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James I. Campbell Jr.

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An Introduction to the History of the Postal Monopoly Law (1995)*

The United States Postal Service is today one of the largest commercial undertakings in the world. It delivers roughly 40 percent of the world's mail and in 1994 earned revenues of almost $50 billion. The Postal Service and postal laws shape development of America's delivery services sector, which accounts for total revenues of at least $80 billion.

An important ingredient in the commercial success of the Postal Service, although not the only ingredient, is the postal monopoly law. The key statutory provision establishing the postal monopoly is the following paragraph of the U.S. criminal code:

> Whoever establishes any private express for the conveyance of *letters or packets*, or in any manner causes or provides 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, shall be fined not more than $500 or imprisoned not more than six months, or both.[1]

In addition to statutory provisions, the postal monopoly law is also set out in administrative regulations issued by the Postal Service. Substantive regulations implementing (or purporting to implement) the postal monopoly take up more than 7000 words. Definition of the key term *letter* alone extends for about 400 words.[2]

Despite the economic significance of the postal monopoly law and long running disputes as to its proper scope, there exists no complete published account

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[1]18 USC 1696(a) (emphasis added).

[2]39 CFR 310, 320. The definition of "letter" is found at 39 CFR 310.1(a).(1)-(a)(6).

of its history and derivation.[3] While a comprehensive history is far beyond the scope of a short essay, this paper provides an introduction to the subject by summarizing the succession of legal instruments setting out the postal monopoly and, in particular, by illustrating how meanings of words, or the official interpretation thereof, have changed over time. I shall illustrate the latter by focusing upon the shifting meanings ascribed to the words "letters and packets," words which have, for all but 27 years of the postal monopoly law, defined the items which, under most circumstances, can be transported only by the post office.

1. ENGLISH PRECEDENTS, 1635-1660

The postal monopoly predates establishment of the Postal Service. Indeed, the Postal Service is only the most recent of five governmental post offices serving the territory of what is now the United States. The Postal Service was established in 1971 as an independent governmental agency to place the national post office on a more business-like basis, free from undue political influence.[4] The predecessor of the Postal Service was the Post Office Department, established in 1792 as the office of the Postmaster General. The Post Office Department in turn succeeded the Continental Post Office, founded by the Second Continental Congress in 1775, when the British Post Office was deemed an unsuitable conduit for revolutionary sentiments. The British Post Office had provided postal services between America and England, and among the several colonies, since 1707. Extension of the British postal service to America supplanted a rudimentary postal service organized under a "patent" (an exclusive license) issued by the English crown in 1692 to a court favorite named Thomas Neale. Prior to Neale's post office, there was no regular postal service in the American colonies despite several attempts by authorities in New York and Boston.

From the Neale Post Office to the U.S. Postal Service, the governmental post office in America has been sustained by a series of laws prohibiting the private carriage of "letters and packets." The sequence of the most important legal measures establishing the postal monopoly is shown schematically in figure 1. The earliest appearance of the postal monopoly in American law drew upon still earlier English laws which established the postal monopoly in England itself. When Neale was granted his patent, he first applied to the colonial legislature in New York for leg-

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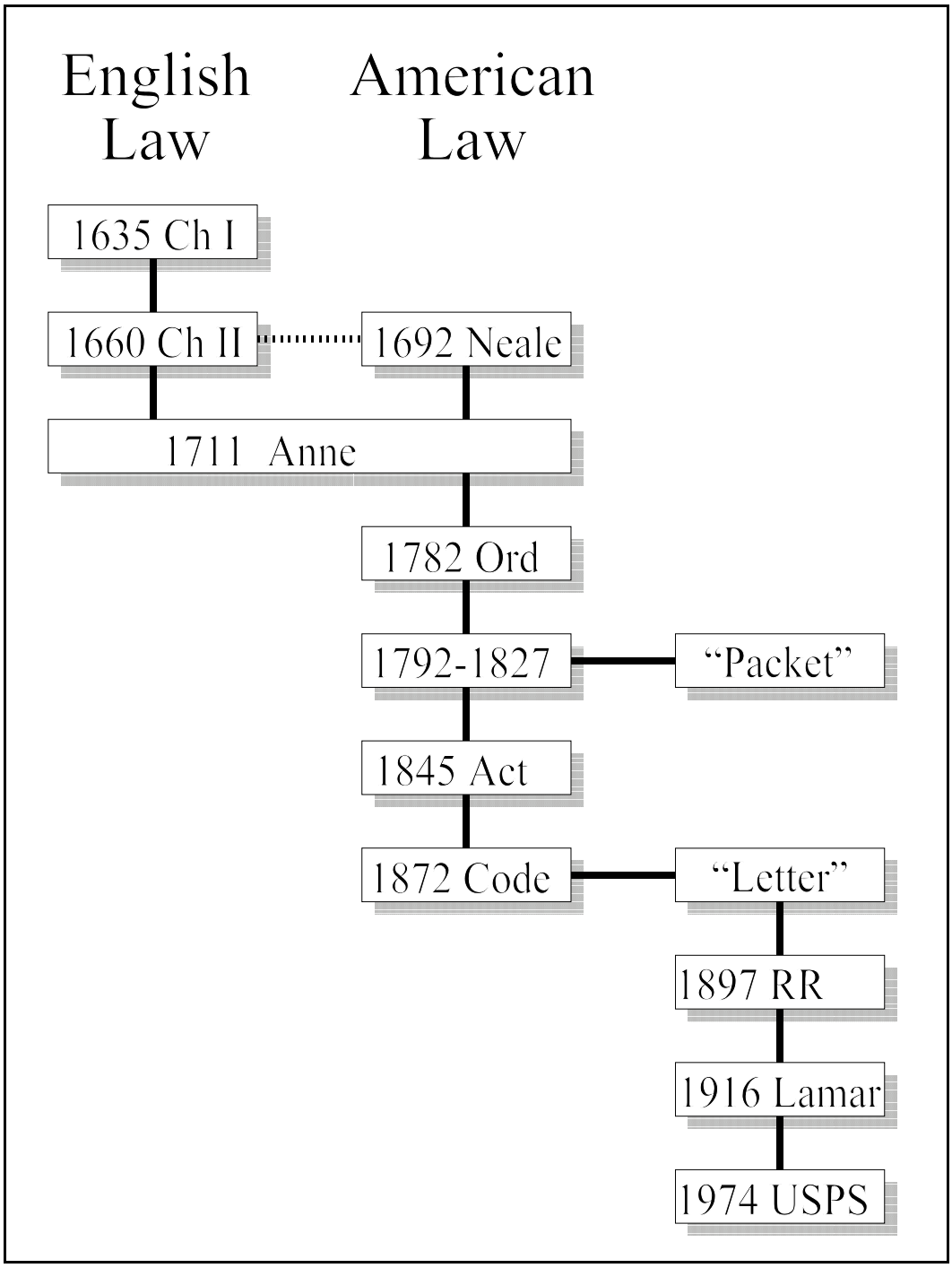
[3]The best historical review of the postal monopoly as a governmental policy is G. L. Priest, "The History of the Postal Monopoly in the United States," 18 J.L. & Econ. 33 (1975). Priest is now a professor of law and economics at Yale University. Priest's article focuses upon the motivations underlying monopoly legislation and does not deal with the specifics of the law nor with the evolution of administrative implementation. The best general historical review of the legal terms of the monopoly is J. F. Johnston Jr., "The United States Postal Monopoly," *The Business Lawyer* (Jan. 1968). *See also* P. Donnici, L Hillblom, L. P. Lupo, and M.B. Collins, "The Recent Expansion of the Postal Monopoly to Include Commercial Information: Can it be Justified?", 11 U.S.F. L. Rev. 243 (1977) and a reply by USPS lawyers, "The Postal Monopoly: Two Hundred Years of Covering Commercial as well as Personal Messages," 12 U. S.F. L. Rev. 243 (1978).

[4]Postal Reorganization Act of 1970, P.L. 91-375, 84 Stat. 727.

Figure 1. Antecedents of the postal monopoly law



islation confirming his exclusive right to provide postal services. The New York legislature accommodated Neale by copying the monopoly provisions from the English postal law of 1660. To understand the American postal monopoly law, therefore, it is helpful to begin with a brief review of English antecedents.

In the late sixteenth and early seventeenth centuries, trade, coal mining, and manufacture were on the rise in England, and the power of the landed aristocracy was challenged by a new merchant class. These merchants, Protestant in faith and sternly rational in outlook, dominated Parliament. They resented the aristocratic ways of the Stuart kings, who were not only born in Scotland but openly tolerant of Catholics (even going so far as to marry them). The second Stuart, Charles I, refused to convene Parliament after 1629 because of continual Parliamentary demands for restrictions on his royal prerogatives. To obtain money to operate the government, Charles I resorted to creative financing—forced loans, taxes unauthorized by Parliament, and a revival of commercial monopolies banned by Parliament during his father's reign.

