

Reforming the Postal Sector in the Face of Electronic Competition

Edited by

Michael A. Crew

Rutgers, The State University of New Jersey, Newark, USA

and

Paul R. Kleindorfer

INSEAD, France and the University of Pennsylvania, USA

ADVANCES IN REGULATORY ECONOMICS

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

© Michael A. Crew and Paul R. Kleindorfer 2013

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2012946673

This book is available electronically in the ElgarOnline.com
Economics Subject Collection, E-ISBN 978 0 85793 580 9



ISBN 978 0 85793 579 3

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire
Printed and bound by MPG Books Group, UK

5. A new governance model for US postal services*

James I. Campbell Jr[†]

1 INTRODUCTION

The United States Postal Service (USPS) is on the brink of collapse. Staggered by debts that it cannot repay, USPS is seeking legislative relief while threatening radical retrenchment. In Congress, prospective decline has evoked sharply contrasting visions of the future of the post. For some members of Congress, six-day, high-quality postal service to every corner of the country remains necessary to ‘bind the Nation together’ – the lifeline for those on the wrong side of the ‘digital divide’, the anchor of small and rural communities, the backbone of a vast subsector of the economy. For others, USPS is a bloated federal bureaucracy built for a bygone era – too many offices, too frequent deliveries, an excessive and overpaid workforce, run by a political board incapable of ‘right sizing’ a business being overtaken by new technologies. Neither vision commands a majority of lawmakers. Current proposals only postpone fundamental reform, while giving postal management detailed, but dubious, instructions on how to run a national postal system.

This chapter proposes a more promising approach. Legislators, it will be argued, should focus less on *what* future postal services should entail and more on *how* such questions should be decided. A wiser strategy for *governing* the postal sector will provide a sounder and more enduring basis for *managing* postal services in the future. Such an approach is well within the mainstream of American postal legislation – in particular, the Postal Reorganization Act of 1970 (PRA) – and consistent with reforms adopted in other national infrastructure industries in the US (for example, aviation, telecommunications) and in the postal systems of other industrialized countries.

This chapter is divided as follows. Following this introduction, Section 2 clarifies the concept of ‘governance’ by summarizing the current governance model for postal services. Section 3 describes how a new governance model is implied by principles of sound governmental design and key market-based and political imperatives. Section 4 offers a concrete example of how a new governance model could be implemented by outlining the major provisions of one possible example of a Postal Modernization Act (PMA). Section 5 provides a short recapitulation of the argument.

[†] Attorney in private practice in Washington, DC.

2 THE CURRENT GOVERNANCE MODEL FOR POSTAL SERVICES

The organization and activities of USPS are directed by three distinct sets of rules (Table 5.1). Legislative rules are embodied in statutes enacted by Congress. Regulatory rules are issued by the Postal Regulatory Commission (PRC). Managerial rules and decisions are made by the management of USPS.

Not all rules are created alike. The source of a rule shapes its nature and purpose. Legislative rules embody political compromises because Congress is a political body, designed to mediate between different interest groups, especially those represented in Washington. In the end, the first objective of members of Congress is to satisfy voters. Regulations and decisions of the PRC differ from legislative statutes because regulators are different from legislators. Regulators are less political and more specialized. The first objective of regulators is to satisfy Congress and the courts by applying statutes impartially and expertly. In contrast to legislators and regulators, USPS managers must focus on operational factors, mailers' needs, and market constraints. Each institution has its own pace of decision making, from the usually glacial pace of legislation to the potentially nimble execution of management.

A cardinal principle of good governmental design is that decision-making authority should be allocated among different governmental bodies so that each is assigned responsibility for decisions suited to its nature. An enduring strength of the US Constitution is that it not only divides governmental authority among three branches of government but also organizes each in a manner appropriate to its task. An enduring postal law suited to the needs of society in the early twenty-first century must reflect the same principles.

