville Reminder* case, a federal appellate court gave brought support for the authority of the Postal Service to regulate the uses to which private mailboxes may be put. This case was not dependent on the mailbox monopoly statute and contemplates Postal Service authority over the mailbox that exceeds the particular rights granted by the mailbox monopoly statute. In the 1981 *Council of Greenburg Civic Associations* case, the Supreme Court upheld the constitutionality of the mailbox monopoly statute. In this case, multiple opinions offer diverse philosophical perspectives on the concept of a mailbox monopoly.

In 1994, Congress substantially increased the fines for sending a letter by private express in violation of the postal monopoly and for illegally depositing mailable matter in a private mailbox by 30 to 200 fold. These increased penalties were the result of a general modernization of the criminal code and may have been inadvertent insofar as the postal monopoly and mailbox monopoly are concerned. Inexplicably, the penalty for operating an illegal private express was unchanged.

11 PAEA and the Current Status of the Monopoly Laws

On December 21, 2006, the Postal Accountability and Enhancement Act (PAEA) modified the postal monopoly law in significant respects. It created new statutory exceptions to the postal monopoly statutes: for letters charged more than six times the stamp price, for letters weighing more than 12.5 ounces, and for a grandfather exception that includes situations in Postal Service regulations purported to "suspend" the postal monopoly. The PAEA also apparently repealed the authority of the Postal Service to adopt substantive regulations implementing the monopoly statutes. Nonetheless, the Postal Service has continued to maintain both its postal monopoly and mailbox monopoly regulations. The PAEA vested the Commission with new authority to administer elements of the postal monopoly statutes and to police the Postal Service's use of its rulemaking authority. A review of the interaction between the PAEA and the complex legacy of the monopoly laws suggests several legal issues for which answers are not self-evident. Since the Commission has not yet adopted regulations or otherwise addressed implemented these new powers, this chapter presents what is necessarily a preliminary evaluation of the effects of the PAEA on the monopoly laws and the current status of those laws.

11.1 Price Limit Exception

The PAEA added a new price limit exception to the postal monopoly that is set out in section 601(b)(1) of the Title 39. It provides that

> (b) A letter may also be carried out of the mails when—
>
> (1) the amount paid for the private carriage of the letter is at least the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter;

For example, since the rate for one ounce single-piece first class letter was $ 0.42 in June 2008, a letter could be carried out of the mails by a private carrier if the shipper paid the carrier $2.52 or more.

The new section does not explain how to calculate the minimum payment for a shipment of multiple letters, a normal occurrence in commerce . Suppose A wants to send B a large envelope containing two smaller envelopes each of which includes a separately composed letter. Is A required to pay the private carrier $ 2.52 or $ 5.04? In the absence of Commission regulations clarifying this point, the most plausible answer seems to be that a shipment of letters

may be carried out of the mail whenever the shipper pays the carrier $ 2.52 or more for a shipment, regardless of the number of individual letters included in the shipment. This result seems implied by a comparison of the PAEA provision with the Postal Service's pre-PAEA suspension for urgent letters, 39 C.F.R. § 320.8. According to paragraph (c) of the suspension regulation, a letter may be carried out of the mails if the shipper pays the carrier at least $ 3.00 or twice the applicable U.S. postage, whichever is greater. For a shipment of multiple letters, the calculation of "applicable postage" is based on the weight of the total shipment, not the weight of the individual letters.[622] Under the urgent letter suspension (using June 2008 postage rates), to transport a large envelope carrying six one-ounce letters out of the mails, a shipper must pay a carrier at least $ 3.36 (twice the applicable postage, $ 1.68). If the new PAEA exception were calculated on the basis of $ 2.52 for each individual letter, the shipper would have to pay the carrier at least $15.12 to ship the same envelope by private carrier. Since the purpose of the PAEA provision seems to have been to expand the scope for private carriage, it appears most plausible that the price limit should be applied on a shipment basis.

11.2 Weight Limit Exception

The PAEA also added a new weight limit exception to the postal monopoly set out in section 601(b)(2) of the Title 39 which provides that

> (b) A letter may also be carried out of the mails when— . . .
>
> (2) the letter weighs at least 12 ½ ounces;

For reasons discussed above in the context of the price limit exception, the most plausible interpretation of this exception seems to be that a shipment of letters may be carried out of the mails if shipment as a whole weighs more than 12.5 ounces regardless of the number of individual letters inside the shipment.