Although English kings had maintained a royal post for official correspondence since 1516, letters of the public were not admitted. They were conveyed by private posts. On July 31, 1635, Charles ordered the master of posts, Thomas Witherings, to open the royal post to private correspondence and forbade private postal services. The prohibitory provision stated:

> noe other me*ff*enger or me*ff*engers foote po*f*t or foot po*f*ts *f*hall take upp carry receive or deliver any lr̄e or lr̄es [letter or letters] what*f*oever other then the me*ff*engers appoynted by the saide Thomas Witherings to any such place or places as the saide Thomas Witherings shall settle the conveyance afore*f*aide Except com̄on knowne carriers or a pticuler me*ff*enger to be sent of purpo*f*e with a lr̄e by any man for his owne occa*f*ions or a lr̄e by a freind. . . .[5]

The monopoly of Charles I thus prohibited private carriage of a "letter or letters." Charles' proclamation also used the term *packet*. It set out postage rates for the carriage of a letter based on distance and noted "if twoe three fower or five lres in one packett or more then to pay according to the bignes of the saide packett." Clearly, then, a *letter* referred to a single sheet of paper and a *packet* to a bundle of *letters*. The public postal service of Charles I lasted only two years; in 1637, he again closed the royal post to private letters.

A restive Parliament, led by Oliver Cromwell, revolted and eventually beheaded Charles I in 1649. There was prolonged debate about the future of the post office and advantages of competition, but in 1654 Cromwell appointed John Manley as postmaster and prohibited private carriage. Cromwell's motive was apparently one of security for the unstable government. Manley was instructed to keep careful track of all letters and unfamiliar post riders.

Manley's vigilance notwithstanding, Cromwell died in 1658. After a period of disorder, an exhausted England invited the son of Charles I to restore the monarchy. Charles II returned to England in 1660, and by the end of the year Parliament approved a new postal law. The act of 1660 reenacted the postal monopoly in terms similar to the proclamation of 1635. It read in pertinent part:

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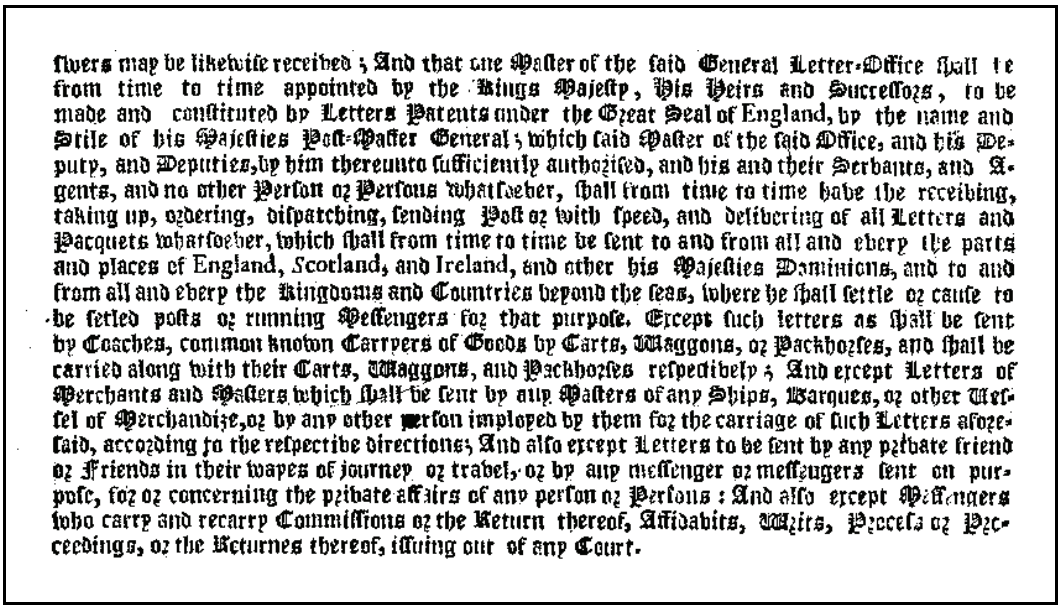
[5]Proclamation of July 31, 1635, Patent Roll (Chancery) 11 Car I, Pt 30, No. 11.

Figure 2. Extract from English Postal Act of 1660



ſwers may be likewiſe received; And that one Maſter of the ſaid General Letter-Office ſhall be from time to time appointed by the Kings Majeſty, His Heirs and Succeſſors, to be made and conſtituted by Letters Patents under the Great Seal of England, by the name and Stile of his Majeſties Poſt-Maſter General; which ſaid Maſter of the ſaid Office, and his Deputy, and Deputies, by him thereunto ſufficiently authoriſed, and his and their Servants, and Agents, and no other Perſon or Perſons whatſoever, ſhall from time to time have the receiving, taking up, ordering, diſpatching, ſending Poſt or with ſpeed, and delibering of all Letters and Pacquets whatſoever, which ſhall from time to time be ſent to and from all and every the parts and places of England, Scotland, and Ireland, and other his Majeſties Dominions, and to and from all and every the Kingdoms and Countries beyond the ſeas, where he ſhall ſettle or cauſe to be ſetled poſts or running Meſſengers for that purpoſe. Except 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; And except 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 directions; And alſo except Letters to be ſent by any private friend or Friends in their wayes of journey or travel, or by any meſſenger or meſſengers ſent on purpoſe, for or concerning the private affairs of any perſon or Perſons: And alſo except Meſſengers who carry and recarry Commiſſions or the Return thereof, Affidavits, Writs, Proceſs or Proceedings, or the Returnes thereof, iſſuing out of any Court.

> no other Perſon or Perſons whatſoever, ſhall from time to time have the receiving, taking up, ordering, diſpatching, ſending Poſt or with ſpeed, and delivering of all *Letters and Pacquets* whatſoever, which ſhall from time to time be ſent to and from all and every the parts and places of England, Scotland, and Ireland, and other his Majeſties Dominions, and to and from all and every the Kingdoms and Countries beyond the ſeas, where he ſhall ſettle or cauſe to be ſetled poſts or running Meſſengers for that purpoſe. . . .[6]

The postal act of 1660 gave the British Post Office its permanent charter. It also introduced the postal monopoly into English law on a permanent basis. The purpose of the monopoly was, simply, to enable the government to enrich its friends and spy on its enemies.[7]

2. COLONIAL POSTAL MONOPOLY LAWS, 1692 - 1775

The legislation of the colony of New York confirming Neale's patent repeated, word for word, the language of the 1660 British postal act by forbidding the "receiving, taking up, ordering, dispatching, sending post or with speed and delivery of all letters and pacquets whatsoever."[8] Massachusetts similarly confirmed Neale's monopoly but only on condition that the service was efficient. Pennsylvania, Connecticut, and New Hampshire agreed as well. Thus, the first postal monopoly in direct application in America was, in essence, the English postal monopoly of 1660. Maryland and Virginia refused to recognize Neale's patent, and the Neale post office

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[6]Post Office Act of 1660, 12 Charles II, c. 35 (1660).

[7]*See generally,* H. Robinson, *The British Post Office: A History*, 48-55 (1948, reprint 1970).

[8]E. Woolsey, "The Early History of the Colonial Post-Office," 9 (1894, reprint 1969).

was limited to the northeastern colonies.[9]

Service by the Neale post office was poor due to lack of support from colonial governments and inadequate roads. It was a commercial failure. In 1707, the British government purchased Neale's patent and turned over its management to the British Post Office. In 1711, during the reign of Queen Anne, Parliament enacted a new postal law, replacing the postal act of 1660. The 1711 law extended the British Post Office's operations to Scotland and the American colonies. It also reenacted the postal monopoly of 1660 in similar terms:

> no other Person or Persons whatsoever, shall, from time to time, and at all Times, have the receiving, taking up, ordering, dispatching, sending Post, or with Speed, carrying and delivering of all *Letters and Packets* whatsoever, which shall, from time to time, and at all or any Times be sent to and from all and every the Parts and Places of Great Britain and Ireland, North America, the West Indies, and other her Majesty's Dominions, and also to and from all and every the Kingdoms and Countries beyond the Seas, where he shall settle or cause to be settled Posts, or running Messengers for that Purpose. . . .[10]

The postal act of 1711 remained the basic postal law of England until well after the American revolution. Although applicable in the American colonies, the postal monopoly law was often evaded by the colonists.

The nature of postal service during the American colonial period was unchanged from that in England during the previous century. The idea is suggested by the phrase "sending post or with speed." To "send post" was to transport by means of a series of posts, or relay stations, located every 10 to 15 miles along a "post road." Post houses for a *horse post* stabled 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 to a subsequent rider at the next station. A *foot post* was similar in concept but relied upon walking messengers. The essence of postal service was extraordinary speed, hence to"send post" was virtually synonymous with to send "with speed." Like the "pony express" in the Western U.S. a century or two later, the function of a postal system was to provide express transportation that was more rapid and reliable than possible for freight generally. The hoped-for rate of travel was seven miles an hour in the summer and five in the winter. By its nature a *postal* service was an inter-city service. Letters and packets were transported from a public place such as an inn, coffeehouse, or dedicated post office in one town to a similar place in another town. Postage was paid not by the sender but by the addressee upon collection at the destination post office. There was no local collection or delivery.