A review of the current decision-making apparatus clarifies the challenge of postal reform. Under current statutes, Congress makes a major portion of decisions relating to national postal services. Legislation establishes USPS as an independent government

Table 5.1 Decision making by governmental bodies relating to postal services

	Congress	PRC	USPS management
Main question	What do the voters want?	What does the law require?	What do customers want?
Basic nature	Mediation among political interests and values	Application of law and economic principles to specific situations	Organization of costs and products
Major factors	Constituent views; political principles and alliances; interest groups	Statutory requirements; transparent proceedings; economic and legal analyses	Statutory and regulatory requirements; customer and institutional needs
Speed and flexibility	Rules persist over many years; difficult to change	Rules evolve over time but speed and flexibility are limited by due process and precedent	Flexible and anticipatory decision making depends on management

agency directed by nine governors appointed by the President with consent of the Senate. Legislation gives USPS a monopoly over certain services and bars USPS from conveying 'non-mailable' items. Legislation also establishes employment policies and fringe benefits for USPS employees. In the Postal Accountability and Enhancement Act (PAEA) of 2006, Congress divided USPS's products into two categories, market dominant and competitive. For market-dominant products, legislation freezes postage rates in real terms (2006 rates plus inflation), prescribes discounts for preferred types of mail, mandates frequency of delivery and, to a substantial degree, determines the number and distribution of post offices. Legislation further directs USPS to maintain nationally uniform rates for certain products and to provide money-losing freight services to the bush country of Alaska. With respect to competitive products, legislation adopts a more hands-off approach, decreeing only basic rate-making principles.

The PRC is established by Congress as a second independent government agency led by five members also appointed by the President with Senate consent. The PRC's main responsibilities include administration of regulatory accounts, allocation of products between market-dominant and -competitive categories, administration of the statutory price cap for market-dominant products and pricing principles for competitive products, prevention of unfair discrimination, and an annual review of USPS's compliance with the postal laws. The PRC has limited authority over service levels. It defines quality of service measures (but not standards), reviews procedures for closing post offices (but not the decision to close), and reviews major changes in national postal service (but cannot enforce its findings).

The decision making of USPS management is circumscribed by decisions already taken in legislative and regulatory rules. USPS managers establish prices and products for market-dominant products within narrow statutory and regulatory limits. They exercise substantially more discretion in the production and pricing of competitive products. Management negotiates wages with unionized employees and directs USPS personnel but must respect federal hiring preferences and other legislative constraints. In many cases, operational decisions which are not determined by legislation are nonetheless influenced by congressional pressure. USPS also exercises governmental functions. It issues regulations, conducts investigations, and adjudicates accusations to enforce criminal and civil statutes.

The purpose of this chapter is to reconsider this *governance model* for postal services, specifically, the allocation of decision-making authority among Congress, the PRC, and USPS. Can decision making with respect to national postal services be better organized? How and why? This chapter is *not* concerned with the *business model* or commercial strategy of USPS. Many observers have offered detailed explanations why USPS should eschew price increases (or raise rates substantially), focus on last-mile delivery (or diversify into new business areas), sustain high-quality service (or cut back on service levels), and make better use of the network of post offices (or franchise retail operations). While good arguments may be made for different business strategies, the premise of this chapter is that a *lasting* legal framework for an efficient, effective USPS suited to the needs of the nation over the next decade or two requires, first of all, an allocation of decision-making authority that draws upon the strengths and avoids the weaknesses of the several bodies, which determine the business model of USPS.¹

3 A NEW GOVERNANCE MODEL: IMPERATIVES AND DESIDERATA

A new governance model for postal services must respond not only to the internal decision-making capabilities of government bodies but also to the external environment which is generating the need for decisions in the first place. In the early twenty-first century, there appear to be three fundamental imperatives that must be satisfied by any practicable revision of the governance model for postal services.