[622] 39 C.F.R. 320.8(c) (2006) provides: "If a single shipment consists of a number of letters that are picked up together at a single origin and delivered together to a single destination, the applicable U.S. postage may be computed for purposes of this paragraph as though the shipment constituted a single letter of the weight of the shipment. If not actually charged on a letter-by-letter or shipment-by-shipment basis, the amount paid may be computed for purposes of this paragraph on the basis of the carrier's actual charge divided by bona fide estimate of the average number of letters or shipments during the period covered by the carrier's actual charge."

11.3 Grandfather Exception

The third new exception to the postal monopoly added by the PAEA is set out in section 601(b)(3) of the Title 39 and provides that,

> (b) A letter may also be carried out of the mails when— . . .
>
> (3) such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect).

This exception permits carriage of a letter out of the mails if "such carriage is within the scope of services described by regulations" in effect in 2005 "that purport to permit private carriage by suspension."[623] The precise contours of the grandfather exception are unclear due to the complexity of the Postal Service regulation referenced. Authority to clarify the bounds of the grandfather exception is vested in the Commission. The following discussion, therefore, is only a preliminary description of this exception.

It seems apparent that the grandfather exception is intended to include all of the private carriage described in the sections 320.2 to 320.8 of the Postal Service's regulations, i.e., carriage of certain data processing materials, letters of colleges and universities, urgent letters, advertisements in parcels or periodicals, and international remail. These seem clearly "services described by regulations that purport to permit private carriage by suspension." Moreover, it appears clear from legislative history, if not from the statutory language, that what is included in the grandfather exception is the right to provide "such carriage" but not the regulatory restrictions attached to the suspensions, such as, for example, the obligation to admit postal inspectors for otherwise unauthorized inspections or the obligation to submit records to the Postal Service. The most recent House committee report explains this grandfather exception as follows:

> The "grandfather clause" provided in the bill will authorize the continuation of private activities that the Postal Service has

[623] The postal monopoly regulations were not amended between the 2005 and 2006 editions of the Code of Federal Regulations. For simplicity of exposition, the analysis of the scope of the grandfather exception will refer to the 2006 edition of C.F.R. instead of the 2005 edition.

> permitted under color of this section [former § 601(b)]. In this way, the bill *protects mailers and private carriers who have relied upon regulations that the Postal Service* has adopted to date in apparent misinterpretation of the current subsection (b). . . .
>
> The suspension for outgoing international mail would be continued, to the extent that it involves the uninterrupted carriage of letters from a point within the United States to a foreign country for delivery to an ultimate destination outside the United States. *However, the requirement that a shipper or carrier submit to an inspection or audit or face a presumption of violation would not be continued.*[624]

The most recent Senate committee report similarly explains:

> The proposed amendment would repeal the Postal Service's authority to suspend the postal monopoly exception for stamped letters—an antiquated and never used authority—and to codify the exemptions to the postal monopoly that the Postal Service has adopted to date in apparent misinterpretation of the suspension provision. The intent of this provision to continue to allow private carriage under those circumstances in which private carriage is purportedly permitted by current Postal Service "suspensions" of the monopoly *but not to continue provisions in the Postal Service regulations that purport to condition or limit use of such "suspensions," e.g., a requirement that customers of private carriers must permit otherwise unauthorized inspections by postal inspectors.*[625]

The grandfather exception also permits private carriage within the scope of services described by section 310.1 where the services are "services described by regulations that purport to permit private carriage by suspension." How this provision should be interpreted is less apparent. In section 310.1, paragraph (a)(7) lists twelve types of items that are stated to be "not letters within the meaning of these regulations." These are:

> (i) Telegrams.
>
> (ii) Checks, drafts, promissory notes, bonds, other negotiable and nonnegotiable financial instruments . . . when shipped to, from, or between financial institutions. . . .
>
> (iii) Abstracts of title, mortgages and other liens, deeds, leases, releases, articles of incorporation, papers filed in lawsuits or

[624] H.R. Rep. No. 66, 109th Cong., 1st Sess. 58 (Apr. 28, 2005) (emphasis added).

[625] S. Rept. No. 108-318, 108th Cong., 2d Sess. 54 (Aug. 25, 2004) (emphasis added).