As is evident from the 1635 proclamation, the term *letter* originally referred to a message recorded by hand, usually on a single scrap of paper just large enough

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[9]W.E. Fuller, *The American Mail: Enlarger of the Common Life*, 18-19 (1972, reprint 1980).

[10]Post Office Act of 1711, 9 Anne, c. 10 (1711).

for the message it contained because of the high cost of paper. Envelopes, a French innovation, were not introduced in the United States until the mid 1800's. For privacy and protection, a letter was folded and sealed with wax. Postage rates varied by the number of sheets of paper sent by post. A correspondence containing a single sheet was called a *single letter*. A correspondence extending to two sheets of paper—i.e., two *letters* or a *single letter* with an enclosure (such as a deed or certificate)—was called a *double letter*. Three sheets constituted a *triple letter*. Since it was difficult to seal more than three sheets of paper with wax, a correspondence of several sheets or several correspondences sent at the same time to same address (a common occurrence in times of infrequent sailings) were tied with twine in a bundle or *packet*. This seventeenth century terminology was used to specify postage rates in the United States until 1863; it is used to describe the postal monopoly to this day.

3. ORDINANCE OF 1782

In the late eighteenth century, increasingly rebellious American colonists naturally came to distrust the British Post Office. In 1775, the Second Continental Congress established its own post office. On July 4, 1776, Congress declared independence from England and, in 1778, established a new government under the Articles of Confederation. The Articles vested the Congress with the "sole and exclusive right [of] . . . establishing and regulating post offices."[11]

When the revolution was secure, the Continental Congress reorganized the post office with the comprehensive Ordinance of October 18, 1782. The 1782 ordinance included a postal monopoly provision modeled on that of the British postal act of 1711. Like the British act, it granted to the post office a monopoly as follows:

> 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 . . . .[12]

The addition of the term *despatches* (i.e., dispatches) appears to signify nothing more than preoccupation with the recent war; *despatches* referred to letters of an official or military nature.

4. EARLY POSTAL MONOPOLY LAWS OF THE UNITED STATES, 1792-1845

The Articles of Confederation proved unequal to the task of unifying the colonies and was replaced by the current federal Constitution in 1789. The Constitution authorized the Congress to establish "post offices and post roads,"[13] but,

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[11] Articles of Confederation, art. IX.

[12] Ordinance of October 18, 1782, 23 J. Cont. Cong. 670.

[13] Constitution, Art. I, sec. 8.

unlike the Articles, did not grant Congress the sole and exclusive power to do so. In its first three sessions, Congress continued in effect the Ordinance of 1782. The first substantive postal law enacted by the new government was adopted in 1792. The 1792 act began in section 1 with a list of post roads to be established, reflecting the traditional concept of postal service as a long distance transport service. Section 2 authorized the Postmaster General to enter into contracts for the carriage of "letters, newspapers, and packets." A postal monopoly was also enacted, as follows:

> if any person, other than the Postmaster General, or his deputies . . . 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 . . . , every person shall forfeit, for every such offence, the sum of two hundred dollars. . . .[14]

Similarities between the American postal monopoly law of 1792 and its English antecedents are apparent. The 1792 act dropped the term *despatches* used in the 1782 ordinance. More interestingly, the 1792 act added the phrase "other than newspapers" after "letters and packets" thus implying that either a *letter* or *packet* might include a *newspaper*. Other provisions in the 1792 law suggested the explanation lay in a broad use of the term *packet*. Section 22 of the 1792 act, dealing with the handling and rates of newspapers, states:

> that all *newspapers*, conveying the mail, shall be under a cover open at one end, carried *in a separate bag from the letters*. . . . 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 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*. . . .

This section plainly suggests that *newspapers* were understood to be distinct from *letters* while the term *packet* could embrace more than simply a packet of letters. At the end of the rate section, the 1794 act refers to a *packet* weighing up to three pounds. *Packet* was thus coming to mean a small package that could include letters, newspapers, or other items. (In addition, in a long-recognized usage, *packet* is also used to refer to a boat that carries the mail.)

In 1794, Congress revised the postal law and expanded the monopoly clause to prohibit the private carriage of letters and packets "other than newspapers, magazines or pamphlets."[15] The postal monopoly provision was revised again in 1799 to read as follows:

> That if any person, other than the Postmaster General, or his deputies . . . shall

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[14]Act of February 20, 1792, ch 7, §14, 1 Stat 232, 236.

[15]Act of March 8, 1794, ch. 23, § 14, 1 Stat 354, 360.

> be concerned in setting up or maintaining any foot or horse post, stage wagon, or other stage carriage, 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, packet boat, or vessel . . . shall forfeit, for every such offence, the sum of 50 dollars. . . .[16]

The 1799 act retains the phrase "letters and packets" to define the basic scope of the monopoly. However, the statute as a whole suggests that the meaning of these terms was continuing to evolve. In specifying postage rates, the 1799 act refers to a "letter composed of a single sheet" instead of the 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 statute also states that a packet must contain "four distinct letters" in order to qualify for quadruple postage, apparently using *letter* in the sense of a single sheet of paper. In short, the term *letter* is in both old and new senses.

In 1825, Congress repealed prior postal laws and enacted the first general postal code. The monopoly provision of the 1825 act prohibited only the transmission of the unqualified term *letters*, suggesting a Congressional understanding that *packet*, as used in the monopoly law, was recognized to encompass no more than a packet of letters. The monopoly provision read:

> 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. . . . Provided, That it shall be lawful for any one to send *letters* by special messenger.[17]

Although the 1825 act repeated the prohibition against carriage of letters by common carriers, it eliminated the prohibition against "setting up" posts found in the 1792 act. This prohibition was reenacted in 1827, again using the traditional phrase *letters and packets* to describe the scope of the monopoly:

> 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.[18]

In 1831, a federal court was asked to rule upon the effect on the postal monopoly of the enlarged use of the term *packet* in the postal laws. In the *Chaloner*

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

[17]Act of March 3, 1825, ch. 64, § 19, 4 Stat 102, 107.

[18]Act of March 2, 1827, ch. 61, § 3, 4 Stat. 238.

case,[19] the defendant was accused of transporting a package of "executions" outside the mails. The United States agreed that "executions" were not *letters* but noted that a package of executions could be considered a *packet*. After careful analysis of the postal monopoly provisions of all postal acts since 1792, the court agreed that *packet* was often used in the postal laws to refer to any small package but concluded *packet* as used in the postal monopoly provision must be interpreted to mean a packet of letters: "by interpreting the word packet . . . to mean a packet of letters, it places all the parts of the statute in harmony with each other." On this basis, the court rendered judgment for the defendant.

5. SUPPRESSION OF PRIVATE EXPRESSES, 1845

The concept of a postal service as a rapid inter-city transport system operating by means of a series of relay stations remained essentially unchanged from 1635 to 1835. The Industrial Revolution, however, precipitated a "transportation revolution" which fundamentally altered the concept of a post office. The steamboat was introduced in America in 1807 by Robert Fulton; the steam railroad by Peter Cooper in 1830. As these two new means of transportation became widespread, it was suddenly possible to transport large quantities of passengers and freight at the highest speed attainable. The essential characteristic of the pre-industrial post office—extraordinarily fast transportation of small quantities of letters and documents—was rendered unnecessary. Any entrepreneur could board a railroad or steamboat with letters in his baggage and transport them between cities as fast as the post office. In fact, many did so. It was common for newspapers and other businesses to hire private messengers to convey time-sensitive information. In the late 1830's, regular "private express" companies were organized as the railroads and steamship lines developed into usable transportation systems. Private expresses operated first in the Boston area and on the routes between Boston, New York, and Washington.[20]

At first, the Post Office resisted dependence upon the railroads. In 1836, the Post Office started its own express mail service, making improved use of stage coaches and riders. By 1839, however, it was clear that there was no practical alternative to reliance upon railroads, and express mail was discontinued. The Post Office then launched prosecutions against private express companies under the traditional postal monopoly laws. These failed because the courts concluded that use of the railroads was not prohibited by a monopoly over the establishment of horse posts and foot posts.[21]

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[19] *United States v. Chaloner*, 25 F. 392 (D. Maine, 1831).

[20] The effects of the transportation revolution on postal service and the U.S. economy generally were widespread and fundamental. *See* George Rogers Taylor, *The Transportation Revolution, 1815-1860* (1951, reprint 1951). The classic history of the rise of the express companies is A. Harlow, *Old Waybills* (1934, reprint 1976).