First, a new governance model must permit and encourage USPS to develop products at prices that satisfy the needs of commercial customers. Businesses and organizations send 90 percent of all mail. For business mailers, and especially for bulk mailers, use of the mail is increasingly a commercial decision, not an unavoidable cost of doing business. Even catalog mailers, who are closely tied to postal service, post more or fewer catalogs with more or fewer pages depending on considerations of price and service because catalogs and websites have become complementary elements in a modern marketing campaign. The rise of ‘commercial mailers’ – in the sense of mailers whose use of the mail is motivated by a commercial evaluation of postal services versus alternatives (not merely for ends that are ultimately commercial in nature) – implies a profound break from the past. In the future it will be commercial mailers – rather than first class mailers – who form the financial base of USPS. Unless USPS has the flexibility and motivation to develop efficient, innovative products at prices commercial mailers are willing to pay, there will be no USPS except as a destitute ward of government. A new governance model must recognize not only that USPS requires managerial flexibility to satisfy the demands of commercial mailers but also that USPS’s commercial customers can no longer serve as a tax base to pay for public services.

Second, a new governance model must accommodate public expectations for maintenance of public services. However much futurists proclaim the demise of ‘snail mail’, Congressional complaints and popular protests demonstrate that many citizens and their representatives believe that USPS must continue to perform certain public services. Perhaps post offices should not be closed where the identity of a small town is threatened. Perhaps charitable institutions should continue to receive special discounts. Perhaps in some areas deliveries should remain more frequent than commercially required. Which services should be ensured by the federal government is a question about which reasonable persons may differ, but in a democracy a new governance model must accommodate a political consensus that the USPS should provide *some* public services that do not cover costs.

Third, a new governance model must respond to the fact that the market for postal services is changing rapidly. Mail volume per capita is down 27 percent from its peak in 2000. Worse, first class mail volume, the most profitable portion of the mail, is down 36 percent. While it is commonly observed that this has been the worse decline in mail volume since the Great Depression (when mail volume fell by 31 percent in four years), this observation wholly understates the magnitude of recent market changes. During the Great Depression, the role of mail in society did not change; when the economy eventually recovered so did mail volume. Today volume declines reflect a fundamental change in the function of paper-based communications. In reality, the market for postal services is changing more rapidly and more fundamentally than at any time since the introduction of the railroad in the 1830s.

Table 5.2 Division of USPS revenues by commercial and public service categories

	Commercial products (71%)	Public service products (29%)
Market-dominant products (86%)	Bulk letters Advertisements Periodicals Inbound international letter post and parcels (commercial) (57%)	Universal services for all MD products Single-piece letters Single-piece parcels Bound printed matter Media and library mail In-county newspapers Nonprofit mail Free postage (blind, overseas voting) Inbound international letter post and parcels (social) Alaskan bush services (29%)
Competitive products (14%)	Express mail Priority mail Bulk parcels Bulk outbound international letters (14%)	Universal services for some competitive products (<1%)

What do these three imperatives imply? At the outset a new governance model must introduce a distinction between *commercial products* and *public service products* in much the same way that the PAEA introduced a distinction between market-dominant and competitive products and for much the same reasons: it is not feasible to apply the same regulatory rules to both types of products. There is an increasing tension between services designed to satisfy commercial mailers and maintenance of public services. Commercial mailers may not need, nor be willing to pay for, postal services with all of the attributes of a public service. For example, commercial mailers have little need for retail post offices, and many do not require six-day delivery. On the other hand, there remains an insistent political demand for public services in specific instances, such as maintaining post offices in small towns. A commercial/public service distinction would cut across the market dominant/competitive distinction approximately as shown in Table 5.2.

In addition, the pace of change implies that *allocation of decision making must shift from slower to faster decision-making bodies*. With respect to commercial products, the unsuitability of ‘micromanagement’ by Congress is apparent. Congress is not organized to gather and evaluate production and marketing information. Nor can Congress function with the speed necessary to keep pace with the evolution of postal markets. Regulators, too, are ill-equipped to address commercial issues in a changing marketplace. For *commercial* products, Congress and the PRC must concentrate on defining and enforcing legal principles that will protect the public interest while establishing operational structures flexible enough to allow USPS to cope with rapidly shifting demand. For *public service* products, the role of Congress must be more direct. To decide how much and what types of public postal services should be federally ensured requires reconciliation of diverse political preferences. This is the sort of decision making that Congress is

set up to handle. Even so, social needs are being transformed by new methods of communications. In defining public service products, therefore, Congress should rely as much as possible on broad objectives while allowing the PRC to fill in the blanks.