> formal quasi-judicial proceedings, and orders of courts and of quasi-judicial bodies.
>
> (iv) Newspapers and periodicals.
>
> (v) Books and catalogs consisting of 24 or more bound pages with at least 22 printed, and telephone directories. . . .
>
> (vi) Matter sent from a printer, stationer, or similar source, to a person ordering such matter for use as his letters. . . .
>
> (vii) Letters sent to a records storage center exclusively for storage, letters sent exclusively for destruction, letters retrieved from a records storage center, and letters sent as part of a household or business relocation.
>
> (viii) Tags, labels, stickers, signs or posters . . .
>
> (ix) Photographic material being sent by a person to a processor and processed photographic material being returned from the processor to the person sending the material for processing.
>
> (x) Copy sent from a person to an independent or company-owned printer or compositor . . . and proofs or printed matter returned from the printer or compositor to the office of the person who initially sent the copy.
>
> (xi) Sound recordings, films, and packets of identical printed letters containing messages all or the overwhelming bulk of which are to be disseminated to the public. . . .
>
> (xii) Computer programs recorded on media suitable for direct input. . . .

From the administrative history of (a)(7), described above, it is evident that the Postal Service originally regarded its definition of "letter" to include items (ii) through (vii) and that the Postal Service never disclaimed that interpretation. Indeed, it seems clear that items (ii) through (vii) are encompassed by the definition of "letter" set out in section 310.1(a)(1) to (a)(6). In shifting these items from the suspension section of the proposed regulations, Part 320, to the definitional section, Part 310, the Postal Service did not change the definition of "letter" set out in (a)(1) to (a)(6). It only added a footnote to section (a)(7) indicating that it might regard these items as "letters" which could be carried out of the mails by virtue of a suspension:

> Several of the items enumerated in this paragraph (a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, *the Postal Service has determined by adoption of these regulations that the restrictions of*

> *the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).*[626]

In light of this history, it seems most plausible to interpret the Postal Service's regulations as indicating that items (ii) through (vii) are "services described by regulations that purport to permit private carriage by suspension." If this interpretation is correct, then private carriage of items (ii) through (vii) would be included in the grandfather exception.

A similar conclusion seems applicable to the other items in (a)(7)—item (i) and items (viii) through (xii)—but the chain of reasoning is less certain because the administrative history is less clear. Items (viii) through (xii) were added to (a)(7) by the 1979 amendments to the postal monopoly regulations. In proposing the addition of these items to (a)(7), the Postal Service referred to the new provisions as "exclusions" rather than "suspensions."[627] In the same announcement, item (i), referring to telegrams, is also described as an "exclusion" rather than a suspension. All of these items would seem to be encompassed within the definition of "letter" set out in (a)(1) to (a)(6) but for being listed in (a)(7). All are qualified by the same footnote that qualifies items (ii) through (vii)—the footnote invoking to Postal Service's suspension authority. Since the Postal Service did not have an "exclusion" authority that was distinct from its purported "suspension" authority, it seems most plausible to interpret the Postal Service's regulations as indicating that items (i) and (viii) through (xii) are likewise "services described by regulations that purport to permit private carriage by suspension."

This conclusion also seems supported by a consideration of legislative history of PAEA. It appears reasonably clear that the objective motivating the grandfather exception was that, as the House committee states, it "protects mailers and private carriers who have relied upon regulations that the Postal Service has adopted." While one could argue that some of these items are not within the definition of "letters" and therefore not covered by the grandfather exception, the result could be put mailers and carriers at risk for relying upon Postal Service regulations. The precise scope of the term "letters" is unclear and the overriding purpose of this provision (judging from the language quoted from the House committee report) was to give legal certainty

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[626] 39 C.F.R. 310.1(a)(7) n. 1 (2006) (emphasis added).

[627] *See* 43 Fed. Reg. 60616-17 (Dec. 28, 1978) ("proposed expanded language in this exclusion [for books and catalogs]"; "the proposed exclusion [for tags, etc.]"; "new exclusion [for photographic materials]"; "proposed exclusion [for sound recordings]").

to those who relied upon Postal Service regulations. Since nonletters are excluded from the postal monopoly in any case, including all of items (i) and (viii) to (xii) in the grandfather exception will further the Congressional purpose for creating legal certainty while, at worst, doing no legal harm (i.e., by redundantly declaring that certain nonletters are outside a postal monopoly over the carriage of letters). In light of such considerations, then, it seems most plausible to regard private carriage of items (i) and (viii) to (xii) in paragraph (a)(7) as covered by the grandfather exception.