[21] *See, e.g., United States v. Thompson*, 28 F.Cas. 97 (D. Mass. 1846); *United States v. Adams*, 24 F.Cas. 761 (S.D.N.Y. Nov. 1844); *United States v. Kimball*, 26 F.Cas. 732 (D. Mass. April 1844).

The Post Office then turned to Congress. Postmaster General Wickliffe urged increased penalties against private express companies and postal control of railroad schedules. He advised Congress to resist the popular demand for much lower postage rates, the approach adopted by England in 1840, because this would jeopardize the policy of financial self-sufficiency that had guided the Post Office since the first days of the Republic. Wickliffe also claimed, without referring to the *Chaloner* case, that the monopoly over the transmission of "packets" already gave the Post Office a monopoly over the carriage of newspapers and miscellaneous printed matter. He wrote,

> 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.[22]

Congress responded with the postal act of 1845. By this act, the postal monopoly was extended to include inter-city transport by private express as well as by post. Congress rejected the Postmaster General's call for postal control over railroad schedules. Congress also, contrary to the PMG's advice, drastically lowered postage rates. Additionally, the 1845 act introduced a separate rate status for circulars and miscellaneous printed matter (there were no mail classes denominated as such) and included such items in the postal monopoly. The scope of the monopoly provision was enlarged and read as follows:

> 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.*[23]

By rephrasing "letters and packets" as "letters, packets, or *packages of letters*" and adding the phrase "other matter properly transmittable in the United States mail," Congress implicitly rejected the contention that the postal monopoly term *packet* already included newspapers and other printed matter. Rather, Congress employed a new, more inclusive phrase to refer to all types of written and printed matter (other than bank notes and books) that could then be transported "in the United States mail," i.e., in the sealed pouches and containers transported between

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[22]*Report of the Postmaster General in relation to the establishment of a private express between New York and New Orleans*, S. Doc. No. 66, 28th Cong., 2d Sess., at 3 (Jan. 21, 1845). In arguing that *packet* was used broadly in the postal monopoly provision, Wickliffe was likely relying upon an 1843 opinion by Attorney General Nelson which declared, without referring to the *Chaloner* case, that the term *packet* included "newspapers, magazines, or pamphlets." 4 Ops AG 276 (1843).

[23]Act of March 3, 1845, ch. 43, § 9, 2 Stat. 732, 735.

cities by the Post Office Department. The phrases "mailable matter" and matter properly transmittable in the United States mail" were specifically defined in section 15 of the act to include, in addition to letters, newspapers, magazines and pamphlets, "all other written or printed matter whereof each copy or number shall not exceed eight ounces in weight." The practical effect of the 1845 monopoly was to add miscellaneous written and printed matter weighing eight ounces or less to the traditional monopoly over the carriage of "letters and packets."

6. POSTAL CODE OF 1872

Until the important postal act of 1863, the Post Office remained essentially a contracting office for inter-city transportation services.[24] In fiscal 1862, costs of inter-city and foreign transportation constituted 63 percent of all expenses.[25] Prior to 1863, inter-city letters were either held at the destination post office for collection or delivered by a "letter carrier" who acted as an independent contractor and charged the addressee two cents, one of which he paid to the postmaster. A person could drop letters at the post office for delivery by a letter carrier within the same city, but this was a secondary service as far as the Post Office was concerned; even after the 1863 act, such "drop letters" were considered "not transmitted in the mails of the United States."[26]

Delivery of local, intra-city letters was pioneered by private companies such as Boyd's Despatch in New York City and Blood's Despatch in Philadelphia. One authority has counted 147 private local postal companies.[27] The "locals" introduced adhesive postage stamps at least as early as 1841. The Post Office did not introduce stamps until 1847 and did not require their use until 1851. Efforts by the Post Office to suppress the locals failed when, in 1860, a federal court ruled that the postal monopoly pertained only to the transportation of letters over "post roads" between post offices and did not prohibit the delivery of letters within a single postal district.[28]

The postal act of 1863 enlarged the mission of the Post Office by providing for "free" city delivery in major cities, i.e., delivery without charge to the addressee. The 1863 act also divided the mail into three "classes" and defined letter postage by weight step instead of number of sheets of paper. In this manner, the original meaning of the term *letter* (a single sheet of paper) lost any practical significance as far as postal rates were concerned.

While the 1863 postal act was still under consideration by Congress, the Post Office set in motion the events that led to the postal code of 1872. Postmaster

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[24]Act of March 3, 1863, ch. 71, 12 Stat. 701.

[25]*Annual Report of the Postmaster General (1862)*, 190.

[26]Act of March 3, 1863, ch. 71, § 23, 12 Stat. 701, 705.

[27]E. Perry, *Byways of Philately*, 1 (1966).

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

General Blair proposed a comprehensive bill to "revise and codify" the postal laws, the first codification since 1825.[29] Although Congress did not enact the proposed code, in 1866 it established a commission to codify all of the laws of the United States. In 1869, this commission produced a few specimen titles, including a new postal code which strongly resembled the legislation proposed by the Post Office in 1863.[30] The specimen postal title was enacted into law with minor revisions as the postal code of 1872.[31]

Although Congressional sponsors of the 1872 act portrayed their bill as essentially a codification of prior law, the new law in fact made fundamental but apparently unnoticed revisions in the scope of the monopoly. The 1872 act extended the postal monopoly to the delivery of local letters, a development of major significance for future postal operations.[32] The 1872 act also reverted to the phrase "letters and packets" to define the scope of mail within the monopoly, thus eliminating the 1845 phrase "other matter properly transmittable in the United States mail." The basic scope of the postal monopoly under the 1872 code was declared to be:

> That 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 between which the mail is regularly carried.[33]

Although unnoticed and unexplained in the Congressional debates, these changes in the scope of the postal monopoly provisions were, in fact, similar to ones proposed by the Post Office in the draft code of 1863. [34] The Post Office's 1863 proposal provided for a postal monopoly over all first class "letter" matter, whether

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[29]"The Post Office Department, Prepared by the Post Office Department for the Committee on the Post Office and Post Roads" (1863).

[30]"Report of the Commissioners to Revise the Statutes of the United States," H.R. Misc. Doc. 31, 40th Cong., 3d Sess (1869).

[31]Act of June 8, 1872, ch 335, 17 Stat 283.

[32] *Blackham v. Gresham*, 16 F.609 (S.D.N.Y. 1883) concluded, "The act of March 3, 1872, was a comprehensive revision of the pre-existing postal laws, and section 228 was particularly addressed to enlarging the provisions of section 9 of the act of March 3, 1845, which prohibited private expresses for the conveyance of letters or packets between cities, towns, or other places between which the mail was regularly transported. As enlarged, the prohibition was made to extend to the conveyance of letters and packets by such private expresses over any post-route established by law."

[33]Act of June 8, 1872, ch 335, § 228, 17 Stat 283, 311 (emphasis added).

[34]Section 169 of the Post Office's draft 1863 code excluded "newspapers, pamphlets, magazines, periodicals, and any other matter classed in this code as miscellaneous mail matter" from the postal monopoly, thereby limiting the postal monopoly to first class matter. Section 83 of the proposed code classified local postal routes as "post roads," a provision not included in prior law and contrary to the court's ruling in *Kochersperger.*

transported between cities or locally. The Post Office's motive in recommending extension of the monopoly to cover local as well as inter-city mail is obvious. But why propose limiting the monopoly to first class mail? No evidence has been found to explain this aspect of the 1863 proposal. However, it may be noted that by 1863, "miscellaneous matter" had grown to include a range of articles weighing up to four pounds, including seeds, cuttings, bulbs, roots, and scions. [35] Thus, the only difference between a monopoly over first class matter in 1863 and the postal monopoly of 1845 was the exclusion of miscellaneous printed matter weighing up to eight ounces. Such mail appears to have been a negligible portion of postal revenues during this period.[36]On the other hand, to have reenacted the 1845 phrase "other matter properly transmittable" in 1863 would have resulted in a monopoly over the carriage of assorted packages weighing up to four pounds, a substantial enlargement of the monopoly granted by Congress in 1845.

Reversion to the phrase *letters and packets* to define the scope of the postal monopoly in 1872 left unclear the status of certain wholly or partially written documents used in commerce and generally referred to as *commercial papers* rather than letters. In the summer of 1881, Postmaster General Thomas James asked Attorney General Wayne MacVeagh to clarify the status of such items under the postal monopoly:

> I have the honor to request that you inform me whether . . . it is a violation of [the postal monopoly law] 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. [emphasis added]

MacVeagh replied that such commercial documents were not within the *letter*

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[35]Act of March 3, 1863, ch. 71, § 20, 12 Stat. 701, 705.