Beyond these three overriding imperatives, one can imagine additional features desirable in a new governance model. The current governance model, for example, provides remarkably little accountability to the ordinary citizen. Despite soaring rhetoric about the importance of the Universal Service Obligation, it is practically impossible for a citizen to hold the local postmaster to specific standards of service. Then, too, the ultimate aim of any law is to advance the welfare of the United States, not that of USPS and its customers. A new governance model should consider how fruits of the postal system can better serve the national economy.

Taken together, these considerations imply the need for a new governance model that is as different from the 1970 PRA as that act was from prior law. In a new governance model, Congress must become more of a designer of motivated, self-regulating institutions and definer of public interest guidelines and less of a setter of rates, service standards, and employment practices. The PRC must protect public service products and fair competition while adopting a more flexible approach towards commercial products. USPS itself must become more competent, nimble, efficient, self-motivated, and innovative. As a direct consequence, USPS must relinquish governmental authority that might give it an unfair lever against customers or competitors. Elements of the postal system, such as the national system of mailboxes and post office boxes, which can improve the efficiency of the entire national system of delivery services – no longer a system supplied by USPS alone – should be made available to all providers of delivery services in a manner that advances the public interest.

4 FROM NEW GOVERNANCE MODEL TO POSTAL MODERNIZATION ACT

The abstract notion of a new governance model will become clearer with a concrete example. This section sketches out how a hypothetical Postal Modernization Act (PMA) might tackle key legislative issues posed by a new governance model. The PMA described below is illustrative only; one of several possible variations on the theme.

Reorganization of Title 39

An attempt to introduce a new governance model by amending the existing postal law, title 39 of the United States Code, quickly reveals that title 39 is poorly organized for addressing the issues of the twenty-first century. When title 39 was drafted in the late 1960s, postal policy began and ended with USPS. Rules that establish USPS are commingled with others that mandate public services or provide for regulation. A necessary first step in crafting a PMA is reorganization of current law under headings relevant to today.

In the reorganized title 39, provisions of current law could be grouped into five parts as follows: part I, general governmental matters; part II, establishment of USPS as a government corporation; part III, definition of USPS's obligation to provide public products; part IV, general regulatory framework for postal services; and part V, provisions

regulating the transportation of mail. The bulk of revisions introduced by the PMA will be concentrated in parts II, III, and IV. Part II will reestablish USPS as a better managed and more efficient government corporation that is equipped to serve commercial mailers and operate in competitive markets. Part III will clarify existing public service obligations and provide a more specific and enforceable Universal Service Obligation. Part III will also include compensation for USPS for the net costs of public services. Part IV will establish a revised regulatory framework that is more focused on protecting public postal services, preventing unfair competition, protecting consumers, and promoting a more efficient national system of delivery services. Parts I and V will deal primarily with the interface between USPS and other departments of government including the Department of Justice (penal postal laws), the Department of State (international postal policies), the Treasury Department (appropriations), and the Department of Transportation (regulation of air transportation of mail).

Reestablishment of the Postal Service

A primary goal of the new governance model is to empower and motivate USPS to produce products at prices that answer the needs of commercial mailers in a rapidly changing market. According to the new governance model, Congress should determine how to establish the USPS so that it can, consistent with government ownership² and public service obligations, operate as efficiently and innovatively as possible. Congress should forbear from managing directly the methods of production, products to be offered, and prices to be charged. These decisions must be left to USPS as the body best equipped to address such issues. At the same time, as explained below, the PRC should continue to enforce a regulatory framework appropriate for different categories of postal products.