The grandfather exception is not limited to private carriage within the scope of services listed in sections 310.1 and 320.2 to 320.8. It applies to all "services described by regulations that purport to permit private carriage by suspension." Sections 310.1 and 320.2 to 320.8 are specified only as particular instances of such sections ("including, in particular"). What other types of private carriage could be encompassed by the grandfather exception? After sections 310.1 and 320.2 to 320.8, the section of the Postal Service regulations which is most significant for private carriage is section 310.3[628] which sets out regulations implementing five of the six traditional statutory exceptions: the cargo letter exception, letters of the carrier exception, private hand exception, special messenger exception, and prior-to-posting exception. As discussed above, the regulations related to one of these exceptions, the prior-to-posting exception, appear to permit private carriage of letters in circumstances where it is not permitted by statute.[629] Section 310.3(e) permits private carriage of letters from a mailer to a distant downstream post office or postal facility. The statute permits private carriage only to the post office or postal facility *nearest* the mailer.

Whether or not the grandfather exception should be deemed to include private carriage permitted by the exceptions set out in section 310.3 depends on issues similar to those considered in the case of items (i) and (viii) through (xii) in paragraph 310.1(a)(7). The regulations do not explicitly say that private carriage is being permitted under authority of the purported suspension power. On the other hand, private carriage that is inconsistent with the postal monopoly statutes is being permitted by regulation and seemingly the only power that could be relied upon by the

[628] 39 C.F.R. § 310.3 (2006).

[629] 39 C.F.R. § 310.2(d) (2006) restates the § 310.3 exceptions to the postal monopoly in more abbreviated form. The discussion in the text applies to § 310.2(d) in the same manner as to § 310.3.

Postal Service to do so is the suspension power. The statutory language of the grandfather exception seems to contemplate the possibility of grandfathering private carriage outside the scope of 310.1 and 320.2 to 320.8. Shippers and private carriers have relied on these regulatory "exceptions" from the postal monopoly, and the overriding intent of the grandfather exception seems to be to protect shippers and carriers who have relied on the regulations. In light of these considerations, it seems most plausible to interpret the grandfather exception to include private carriage where permitted by the exceptions listed in section 310.3.

Sections 310.2(b)(2) and (c) are additional regulatory provisions under which the Postal Service purportedly permitted private carriage. These provisions provide as follows:

> (b) Activity described in paragraph (a) of this section [referring to the postal monopoly statutes] is lawful with respect to a letter if: . . .
>
> (1) [statutory provisions of the stamped envelope exception, 39 U.S.C. 601(a)]
>
> (2)(i) The activity is in accordance with the terms of a written agreement between the shipper or the carrier of the letter and the Postal Service. Such an agreement may include some or all of the provisions of paragraph (b)(1) of this section, or it may change them, but it must;
>
> (A) Adequately ensure payment of an amount equal to the postage to which the Postal Service would have been entitled had the letters been carried in the mail;
>
> (B) Remain in effect for a specified period (subject to renewals); and
>
> (C) Provide for periodic review, audit, and inspection.
>
> (ii) Possible alternative arrangements may include but are not limited to:
>
> (A) Payment of a fixed sum at specified intervals based on the shipper's projected shipment of letters for a given period, as verified by the Postal Service; or
>
> (B) Utilization of a computer record to determine the volume of letters shipped during an interval and the applicable postage to be remitted to the Postal Service.
>
> (c) *The Postal Service may suspend the operation of any*

> *part of paragraph (b)* of this section where the public interest requires the suspension.[630]

In brief, sections 310(b) and (c) state that private carriage which is otherwise prohibited by the postal monopoly statutes is "lawful" if it is "in accordance with the terms of a written agreement between the shipper or the carrier of the letter and the Postal Service." This "agreement exception" is provided in addition to the stamped envelope exception established by statute and set out in section 310.2(b)(1). If While the terms of the agreement may "adequately ensure payment of an amount equal to the postage to which the Postal Service would have been entitled had the letters been carried in the mail," the Postal Service "may suspend the operation of" this requirement as well. The legal and policy considerations which argue for interpreting the statutory grandfather exception to include private carriage purportedly permitted under other administrative exceptions seem to apply to this administrative "agreement exception" as well.

In sum, the proper interpretation of the scope of the grandfather exception is not self-evident. Nonetheless, preliminarily, it appears most plausible that the grandfather exception permits private carriage where such carriage is within the scope of services described by regulations 310.1(a)(7), 310(b)(2), 310.3, and 320.2 to 320.8 of Title 39 of Code of Federal Regulations in effect on July 1, 2005.

11.4 Amendments to Postal Service Rulemaking Authority

The PAEA included four provisions which modify the Postal Service's rulemaking authority with respect to the postal monopoly statutes and the mailbox monopoly statute.