[36]The Act of March 3, 1851, ch. 20, § 10, 9 Stat. 587, 591 authorized the Post Office to establish collection boxes and local postal routes served by letter carriers who separately charged for local delivery. For several years, the Postmaster General reported such revenues by item separately from other postal revenues. The last report of a Postmaster General providing reliable such data seems to have been the report for fiscal 1855, which reported that circulars and handbills comprised 4.0 percent of local postal items. The percentage of such items "in the mails" (i.e., items carried in the inter-city mails), which accounted for the real business of the Post Office then, must have been much smaller.

monopoly and that the term *letter* extended no further than common usage:

> *In my opinion, it is no violation of [the postal monopoly law] for an express company to transport the documents mentioned in yours of 15th instant*., viz., manuscripts 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. [emphasis added]

Although the term *commercial papers* was not defined in U.S. law, it was defined in international postal conventions, which were taking shape at the same time. The first Universal Postal Convention was agreed in 1874. According to the second, more polished version of 1878, the term *commercial papers* was defined as follows:

> All instruments or documents written or drawn wholly or partly by hand, which have not the character of current and personal correspondence, such as papers of legal procedures, deeds of all kinds drawn up by public functionaries, waybills or bills of lading, invoices, the various documents of insurance companies, copies or extracts of deeds under private seal written on stamped or unstamped paper, scores or sheets of manuscript music, manuscripts of works forwarded separately, etc.[37]

Reliance of postal lawyers upon this UPU definition to determine the scope of the postal monopoly is illustrated by an opinion of the Post Office's legal department issued in 1898. In response to the question whether answered letters were within the postal monopoly, attorney H.J. Barret advised:

> *. . . if "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 first class matter if presented for mailing, are not considered as matter in the transmission of which the Government claims a monopoly.[38]

The statutory provisions defining the postal monopoly have not changed materially since the postal code of 1872. The 1872 act was reenacted in the 1874 Revised Statutes, a general codification of U.S. law.[39] The penal postal monopoly

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[37]The French word *actuelle* was mistranslated as "actual" instead of "current" for many years in U.S. legal texts. French was the only official language of the Treaty. The correct translation is given in the quotation.

[38]3 AAG POD 211 (1898) (No. 1141) (emphasis added).

[39] The provisions corresponding to current 18 USC § 1696(a) and (b) were R.S. §§ 3982 and 3984, 18 Stat 770, respectively.

provisions were incorporated into the Criminal Code of 1909.[40] Other than minor stylistic revisions, the 1909 code made only one significant change to the main postal monopoly provision. The penalty for establishing a private express was increased from $150 to $500 and/or six months' imprisonment. The postal monopoly portions of the 1909 code were reenacted without significant change as part of the Criminal Code of 1948.[41]After the postal code of 1872, the only significant changes in the legal instruments defining the postal monopoly are found in administrative rulings issued by the Post Office Department and the Postal Service.

7. EXTENSION OF THE MONOPOLY TO RAILROAD MAIL, 1896

Relations between the Post Office and the railroads were contentious ever since the earliest railroads gave rise to the development of private expresses. By the 1890's, large railroads were coalescing into great national systems of roads with interlocking directorates and cross stock ownership. Railroads represented a different order of organizational complexity from that employed in earlier commercial and manufacturing activities. They depended upon the smooth integration of a host of smaller and simpler companies.[42] Railroad operations therefore generated a constant flow of documents between companies with closely interrelated activities. A railroad train typically included not only cars belonging to the railroad company that owned the locomotive and the tracks 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 might operate trains over not only its own tracks but also tracks belonging to other companies. Railroads were also closely integrated with other types of companies. 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 both costs and profits. Similarly, hotels and restaurants were built along railroad rights of way and were integrated with, or alternatives to, dining and sleeping car services.

The Post Office had traditionally acquiesced in the railroads' carriage of letters and documents relating to these interrelated operations.[43] Beginning in about 1896, the Post Office decided that such mail violated its monopoly. The effort to enforce the monopoly over "railroad mail" was led by Charles Neilson, the Second Assistant Postmaster General, rather than the Assistant Attorney General, who acted in an

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[40]Act of March 4, 1909, ch 321, 35 Stat 1088. The provisions corresponding to current 18 USC § 1696(a) and (b) were then sections 181 and 183, 35 Stat 1123-24, respectively.

[41]Act of June 25, 1948, ch 654, 62 Stat 683. Section 1696 appears at 62 Stat 777.

[42]A. Chandler, *The Visible Hand*, 171-87 (1977).

[43]3 Ops Sol POD 140 (Op. No. 1111)(June 26, 1896) (acknowledging practice of allowing railroads to carry railroad mail); Postmaster General Order No. 422 (July 2, 1896) (declares monopoly will be "rigidly enforced" against railroads).

advisory role.[44] The Second Assistant Postmaster General wielded considerable clout over the railroads because he was the officer in charge of transportation contracts. In a series of rulings orchestrated by Neilson, the Post Office asserted that a railroad violated the postal monopoly if it transported its own mail to or from other companies[45] or transported another company's mail in connection with joint services provided with the railroad.[46] Further, the Post Office held that a railroad could not send mail by special messenger over the lines of another railroad.[47]

To apply these new rulings, the Post Office also had to decide whether various documents unique to railroad operations were to be considered "letters and packets." On January 7, 1897, the Assistant Attorney General for the Post Office, John L. Thomas, advised Neilson that "car tracers" and "junction reports" were "letters." These documents were standard 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 given station. Using exhibits such as shown in figure 3, Thomas 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* [emphasis original] 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 files of documents relating to "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. . . ."

In applying the postal monopoly to railroad mail, the Post Office for the first time employed an administrative definition of the term "letter" that was not rooted in the original distinction between letters and commercial papers and that was clearly

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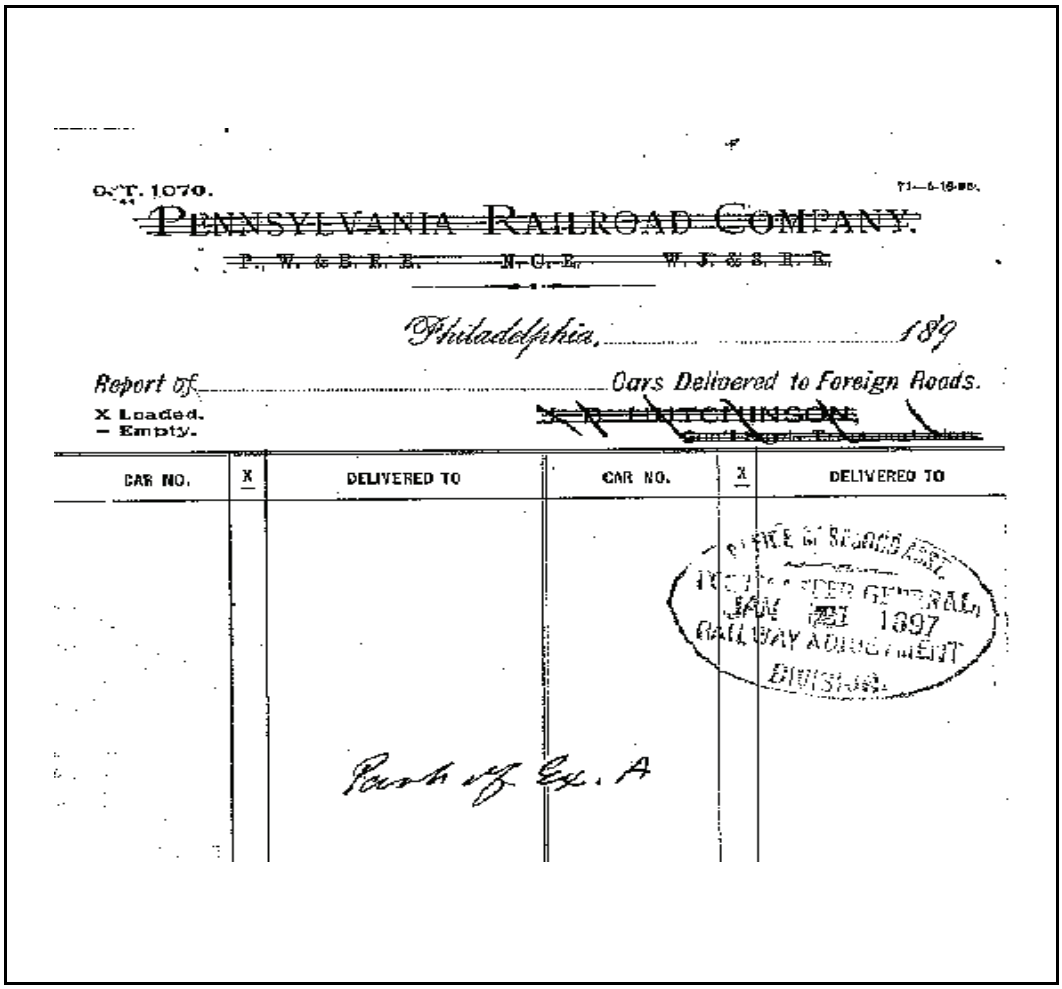
[44]The Assistant Attorney General for the Post Office agreed that legal rulings on the scope of postal monopoly in respect to railroad mail should all "emanate from" the office of the Second Assistant Postmaster General. Letter from J.L. Thomas to C. Neilson (Dec. 29, 1896).