To implement these goals, the PMA must reestablish USPS so that it becomes a more competent and efficient government corporation. How? One possible precedent is Conrail. In 1976, Conrail was organized as a government corporation established under state corporate law to manage the assets of six bankrupt railroads in the northeastern United States. Conrail had all of the powers of a normal private corporation except where modified by statute. It was managed by a board of 13 directors. Six represented the government while others represented bondholders of railroads and other private interests. The government's directors were not named directly by the President. Instead they were chosen by a second board that included the secretaries of the Treasury and Transportation and nine other presidential appointees. The statutory duty of government directors was to protect the profits of Conrail no less than the private directors.³ To provide maximum freedom to operate like an ordinary business, the act declared that Conrail 'shall be a for-profit corporation . . . and shall not be an agency or instrumentality of the Federal Government'.⁴

In a similar manner, the PMA could reestablish USPS as a normal corporation organized under state corporate law. So far as possible (there are constitutional limits), it would no longer be an agency of the federal government. The board of directors could be chosen by a committee consisting of the secretaries of relevant departments (for example, Commerce, Labor, Transportation, and Treasury) or, alternatively, by the secretaries acting individually. Directors would be selected based on professional qualifications

alone and obliged to protect and advance the ownership interests of government, not the broader interests of the general public. Reestablishing the USPS in this manner would create a more flexible and capable organization, one better equipped to develop commercial products and respond to changing market demands.

The US Constitution, however, raises a red flag over a board of directors appointed in this manner. To preserve accountability, the Founding Fathers set strict limits to how far executive authority may be delegated by the President. In brief, the ‘appointments clause’ creates only two classes of federal officials: a ‘principal officer’ appointed by the President and confirmed by the Senate and an ‘inferior officer’ appointed by the President or by a ‘Head of Department’ and not confirmed by the Senate.

In a USPS reestablished as described, the board would thus be composed of inferior officers appointed by principal officers. Since a board of inferior officers may *not* appoint another inferior officer, the Postmaster General and other USPS officials would be mere ‘employees’ of the United States in constitutional terms and unable to exercise sovereign powers of government, such as administering, executing, or authoritatively interpreting the laws.⁵ Thus, a USPS board of directors that is less politically accountable and more commercially flexible must, of constitutional necessity, become less governmental. The appointments clause reinforces the conclusion that a more commercial USPS should not exercise governmental authority.

‘Degovernmentalization’ should work both ways. Under a new governance model, USPS should be insulated from political interference when making specific operational decisions. In the PRA of 1970, Congress prohibited political officials, including members of Congress, from proposing or supporting candidates seeking positions as postmasters. The PMA could extend this protection from political interference to all types of operational decisions. Members of Congress could continue to support public services affecting their constituents in PRC proceedings applying statutory guidelines on public services to specific situations.

The PMA must also address pension and health benefits and the treatment of legacy costs. The critical importance of commercial products to the long-term survival of USPS implies that the PMA should give management and employees the same flexibility to deal with labor costs as a private company. USPS employees should no longer be required to participate in federal benefit programs established for civil servants. Benefits should be decided at the collective bargaining table along with wages. However, in my view, benefits already promised to postal employees must be honored. These are legislative commitments by Congress, not contractual commitments by USPS. Congress has provided funds for these programs by requiring annual contributions from USPS, but funding requirements have been unevenly drawn. It appears that Treasury has collected some \$13 billion (as of the end FY 2011) more than required to fund pension programs, but undercollected for retiree health-care programs by about \$46 billion.⁶ The question is who should get the ‘surplus’ and who should be stuck for the ‘unfunded liabilities’, the Treasury or future mailers? It seems unrealistic to expect that large liabilities can be collected from commercial mailers, the primary source of future USPS revenues, without significantly depressing demand. Moreover, it is questionable whether future mailers should bear costs associated with services rendered to other mailers in the past. The fairest and more practicable answer may be simplest. The Treasury should keep the overfunding and cover the underfunding from general revenues, allowing the reestablished USPS to begin with a clean slate.

Universal Service and Other Public Service Products

A second primary goal of the new governance model is to maintain public services that meet the needs of society in a rapidly changing environment. To implement the new governance model, the PMA must address three questions not answered by current law: (i) What universal postal services should be guaranteed to all Americans? (ii) How should such a guarantee be enforced? (iii) How should it be paid for?