First, the PAEA changed the scope of section 401(2) of Title 39, which defines the Postal Service's rulemaking authority. The former statute authorized the Postal Service "to adopt, amend, and repeal such rules and regulations as it deems necessary *to accomplish the objectives of this title.*"[631] The revised version authorizes the Postal Service to "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, *as may be necessary in the execution of its functions under this title* and such other functions as may be assigned to the Postal Service

[630] 39 C.F.R. §§ 310.2(b)-2(c) (2006) (emphasis added).

[631] 39 U.S.C. § 401(2) (2006)

under provisions of law outside of this title."[632] This amendment naturally presents the question whether rules and regulations administering the monopoly statutes in Title 18 are "necessary in the execution of " the Postal Service's functions under Title 39.

The answer to this question does not appear self-evident from the terms of the statute. A reasonable person could argue that regulations implementing the monopoly statutes are "necessary in the execution" of universal postal service, one of the "functions" of the Postal Service provides under Title 39. On the other hand, a reasonable person could argue that nothing in the present version Title 39 specifically commits to the Postal Service to the function of administering the monopoly laws other than the limited function of searching for and seizing illegally transported letters. While the monopoly *statutes* may assist the Postal Service in the execution of its functions under Title 39, the additional assistance provided by Postal Service *regulations* is marginal. Since the Postal Service cannot by regulation alter the scope of the monopoly statutes,[633] its regulations can only contribute appropriate clarification. The legal question is not whether the postal monopoly and mailbox monopoly *statutes* are necessary to allow the Postal Service to execute its functions under Title 39, but whether *regulations* issued by the Postal Service are necessary to that purpose. Since, in broad terms, universal postal service was achieved was in the United States before the Post Office Department or Postal Service issued substantive postal monopoly regulations and since another agency, the Department of Justice, is more specifically vested with authority to enforce the criminal provisions which establish the postal monopoly and mailbox monopoly, the most plausible conclusion is that Postal Service is not authorized to adopt regulations implementing the criminal statutes in Title 18.

Legislative history supports the view that the intention underlying the amendment to section 401(2) was to divest the Postal Service of general authority to adopt regulations

[632] 39 U.S.C. § 401(2) (2006), *amended by* Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 504, 120 Stat. 3198, 3235.

[633] Given the Postal Service's broad interpretation of "letter"in the postal monopoly statutes, almost the only consequence of the Postal Service's postal monopoly regulations is to reduce the scope of the monopoly by creating explicit or implicit suspensions. Since the suspension authority was repealed by PAEA, it will no longer be necessary, or lawful, for the Postal Service to exercise this function.

implementing the monopoly statutes.[634] The most recent House committee report states that, "This amendment is intended to make clear that the Postal Service is not, unless explicitly authorized by Congress, empowered to adopt regulations implementing other parts of the U.S. code, e.g., the criminal laws."[635] The most recent Senate committee report notes that the Postal Service is authorized to adopt rules with respect to some functions outside of Title 39 but conspicuously fails to mention Title 18, "This amendment is intended to make clear that the Postal Service is not empowered to adopt regulations implementing other parts of the U.S. Code unless explicitly authorized to do so by Congress. . . . The amendment recognizes that the rulemaking authority of the Postal Service is affected by its obligations under title 5 and certain other limited provisions of law outside Title 39."[636] Both committees agreed that the intention of the amendment was to divest the Postal Service of authority to issue regulations implementing titles of the United States Code other than Title 39 unless "explicitly" authorized to do so. In light of these committee reports, it seems difficult to interpret the revised version of section 401(2) as "explicitly" authorizing the Postal Service to adopt regulations implementing the provisions of the monopoly statutes in Title 18.

It is undeniable that Congress amended the rulemaking authority of the Postal Service. It may be presumed that there was some purpose for this amendment. The revised language seems clearly to narrow the scope of rulemaking. In light of legislative history, the most plausible interpretation of the revised rulemaking provision appears to be that Congress divested the Postal Service of general authority to adopt regulations implementing the criminal portions of the monopoly statutes. Moreover, since the revised complaint procedure, section 3662,[637] authorizes the Commission to determine whether the Postal Service has lawfully exercised its authority

[634] In floor consideration of the PAEA, the only reference to the amendment of the rulemaking authority of the Postal Service seems to have been a question put to Tom Davis of Virginia, the chairman of the House Committee on Government Oversight and Reform. He was asked "to clarify how rulemaking by the Postal Service should consider the circumstances within the postal sector." Chairman Davis, "The committee intends that the Postal Service will exercise *the more clearly delineated rulemaking powers* provided under this section in a way that is rationally related to the policy objectives set out in the revised statute, and it is predicated upon an understanding of the effect the regulations will have on the conditions in the postal sector."152 Cong. Rec. H6512 (Jul. 26, 2005) (emphasis added). These remarks suggest that Congress intended to narrow 39 U.S.C. § 401(2) in some respect but do not shed much light on what authority was eliminated by the revision.