[45]3 AAG POD 132 (Op. No. 1107) (June 3, 1895); 3 AAG POD 140 (Op. No. 1111) (June 26, 1896).

[46]2 AAG POD 877 (Op. No.956) (1890) (telegraph); 3 AAG POD 140 (Op. No. 1111) (1896) (hotel).

[47]3 AAG POD 146 (1896).

Figure 3. Railroad "car tracer" form reviewed by J.L. Thomas


O. T. 1070.

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.

CAR NO.	X	DELIVERED TO	CAR NO.	X	DELIVERED TO

RECEIVED GENERAL
JAN 31 1897
RAILWAY ADJUSTMENT
DIVISION

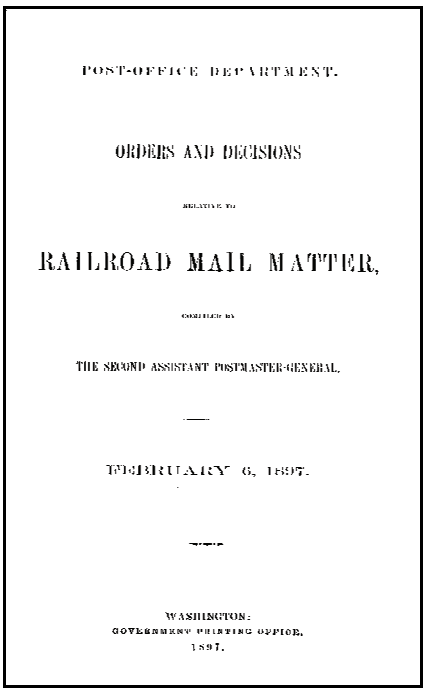
Penn R.R. Co.

subservient to a larger commercial objective. Rather than asking whether a particular type of mail was more like the traditional concept of a letter or more like the traditional concept of commercial papers, the Post Office based its approach upon an abstract definition of *letter* and asked whether the mail in question could fit within that definition. In effect, Thomas held that a *letter* was any communication wholly or partly in writing that was composed for the attention of an identifiable person or office.

Thomas' approach to railroad mail cannot easily be reconciled with the traditional distinction between letters and commercial papers. It is apparent that his rationale would include within the monopoly documents which the Universal Postal Convention listed as examples of commercial papers, such as papers of legal procedures, waybills or bills of lading, invoices, and the various documents of insurance companies. Similarly, it is hard to believe that unsigned lists of railroad cars would be deemed "letters" by the test of Attorney General MacVeagh: "the idea which common usage attaches to that term."

A month after Thomas' opinion on car tracers, Neilson published a pamphlet reprinting a selection of expansive postal monopoly rulings relating to application

Figure 4. 1897 Railroad mail pamphlet



POST-OFFICE DEPARTMENT.

ORDERS AND DECISIONS

RELATIVE TO

RAILROAD MAIL MATTER,

COMPILED BY

THE SECOND ASSISTANT POSTMASTER-GENERAL.

FEBRUARY 6, 1897.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1897.

of the monopoly to railroad mail (figure 4).[48]Most of the rulings purporting to limit the right of a railroad to carry mail related to its business or to use special messengers were reversed or limited by the Attorney General, the courts, or the Post Office itself.[49] Nonetheless, Thomas' approach to defining the term *letter* initiated a practice using a flexible administrative definition for the purposes of assuming a legal position with respect towards customers. The pamphlet on railroad mail remained the standard summary of the Post Office's position on the postal monopoly for the next decade. In 1901, the Second Assistant Postmaster General cited this pamphlet as authority for the proposition that "tissue copies" of waybills were considered to be *letters*,[50] even though waybills were unarguably within the traditional concept of commercial papers.

While expansive in defining the *letter* monopoly over railroad mail, the Post Office remained more cautious in making claims that could be tested in court. In 1909, a U.S. attorney asked if a manufacturing company could forward by private express letters mailed to one branch of the company that should have been mailed to another branch. Mr. Goodwin, the Assistant Attorney General for the Post Office, replied in words reminiscent of MacVeagh:

> *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 they should be construed as coming within the definition of "letters."

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[48]Post Office, *Orders and Decisions relative to Railroad Mail Matter compiled by the Second Assistant Postmaster General* (Feb. 6, 1897).

[49]*Compare* 3 AAG POD 132 (June 3, 1895) (Op. No. 1107)(letter to railroad) and 3 AAG POD 140 (June 26, 1896) (Op. No. 1111) ("carrying by railroads of their own letters") *with* 21 Ops AG 394 (Aug. 12, 1896) (railroad may transport its own mail but not mail of connecting lines). *Compare* 2 AAG POD 877 (Op. No.956) (1890) (telegraph company mail); .3 AAG POD 140 (Op. No. 1111) (1896) (hotel company mail) *with United States v. Eire Railroad Co.*, 235 U.S. 513 (1915)(railroad may transport telegraph company mail with whom railroad has joint venture). *See* 3 AAG POD 146 (1896) (railroad may not regularly send mail by its messenger over another line), *reversed by* 6 Ops Sol POD 293 (1915) (public utility may regularly deliver invoices by its employees to customers).

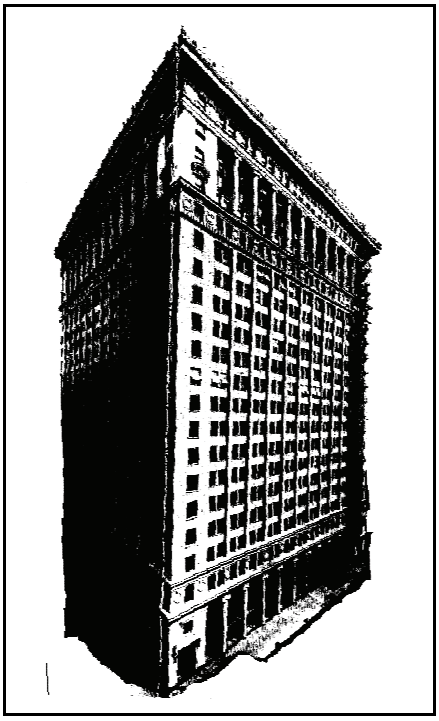
[50]Letter from the Second Assistant Postmaster General to J.D.B. DeBox, Assistant General Counsel, Nashville, Chattanooga & St. Louis Ry. , dated July 13, 1901.

> 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. . . .[51]

8. OPINIONS OF SOLICITOR LAMAR, 1916

In 1913, William H. Lamar was appointed Assistant Attorney General for the Post Office Department, a title that was changed to Solicitor in 1914. Lamar was 54 at the time of his appointment, a veteran of the Spanish American War and the Justice Department and the son-in-law of a U.S. Supreme Court Justice. In early 1916, W.H. Lamar issued a series of opinions which substantially expanded upon the postal monopoly approach adopted in the railroad mail cases.

Figure 5. Chicago Bd. of Underwriters



On March 10, 1916, Lamar considered the lawfulness of a messenger system established for the carriage of "fire insurance policies, bills of debits and credits, and other insurance data" between insurance companies, agents, brokers, and a common clearing house called the Chicago Board of Underwriters. The clearing house and insurance agents were all located within a single office building, shown in figure 5. Lamar ruled first that the corridors of a public building served by letter carriers were "postal routes." He then considered whether the documents in question were *letters*, quoting with approval a dictionary definition ("a written message, usually on paper, folded up and sealed, sent by one person to another") and brief discussions of the term *letter* culled from three federal cases. The first case dealt with postal fraud and discussed the meaning of "letter" in a context wholly different from the postal monopoly.[52] The second case concerned the mailability of obscene "letters"; it not only bore no relation to the postal monopoly but suffered from the further defect of having been

[51] 5 AAG POD 193 (1909).

[52] In *United States v. Denicke*, 35 F.407 (C.C.S.D. Ga. 1888), 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: " can 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.

overruled.[53] The third case was an 1851 Supreme Court opinion holding that an order for goods was "clearly mailable matter" and thus within the postal monopoly law of 1845.[54] The principle derived from these sources was that 'a letter is a message in writing.' On this basis, Lamar seems to have reasoned that all writings could be deemed *letters* and that therefore the monopoly included all first class matter:

> 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 [the postal monopoly law].

On October 13, 1916, Lamar ruled that the postal monopoly prohibited the daily private carriage of insurance documents transmitted in bulk shipments averaging twelve pounds. He held such shipments were "letters" because of the *purpose* for which they were being transported: that is, that they were transmitted "for the purpose of detecting any discrepancies that may exist in rates, form, or details."[55] In 1918, Lamar held that "carbon copies" of business documents were "letters" and not "commercial papers" if sent "not merely for filing purposes but for [the addressee's] information and perhaps, where necessary, attention."[56] With these opinions, Lamar articulated a rationale which could be used to claim virtually any written document was a *letter*.