The proposed PMA would begin by defining ‘essential postal services’ to mean adequate and efficient postal services provided at fair and reasonable rates throughout the United States and appropriate for the transmission of *single-piece* letters, documents, and parcels. Bulk mailers would be assured access to essential postal services, so their ability to reach the entire nation at reasonable rates would also be guaranteed. Under this approach, however, the federal government would not guarantee – although it could continue to regulate – special discounted rates suited to bulk mail. The PMA would require that rates for essential postal services must be reasonable, equitable, and affordable for all residents of the United States. The PMA would further require that essential postal services must provide prompt and reliable service in all areas and all communities of the United States. It could require further that services in rural areas, communities, and small towns must be comparable to services in urban areas to the maximum extent practicable.

In short, the idea of a PMA is compatible with a strong universal service obligation. Congress could go further and mandate a minimum number of post offices or days of delivery, but it would be unwise to do so. The market for postal services is changing so rapidly that no one can predict what levels of services will be essential to society in 10 or 15 years. Instead, the PMA should delegate to the PRC the task of translating statutory principles into specific rate and service policies for essential postal services. USPS would be obliged to notify the PRC that it could not profitably provide essential postal services in conformance with rate and service policies set by the PRC. In such cases, the PRC could issue a protective order requiring USPS to maintain such rates, services, and facilities as may be needed to sustain universal service. When operating subject to a protective order, USPS would be entitled to receive compensation for net losses incurred in providing the required service.

In this manner, essential postal services provided under protective order would become one of several public services required by the PMA. Other public services, carried over from current law, would include free and reduced rates for preferred classes of mail, freight services to the Alaskan bush country, franked and penalty mail services, and issuance of semipostals. Not all of these services impose a net cost on USPS, but when there is a net cost, USPS would be entitled to compensation.

Like the original PRA, the PMA proposes that public appropriations should fund the net costs of public services. However, rather than appropriating money directly to USPS, the PMA would direct the money to a special fund in the Treasury under the control of the PRC. USPS have to satisfy the PRC that the public services were satisfactorily provided and net costs correctly calculated before the PRC would disburse the funds. If Congress fails to appropriate sufficient funds, USPS would be permitted to raise rates as necessary without further PRC review (again, as provided in the PRA). As a last resort, USPS could deduct uncompensated losses from any money owed to the Treasury.

Regulation of Postal Rates and Services

Under the new governance model, regulation of postal rates and service would continue – and be extended in some respects – but also simplified and clarified. By concentrating regulatory scrutiny on market-dominant products, the PAEA permitted more flexibility for competitive products. The PMA would again tighten the focus of the PRC's efforts by emphasizing the need to protect public service products while allowing USPS more freedom in the production of commercial products.

The PMA would adopt a more nuanced approach towards rate regulation. As in current law, changes in rates for competitive products, whether public service or commercial, would be required to meet two tests: (i) the rate for each product must cover its attributable costs; and (ii) rates of all competitive products collectively must make a fair contribution to overhead costs. For changes in rates of market-dominant products, review would depend on whether or not the rates pertain to public service products. For essential postal services, USPS could be required to demonstrate that new rates are consistent with PRC policies before implementation. In principle, a priori review could be extended to changes in other public service rates as well; however, most of these rates are either free or tied to changes in the rates of commercial products. For changes in the rates for commercial products, the PRC could be authorized to adopt any form of review it deemed sufficient *except for* a priori review. Criteria for review could be simplified, for example, by requiring only that rates for commercial market-dominant products cover attributable costs, avoid unjust or unreasonable discrimination, and are not excessive or abusive. Rate regulation should no longer be employed to second-guess USPS management as to the flexibility, efficiency, predictability, adequacy, and so on of commercial rates. Similarly, the PMA should relieve USPS of the requirement to seek a PRC opinion before making changes in the nature of services for commercial products. At the same time, the PRC's authority to adopt service standards and issue protective orders would give it more power to protect service levels for essential postal services.

The PMA could also give the PRC new authority to permit access to features of the postal system that can improve the operation of national delivery services. For example, the national system of mailboxes is a secure and inexpensive means of delivery that could reduce the costs of all delivery services. The PMA could authorize the PRC to allow reputable private companies to deliver to private mailboxes provided that public interest criteria are met, such as ensuring the security of the mailbox, the rights of the householder, and the ability of USPS to collect outbound mail. In addition, the PRC could be authorized to open post office boxes to delivery by private companies provided that USPS is compensated for maintenance of the boxes and the preferences of box holders are respected.