[635] H.R. Rep. No. 66, 109th Cong., 1st Sess. 59 (Apr. 28, 2005).

[636] S. Rep. No. 318, 108th Cong., 2d Sess. (Aug. 25, 2004).

[637] 39 U.S.C. § 3662 (2006).

under section 401(2), it appears to be within the authority of the Commission to provide a definitive interpretation of this provision.

Second, the PAEA added section 404a to the Title 39.[638] This section limits the rulemaking authority of the Postal Service as follows:

> (a) Except as specifically authorized by law, the Postal Service may not—
>
> (1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service;

Since any regulation implementing the monopoly laws would seem to "preclude competition or establish the terms of competition," the effect of this provision appears to require that any regulation implementing the monopoly statutes must not "create an unfair competitive advantage." This prohibition appears to suggest the Postal Service is not authorized to adopt regulations prohibiting private companies from competing with the Postal Service. Since section 404a(b) authorizes the Commission to adopt regulations implementing section 404a, it appears to be within the authority of the Commission to provide a definitive interpretation of this provision.

Third, the PAEA authorized the Commission to adopt the regulations necessary to implement section 601 of Title 39. Section 601(c) provides, "Any regulations necessary to carry out this section shall be promulgated by the Postal Regulatory Commission." By its terms, this provision appears to exclude the possibility that the Postal Service may also adopt regulations to implement section 601. Moreover, section 401(2) limits the rulemaking authority of the Postal Service to rules "not inconsistent with this title."

Fourth, the PAEA repealed former section 601(b) of Title 39, the statutory provision upon which the Postal Service relied to adopt regulations that purport to permit private carriage by suspension of the stamped envelope exception. Since the suspensions are integral to the definition of the postal monopoly, repeal of the suspension authority appears to call into question the post-PAEA validity of the entire set of set of regulations.

[638] 39 U.S.C. § 404a (2006).

In sum, it appears that the PAEA repealed the authority of the Postal Service to adopt substantive rules defining the postal monopoly and the mailbox monopoly laws.

In December 2007, the Federal Trade Commission (FTC) came to a similar conclusion with respect to the Postal Service's rulemaking over the postal monopoly statutes. The FTC's observation was included in a report required by the PAEA on the application of laws to the Postal Service's competitive products and to similar produces provided by private companies.[639] The FTC concluded that the PAEA "repealed the statutory authority for the USPS to issue regulations to define the scope of its monopoly."

> *The PAEA also repealed the statutory authority for the USPS to issue regulations to define the scope of its monopoly*. The Act also specifically prohibits the USPS from establishing any rule or regulation "the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service." The extent to which the PAEA grants the PRC the authority to issue regulations that 69 define the scope of the letter monopoly is unclear. 39 U.S.C. § 601(c) provides that the PRC may promulgate "any regulation necessary to carry out" the section of the PAEA codifying the exceptions to the PES (39 U.S.C. §§ 601(a)-(b)). It is unclear, however, whether this legislative grant of authority includes the ability to issue regulations that further refine the scope of the postal monopoly.[640]

In this discussion, the FTC cited the PAEA's amendments to section 601 and inclusion of new section 404a but did *not* consider the effect of the amendment to section 401(2). Perhaps for this reason, the FTC did not address whether the PAEA has also repealed the Postal Service's rulemaking authority over the mailbox monopoly statutes.[641]

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[639] Postal Accountability and Enhancement Act, Pub. L. 109-435, §703, 120 Stat. 3198, 3244 (2006).

[640] Federal Trade Commission, "Accounting for Laws That Apply Differently to the United States Postal Service and its Private Competitors," at 16 (Dec. 2007) (emphasis added, footnotes omitted).