On May 5, 1916, Lamar addressed wholly printed matter. He held that the postal monopoly also forbade a railroad from transporting printed circulars that were being distributed to members of a railroad union. Lamar concedes that circulars were third class rather than first class matter, but states,

> While for some purposes a distinction is observed between "letters" and

---

[53] *United States v. Gaylord*, 17 F.438 (C.C. S.D. Ill., 1883) was one of a line of cases on whether an obscene "letter" was within the scope of postal law provision that made obscene "writings" nonmailable. *Gaylord* held that a "letter" is a "writing" within the context of this law. The Supreme Court disagreed and upheld another line of cases holding the opposite. *United States v. Chase*, 135 U.S. 255 (1890). *Gaylord* was thus overruled *sub silentio*.

[54] In *United States. v. Bromley*, 53 U.S. (12 How.) 88 (1851), the captain of a canal boat chartered by the Post Office to carry the mail was charged with a violation of the 1845 postal monopoly. The alleged offense was the carriage, out of the mails, of "a request to send some tobacco" written on an unsealed half sheet of paper. 53 U.S. at 91. 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. 53 U.S. at 92. The Circuit Court affirmed. The Supreme Court held "an order to the wholesale dealer for merchandise is a common subject of correspondence . . . [and] an inference may be drawn that something more than a mere order for goods was requested by the writer. But an order for goods . . . *is clearly mailable matter*." 53 U.S. at 97. Since *Bromley* explicitly depended upon the "mailable matter" language of the 1845 act and this language was narrowed by the 1872 act, *Bromley* sheds no light on the scope of the 1872 postal monopoly. It may be noted in passing that Justice McLean, who wrote the opinion of the Court, was a former Postmaster General.

[55] 6 Ops Sol POD 457 (1916).

[56] 6 Ops Sol POD 606 (1918).

> "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."

To support this ruling, Mr. Lamar cites, in addition to the sources noted above, phrases from post-1872 laws which refer to circulars as "printed letters" and 'letters for the blind" in raised type, allowing them to be posted at third class rates.

Lamar left the Post Office Solicitor's post in June 1921 after seven years of service. Between June 1921 and November 1951, postal solicitors issued approximately 166 opinions dealing with the postal monopoly. Most claim a monopoly over the carriage of various items; some disclaim a monopoly. Almost all are devoid of legal citations of any sort. On two occasions, Lamar's immediate successor, Solicitor John H. Edwards, referred to the Chicago Board of Underwriters opinion to support a definition of the term *letters* as "live communications."[57] In 1929, Solicitor Donnelly cited Lamar's railroad union circular opinion to support a claim of monopoly over the transportation of computer cards, and by implication all computer data.[58] In 1935, Solicitor Karl Crowley listed solicitors' opinions and court cases to support the proposition that bills and statements are *letters*; his list of court cases is similar to, and clearly derived from that of Lamar in the Chicago Board of Underwriters opinion.[59] Disregarding a handful of opinions dealing with the scope of exceptions to the monopoly,[60] mere repetitions of the postal monopoly statutes, and general references to Post Office monopoly pamphlets, [61] the Lamar opinions comprise the entire body of legal reasoning presented by the Post Office solicitors in support of an enlarged interpretation of the postal monopoly after 1916.

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[57]7 Ops Sol POD 131 (1921).

[58]7 Ops Sol POD 699 (1929). Solicitor Donnelly also updates 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 "cards punched to give certain information." 7 Ops Sol POD 622 (1927).

[59]8 Ops Sol POD 500 (1935).

[60]*See, e.g.,* 8 Ops Sol POD 137 (1931) *citing* 2 AAG POD 2 (1885)(No. 428) for the proposition that checks are not *letters*; 7 Ops Sol POD 360 (1922), 7 Ops Sol POD 651 (1928), and 8 Ops Sol POD 485 (1935) *citing United States v. Eire Railroad Co.*, 235 U.S. 513 (1915) and/or 28 Ops AG 537 (1910) for the proposition that railroads engaged in various relationships are separate entities for the letters of the carrier exception; 8 Ops Sol POD 410 (1935) citing *Erie* and other cases to extend this interpretation of the letters of the carrier exception to public utilities; 8 Ops Sol POD 188 (1932) discussing various cases in relation to the cargo letter rule; 8 Ops Sol POD 355 (1934) and 8 Ops Sol POD 436 (1935) citing *United States v. Thompson*, 28 F.Cas. 97 (D. Mass. 1846) for a narrow view of the private hands exception; 8 Ops Sol POD 485 (1935) citing various non postal cases in support of the proposition that statutes of limitations do not apply to claims by the POD under the postal monopoly; 8 Ops Sol POD 426 (1935) citing the "mail box" statute.

[61]And disregarding one opinion that contains a "laundry list" of case citations without explanation, 7 Ops Sol POD 349 (1922). This opinion advises a mailer that the POD Solicitor is authorized to give opinions only to postal officers.

Notwithstanding the broad rationale advanced by Solicitor Lamar, the Post Office continued to recognize that certain types of first class matter were not included in the *letter* monopoly, including checks, insurance policies, legal documents, official records, maps and drawings, newspaper copy, and telegrams.[62] Moreover, when questioned by Congress about his claim of a monopoly over third class matter, Lamar resurrected the discredited argument that the term *packet* could refer to more than merely letters. In 1919, Lamar drafted a letter for Postmaster General Koons in reply to a direct inquiry from the chairman of the House postal committee, "does [the postal monopoly] include any of the mailable matter now mailable as third-class matter, such as letters and circulars?" Koons replied:

> *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.[63]

Postmaster General Koons' reply, however, also suggests that "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." Koons notes that only nine years earlier, a federal court had again held that *packet*, as used in the postal monopoly law, referred to a packet of letters,[64] but he suggests:

> 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*.

Speaking more plainly, Postmaster General Brown in 1930 testified to Congress, "As you understand, *we have a monopoly only of first-class mail*. That is the trouble. . . . we have a monopoly of only sealed-letter mail. *We have to come into competition with every sort of carrier on everything else*. . . ."[65]

9. POSTAL SERVICE REGULATIONS, 1974

The Postal Reorganization Act of 1970 abolished the Post Office Department and established the U.S. Postal Service as an independent federal agency. In 1974,

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[62] *See, e.g.,* Post Office Department, *Restrictions on Transportation of Letters*, 9-14 (5th ed., 1967)

[63] Letter from Acting Postmaster General J.C. Koons to Halver Steenerson, chairman, House Comm. on Post Office and Post Roads, dated August 18, 1919.

[64] *Williams v. Wells Fargo & Co. Express*, 177 F. 352 (8th Cir. 1910).

[65] 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).

the Postal Service adopted comprehensive postal monopoly regulations that substantially revised the previous administrative definition of *letter*.[66]The new definition of *letter* was "a message in or on a physical object sent to a specific address."[67]This definition manifestly included within the postal monopoly all physical communications, whether recorded by means of writing, printing, photography, or electro-magnetic process. In response to criticism that the proposed definition of *letter* incorrectly extended the monopoly to commercial papers long held outside the monopoly, the Postal Service cited vaguely to the authority of "original general definitions":

> [Checks and other commercial papers] 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 t*he original general definitions of "letter"* because such documents are in fact messages, conveying information of several kinds.[68]

Similarly, the Postal Service responded to commenters who objected to the inclusion of newspapers in the definition of *letter* by explaining

> newspapers and periodicals also meet the tests in *past guidelines* for determining what are letters . . . an exclusion of newspapers and periodicals seems of doubtful validity."[69]

To mitigate opposition to its new definition of *letter*, the Postal Service also issued regulations which purported to "suspend" the postal monopoly. These "suspensions" created administrative exceptions from the postal monopoly for newspapers, magazines, checks (when sent between banks), data processing materials (under certain circumstances), urgent letters, international remail, etc. [70] While the suspensions have prevented politically powerful mailers from petitioning for Congressional review of the postal monopoly, it appears clear that, as a matter of law, Congress has never authorized the Postal Service to suspend the postal monopoly. As statutory authority for these suspensions, the Postal Service cites an 1864 postal act.[71] However, it is apparent from even a superficial reading of the legislative history of the act[72] that this provision was never intended to confer

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[66]The first notice of proposed rulemaking was published on June 29, 1973. 38 Fed. Reg. 17512 (1973). A revised version of proposed regulations was the subject of a second notice of proposed rulemaking issued on January 30, 1974. 39 Fed. Reg. 3968 (1974). The regulations were adopted in a third notice on September 13, 1974. 39 Fed. Reg. 33209 (1974).

[67]38 FR 17513 (1973) (proposed §310.1(a)). The key terms of this definition were in turn defined.

[68]38 Fed. Reg. at 17513 (emphasis added).

[69] 39 Fed. Reg. 3969 (emphasis added).

[70] *See* 39 CFR 310.1(a)(7) n. 1; 39 CFR 320.