General Government Issues

With one prominent exception, the implications of a new governance model are less profound for other parts of the legal framework for postal services. The exception is the set of penal provisions jointly administered by USPS and the Department of Justice. This subsection outlines how a PMA could revise the concept of postal penal provisions and

then notes other revisions in current law that could facilitate implementation of a new governance model.

The most significant postal penal provisions are those that establish the postal monopoly. Provisions of title 39 and of title 18, the criminal laws of the United States, prohibit certain delivery services in competition with USPS. Continuation of a postal monopoly is incompatible with the new governance model. The PMA seeks to motivate as well as to empower USPS, while the monopoly creates a shield from competition that undermines commercial incentives. Moreover, a public monopoly cannot be bestowed without public controls, while USPS will need as much flexibility as possible to meet the needs of commercial mailers in the future. Like all major industrialized countries that have adopted comprehensive postal modernization laws (except Australia), the PMA would repeal the postal monopoly after an appropriate transition period.

Repeal of the postal monopoly is, however, only a start in dealing with broader issues posed by postal penal laws. Nonmailability laws prohibit USPS from carrying certain types of items, including items posted for illegal purposes such as perpetration of a fraud, conducting a lottery, or distribution of pornography or alcoholic beverages. Other provisions make it a crime to interfere with USPS in the performance of its duties. To implement such laws, USPS operates its own police force, which is empowered to investigate citizens for violation of regulations adopted by USPS. In some cases, USPS may try persons for such offenses before USPS judges. Violations of postal penal provisions can result in loss of business, fines, and imprisonment.

Such authority is inappropriate for USPS in the twenty-first century. As noted above, under the appointments clause of the Constitution, if USPS is reestablished as more independent and commercially flexible government corporation, it cannot continue to exercise the penal powers of a sovereign. Moreover, postal penal provisions create distortions in the national delivery services market that are neither just nor reasonable. If interstate transmission of an item is lawful, then USPS should be able to offer services in competition with private companies while complying with the same federal and state laws. If unlawful, then the prohibition should apply alike to USPS and private delivery services. Similarly, laws protecting the operations of the postal service should apply in like manner to all providers of similar delivery services. The proposed PMA would, therefore, require a comprehensive review of postal penal provisions and law enforcement activities of USPS by the Attorney General. In the short term, the PMA would transfer to the PRC the authority to adopt regulations and adjudicate guilt with respect to non-mailability laws.

In other areas of general government, more limited revisions in current law could suffice. The PRC should continue as an independent regulatory body of persons appointed by the President and confirmed by the Senate. The Department of State should continue to represent the US in international negotiations relating to trade in postal services, although the PMA should clarify the role of a more commercial USPS in the development of the national policies towards trade in services generally. The Department of Transportation must continue to regulate the air transportation of mail where needed, but the need for such regulation should be reexamined.

5 SUMMARY AND CONCLUSIONS

This chapter has argued that viable and enduring postal reform in the United States requires a new ‘governance model’ for national postal services. Authority over postal services should be reallocated between Congress, the PRC, and USPS so that each is assigned responsibility for decisions suited to its nature. At the same time, a new governance model must respond to three overriding imperatives of the market and society. First, the financial viability of USPS is dependent on its ability to satisfy the demands of large commercial mailers who can increasingly turn to alternatives to the mail. Second, USPS must continue to provide public services demanded by the American people. Third, the postal market is changing so fundamentally and so rapidly that governmental decision making must stress speed and flexibility.

Taken together, these observations imply the need for a new governance model for postal services that is as different from the current statute as the PRA was from prior law. Congress cannot manage large portions of the business of USPS directly. It must become a designer of self-sustaining institutions and a definer of broad social principles. USPS should be reestablished as a more professional and less political government corporation, perhaps based on the 1976 Act establishing Conrail. The reestablished USPS must be capable of producing efficient and innovative commercial products (about 71 percent of USPS revenues) suited to the rapidly changing needs of commercial mailers. The postal monopoly should be ended, and governmental functions of USPS transferred to other bodies. The role of the PRC should evolve as well. Regulation of rates and services should be maintained, but simplified.