[641] See id. 16-18. On the other hand, the FTC did suggest that the Postal Service's Domestic Mail Manual provisions implementing the mailbox monopoly may exceed the scope of section 1725 of Title 18. The FTC's study states, "The USPS's regulations that define the mailbox monopoly may go beyond the scope of 18 U.S.C. § 1725, which prohibits only the depositing of 'mailable matter' into a mailbox with 'the intent to avoid payment of lawful postage.' Because competitive products do not require postage, it is unclear that Congress intended Section 1725 to apply to competitive products (which, of course, did not exist at the time Congress enacted Section 1725). The Domestic Mail Manual also restricts items placed upon, supported by, attached to, hung from, or inserted into a mailbox. Id. The USPS does not classify door slots, nonlockable bins or troughs used with apartment house

Despite the PAEA's modifications in the Postal Service's rulemaking authority, the Postal Service has not revised or withdrawn regulations which implement the postal monopoly and mailbox monopoly statutes. The current version of the Code of Federal Regulations (July 1, 2008 edition) includes Parts 310, 320, and 959. These implement provisions of the postal monopoly laws, including sections 1693 to 1699 of Title 18 and section 601 of Title 39. They also purport to suspend the "operation of 39 U.S.C. 601(a)(1) through (6)," apparently under authority section former 601(b) of Title 39, a provision repealed by the PAEA.[642] Similarly, the current version of the Domestic Mail Manual (May 12, 2008 edition) includes section 508.3.1.1, designating letter boxes subject to section 1725 of Title 18, and sections 508.3.1.2 and 508.3.2.10, creating limited exemptions from section 1725 of Title 18.[643]

In general, a federal agency may not adopt regulations in excess of rulemaking authority delegated to it by Congress even if the regulations may, in the view of the agency, serve the public interest.[644] The continuing validity, after enactment of the PAEA, of Postal Service's regulations implementing the postal monopoly and the mailbox monopoly statutes may therefore be reasonably questioned.

The Postal Service's mailbox monopoly regulations may, however, not be entirely dependent upon the mailbox monopoly statute for their validity. As noted above, the *Rockville Reminder* case appears to hold that the Postal Service may establish an *administrative* mailbox monopoly by regulations issued under authority of section 101 of Title 39 without relying upon the mailbox monopoly statute, section 1725 of Title 18. Although addressing a different legal issue, the Supreme Court's analysis in *Council of Greenburg Civic Associations* appears to support this conclusion, for the majority of the Court accepted the view that Congress and Postal Service regulations had placed private mailboxes under the control of the Postal Service. The Postal Service regulation that establishes a mailbox monopoly is section 508.3.1.3 of the

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mailboxes, or support posts as subject to these restrictions. Postal Service, *Domestic Mail Manual* § 508.3.1.2 (May 12, 2008 ed). Further, the Postal Service allows customers to attach newspaper receptacles to their mailbox posts, and for newspapers 'regularly mailed as periodicals' to be placed in the mailboxes of 'rural route and highway contract route' subscribers on Sundays or holidays. Id. § 508.3.2.10-11. The USPS also prevents any private delivery to Post Office boxes. Id. § 508.4.4.2." Id. at 17 n. 74.

[642] 39 C.F.R. Parts 310, 320 (2008).

[643] Postal Service, *Domestic Mail Manual* (May 12, 2008 ed).

[644] *See* MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218 (1994).

Domestic Mail Manual. It declares "no part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle." This regulation does not cite 18 U.S.C. § 1725 as its legal basis. Judging from the case law, it does it require the mailbox monopoly statute for its legal authority.[645] Similarly, section 508.3.2.11 of the Domestic Mail Manual allows householders to attach a receptacle for receipt of newspapers to the post of a curbside mailbox. This regulation, too, appears to be independent of the mailbox monopoly statute.

To the extent that the Postal Service's mailbox monopoly regulations are not grounded in Title 18, the continuing validity of these regulations may be unaffected by the PAEA's modification of the Postal Service's rulemaking authority, section 401(2). However, it could be still argued that the mailbox monopoly regulations "preclude competition or establish the terms of competition" and that therefore, under new section 404a, they must be reviewed to ensure that they do not "create an unfair competitive advantage."

11.5 Status of the Postal Monopoly over the Carriage of "Letters and Packets"

The PAEA did not modify the postal monopoly statutes. The scope of the monopoly over the carriage of "letters and packets" is therefore unchanged except that, as discussed in the previous section, it appears that the courts and affected parties must now interpret the statutes themselves rather than relying upon regulations of the Postal Service.