The scope of public services, including ‘universal’ postal services, to be provided by the Postal Service is a political judgment which Congress must decide. In so doing, Congress needs to specify more clearly the public interest objectives to be accomplished and give the PRC adequate authority to ensure the maintenance and efficient production of public service products. Instead of funding public service products by surreptitiously raising the rates of commercial mailers (who increasingly have alternatives to the mail), Congress should compensate USPS for the net costs of such services by making available public funds to the PRC, which should be responsible for the efficient administration of such funds.

NOTES

* The views expressed in this chapter are those of the author and do not represent the views of any client or other person.

1. Most proposals on USPS reform have eschewed questions of governance in favor of ideas for improving operations. The President’s Commission (2003) offered much business advice but proposed only modest regulatory changes and an unworkable revision in the USPS board. Recent reports by USPS (2010) and GAO (2010) are primarily business plans, facilitated by regulatory adjustments and revisions in pension and retiree health-care accounts. Of recent papers, Crew and Kleindorfer (2008) and Panzar (2012) begin to address the core issue of governance. While I agree with much of the commentary in both papers, in my view neither deals adequately with what William Kovacic referred to in his insightful commentary at the 20th Conference on Postal and Delivery Economics (2012) in Brighton as the ‘engineering problems’ posed by governmental design and legislative drafting. One early discussion of governance deserves special mention. In a paper prepared for USPS, McKinsey & Company (2000) made the case for privatization and a contractual obligation to maintain universal services. This prescient analysis has never been published.

2. Crew and Kleindorfer (2008, pp.132–34) argue that a privatized USPS would be better empowered and motivated than a commercialized USPS. Panzar (2012, p.143) maintains that American reliance on USPS as a provider of public services implies that the US is ‘best served’ if USPS remains a government corporation. I think Panzar is probably right as a practical political matter. In any case, unless and until USPS is successfully commercialized, talk of privatization appears premature.
3. Conrail was reorganized and made operational by the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31. Under that act, appointment of governmental directors to the Conrail board was vested in the United States Railway Association whose board, in turn, consisted of the Secretaries of Transportation and Treasury, the Chairman of the Interstate Commerce Commission and eight individuals appointed by the President with the advice and consent of the Senate. The Senate committee said of the governmental directors, ‘The responsibilities of these directors are not, of course, different from those of the other ConRail directors – to operate ConRail at a profit for the benefit of its shareholders’ (S. Rept. No. 499, 94th Cong., 1st Sess. (1975) at 93).
4. 15 U.S.C. § 741(b) (2010).
5. Department of Justice, Office of Legal Counsel, ‘Officers of the United States Within the Meaning of the Appointments Clause’ (April 16, 2007), pp. 1, 4.
6. US Postal Service, Form 10-K (2011) at 26, 28.

REFERENCES

- Crew, Michael A. and Paul R. Kleindorfer (2008), ‘Reform of the United States Postal Service: an unfinished task’, in Crew, Kleindorfer, and J. Campbell, Jr (eds), *Handbook of Worldwide Postal Reform*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp.123–42.
- McKinsey & Company (2000), ‘USPS’s preferred regulatory end game and transition path’, (unpub.).
- Panzar, John C. (2012), ‘Towards a 21st century postal service’, in M. Crew, and P. Kleindorfer (eds), *Multi-modal Competition and the Future of Mail*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp.139–49.
- United States, Government Accountability Office (GAO) (2010), ‘Strategies and Options to Facilitate Progress Toward Financial Viability’, Report No. GAO-10455, Washington, DC.
- United States, President’s Commission on the United States Postal Service (2003), *Embracing the Future: Making the Tough Choices to Preserve Universal Service*, Washington, DC: Government Printing Office.
- United States Postal Service (USPS) (2010), ‘Ensuring a Viable Postal Service for America: An Action Plan for the Future’, Washington, DC: US Postal Service.