Although the Supreme Court has not defined the scope of the postal monopoly since enactment of the current postal monopoly statutes in 1872, it has seemingly prescribed the methodology for doing so. In 1988 in the *Regents of the University of California* case the Court interpreted two statutory exceptions to the postal monopoly: the letters-of-the-carrier exception and the private hand exception. With respect to the letters-of-the-carrier exception, the Court reviewed the 1896 opinion of Attorney General Harmon, the legislative history of the act adding the exception to the Criminal Code of 1909, and the interpretation of the exception in the 1915 *Erie Railroad* case. With respect to the private hands exception, the Court reviewed the postal ordinance of 1782, the postal act of 1792, the legislative history and text of the 1845 act,

[645] Indeed, the regulation appears to exceed the scope of the mailbox monopoly statute since it restricts the use to which a mailbox may be put and not merely what may be deposited in the mailbox.

contemporary dictionaries, and the construction of the act by the *Thompson* court and by the Attorney General. The Court then concluded,

> *The parties and the United States as amicus curiae have focused their arguments largely on Postal Service regulations* construing the "letters of the carrier" and the "private hands" exceptions. With respect to the "letters of the carrier" exception, the Postal Service has consistently read the statute to require that the letters be written by or addressed to the carrier. Even before the Service issued formal regulations, it espoused this view in periodic pamphlets it published describing the reach of the Private Express Statutes. See, e.g., United States Post Office Dept., Restrictions on Transportation of Letters 16-17 (4th ed.1952). . . .
>
> Appellant and the United States have urged us to defer to these agency constructions of the statute. While they reach a different conclusion as to the proper application, appellees specifically indicated at oral argument that they were not challenging the validity of the regulations. Tr. of Oral Arg. 33. *Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency.*[646]

In the wake of the PAEA, in order to determine the status of the postal monopoly over "letters and packets," it appears that a similar historical and legal analysis must be undertaken.

Since 1872, the only judicial analysis of the scope of the postal monopoly over "letters and packets" that approaches the careful methodology of the Supreme Court in *Regents* is found in the *ATCMU* case in 1979. In that case, the Court of Appeals for the D.C. Circuit analyzed the legal history of the postal monopoly in detail. In the course of the proceeding, the Postal Service provided a detailed analysis of the statutory and administrative development of the postal monopoly statutes, although the court apparently lacked knowledge of some key historical facts. In the end, the Court of Appeals did not wholly endorse or reject an expansive statutory interpretation advanced by the Postal Service; rather, it deferred to the rulemaking authority of the Postal Service in the absence of clearly demonstrated error.

In sum, the present status of the postal monopoly over "letters and packets" seems to be as follows. The postal monopoly today includes those items which Congress intended to include in the term "letters and packets" when it enacted the postal code of 1872. It appears that the

[646] Regents of Univ. of Cal. v. Public Empl. Rel. Bd., 485 U.S. 589, 602 (1988) (emphasis added).

Postal Service is no longer authorized to adopt substantive regulations defining the scope of the postal monopoly statutes, although its views on statutory interpretation—last detailed in the course of the ATCMU case—must still be given appropriate consideration. It appears to be settled law that the term *packet* refers to a packet of letters, so the scope of the postal monopoly turns on the meaning of the term *letters*. With one trivial exception,[647] the courts have not defined the scope of statutory term *letters* other than by deference to regulations of the Postal Service which, after PAEA, can not command deference. Hence, there exists no authoritative construction of what Congress intended by the term *letters* in the postal code of 1872. On balance, the evidence uncovered in this study suggests that the most plausible interpretation of the term *letters* as used in the postal code of 1872 is that it referred to personal written correspondence and that the term did not to include certain types of commercial documents subject to first class postage, much less matter in other classes of mail such as newspapers (second class), advertisements (third class), or books (fourth class). The history of the postal monopoly law is a vast forest, however, and reasonable persons may be able to divine more than one trail.

Finally, the PAEA authorized the Commission to adopt "any regulations necessary to carry out" section 601 of Title 39. It appears that the Commission could plausibly conclude that it should adopt a definition of the term "letters" for the purposes of implementing section 601. Whether or not the Commission should take this step or not appears committed to the sound discretion of the Commission. Because of the close relation between section 601 of Title 39 and the private express provisions in Title 18, it seems possible that any decision by Commission interpreting the term "letter" in section 601 would be considered tantamount to defining the scope of the postal monopoly.

[647] National Ass'n of Letter Carriers v. Independent Postal Systems, 336 F. Supp. 804 (W.D. Okla. 1971), *aff'd* 470 F. 2d 265 (10th Cir. 1972). The district court's discussion of the term *letter* was superficial when compared to the standard of statutory and legislative exegesis set by the Supreme Court in *Regents of Univ. of Cal. v. Public Empl. Rel. Bd.*, 485 U.S. 589, 602 (1988).

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