[71]Act of March 25, 1864, ch. 40, 13 Stat 37, codified at 39 USC 601(b).

[72]*See Cong. Globe*, 38th Cong., 1st Sess., 1243 (1864).

authority to suspend the postal monopoly. The gist of the 1864 law was to allow the Postmaster General to reapply the postal monopoly by suspending, on a selective basis, an exception to the postal monopoly allowing private carriage of letters in stamped envelopes, now found at 39 USC 601(a).[73]

In applying its new definition of *letter*, between 1974 and 1978, the Postal Service's lawyers advised mailers that the postal monopoly included the carriage of items such as payroll checks, Walt Disney posters, fishing licenses, professional football tickets, IBM cards, blueprints, data processing tapes and computer programs, gasoline company credit cards, intracompany memoranda, and documents which are electronically transmitted and converted to hard copy form, when being carried from the telecommunications receiver to the addressee or from the sender to the telecommunications transmitter.[74]

The only major federal case to consider the meaning of the term *letters and packets* since 1970, indeed since 1872, upheld the Postal Service's 1974 administrative definition of *letter*. In the *ACTMU* case,[75] decided in 1979, a divided D.C. Circuit Court of Appeals held that printed advertisements were within the postal monopoly over *letters and packets*. The court's judgement was based substantially upon the 1974 Postal Service regulations and the 1916 railroad circular opinion of Solicitor Lamar. Although the *ACTMU* case relied heavily on historical analysis, the court was plainly uninformed about several key elements of the history of the postal monopoly law, including the 1881 opinion by Attorney General McVeagh and the 1919 POD letter to Congress linking a claim of monopoly over third class matter to an expansive definition of *packet*.

10. SUMMARY AND CONCLUSION

The postal monopoly law of the United States is derived directly from a short-lived decree by Charles I in 1635, proclaimed for the purpose of protecting the monarchy from the demands of commercially-oriented Protestant groups in Parliament. The postal monopoly law was reenacted on a permanent basis upon the restoration of Charles II in 1660, for reasons of revenue and security. To a remarkable degree, the terms and phrases in current America are the same as used in the English postal act of 1660. In particular, the key phrase *letters and packets*, describing the scope of items whose carriage is monopolized, has remained

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[73]Nonetheless, it is a basic principle of law that a federal agency will generally be held bound by its own regulations. *See, e.g.,* B. Schwartz, *Administrative Law* (2d ed., 1984). Hence, it seems unlikely the government cant issue even illegal "suspensions" of the postal monopoly and then prosecute persons who rely upon them.

[74]*See* PES Letter 74-24 (1974) and PES Letter 75-1 (1975); PES Letter 75-5 (1975); PES Letter 76-5 (1976); PES Letter 75-32 (1975); PES Letter 75-11 (1975); PES Letter 74-14 (1974); PES Letter 78-11 (1978); PES Letter 76-8 (1976); PES Letter 74-7 (1974) and PES Letter 74-15 (1974); and PES Letter 78-14 (1978), respectively.

[75]*Associated Third Class Mail Users v. U.S. Postal Service*, 440 F.Supp. 1211 (D.D.C. 1977), *aff'd* 600 F.2d 824 (1979), *cert. den.* 444 U.S. 837 (1979).

unchanged.

Although the terms have not changed, their meanings have. Originally, a *postal service* was a means of providing express inter-city transportation for letters by means of a series of posts. Until the 1860's, the U.S. Post Office did not normally provide either intra-city postal service nor collection and delivery of inter-city letters. The term *letter* originally referred to a message inscribed by hand on a single sheet of paper. A *packet* referred to a bundle of letters fastened by twine or other means, envelopes not having been introduced. By 1830, the term *packet* had become synonymous with "package." Although the Post Office argued the postal monopoly should be interpreted according to this enlarged definition of *packet*, neither the courts nor Congress accepted this view.

When railroads and steamboats made it possible for private express companies to compete with "postal services," Congress, after much debate, extended the postal monopoly to include express transportation in the postal act of 1845. At the same time, Congress expanded the scope of the postal monopoly to include not only letters but also "other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines." This additional phrase added miscellaneous written and printed matter to the monopoly. By 1863, the scope of mailable matter had increased substantially, and the Post Office itself recommended limiting the postal monopoly to first class mail while expanding the monopoly to include local as well as inter-city mail. In 1872, Congress enacted a new postal law in which the monopoly provision was revised by including local mail and by reverting to the pre-1845 phrase "letters and packets". These changes to the postal monopoly and others, obscured by Congressional sponsors who portrayed the bill as a codification of existing law, were effected by Congress without debate.

After the 1872 act, it was generally held that the scope of the monopoly depended upon the definition of the term *letter* (a *packet* being accepted as a letter of several sheets). Following a ruling by the Attorney General in 1881, the Post Office considered that the *letter* monopoly included only first class items which could not be described as *commercial papers*. Subsequently, the administrative definition of *letter* was enlarged in three major steps.

- First, in considering the scope of the monopoly over railroad mail in the mid-1890s, the Post Office held that the *letter* monopoly included a number of documents which appeared to fall within the traditional concept of commercial papers.
- Second, in 1916, the Post Office adopted an interpretation of the term *letter* under which the postal monopoly could be extended to include all first class matter and third class matter such as circulars.
- Third, in 1974, the Postal Service issued regulations defining the term *letter* as "a message in or on a physical object sent to a specific address," thereby extending the postal monopoly to include all letters and commercial papers (first class matter), periodical printed matter such as newspapers and magazines (second class matter), non-periodical printed matter (third class matter), and other items of a communicative nature. To

render this new definition politically acceptable, the Postal Service declared that the postal monopoly was for certain types of mail, citing non-existent statutory authority.

None of these administrative expansions of the postal monopoly has been accompanied by substantial legal justification. In each case, potential opposition has been muted by other administrative rulings which have tended to undercut the full and immediate effect of the new administrative rationale.

In interpreting the statutory and administrative provisions setting out the postal monopoly today, two recent Supreme Court cases leave little doubt that history matters.[76] Neither, however, addresses the obvious question posed by the history of the postal monopoly law: Would the courts, if fully apprised of historical events, regard as a lawful and correct implementation of the postal monopoly enacted by Congress in 1872 the administrative rulings of the Post Office and Postal Service which interpret the phrase *letters and packets* as embracing modern commercial papers and printed matter? To date, no judicial opinion offers final answers to this question. The only available guidance is that which may be derived from a study of the general principles of administrative law and the history of the postal monopoly law.

[76]*Regents of Univ. Cal. v. Public Empl. Rel. Bd.*, 485 U.S. 589 (1988) (scope of the "private hands" exception to the postal monopoly); *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991) (rejecting standing of postal union to enforce the postal monopoly).

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U.S. Postal Inspectors and the Private Expresses (2000)*

The topic of the Subcommittee's hearing today, competition policy questions raised by the role of the Postal Inspection Service, is both timely and important. As the Subcommittee has recognized in developing H.R. 22, the Postal Modernization Act of 1999, the Nation's delivery services sector is evolving rapidly due to technological and commercial innovation. This evolution has rendered imperative a fundamental review of the legal privileges and burdens that bedevil Postal Service efforts to compete on fair and equal terms with private companies. In this review, the role of the Inspection Service presents an especially sensitive area, for the Inspection Service is wielding the police power of the United States. Extra care is appropriate to ensure that national police authority is not debased to the status a commercial chip in the increasing competitive game in which the Postal Service finds itself.

By way of introduction, I should explain that I am an attorney in private practice. I have worked on regulatory issues for the present generation of private express companies—DHL, Federal Express, and TNT (now part of TNT Post Group)—since mid 1970s. Based on this experience, I am familiar with competition issues presented by the Postal Inspection Service. I am, however, testifying today in my personal capacity at the invitation of the Subcommittee. I have not consulted with any private express company in the preparation of my comments ,and my comments should not be construed to represent the views of anyone but me.

1. Issues Addressed

At the outset, I would like to clarify the issues addressed in my testimony. First, it should be kept in mind by all that enforcement of the postal monopoly has

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*Prepared statement of James I. Campbell Jr in *The U.S. Postal Service and the Postal Inspection Service: Market Competition and Law Enforcement in Conflict?: Hearing Before the Subcommittee on the Postal Service of the House Committee on Reform*, 106th Cong., 2d Sess., 37-73 (2001).

not been the primary function of the Inspection Service. The basic mission of the Inspection Service has been to protect the security of the mails. I have absolutely no doubt the United States has benefitted from the work of the dedicated men and woman of the Inspection Service to this end. Nothing in my testimony should be interpreted to suggest any lack of appreciation on my part for this important public service.

Second, the Inspection Service operates at the direction of the Postmaster General. As I explain below, I believe that competition issues presented by the activities of the Inspection Service are issues that arise primarily from the organization and mandate of the Postal Service, not from administration of the Inspection Service.

Finally, the focus of my remarks is on the Postal Service's express or implied use of *governmental authority* to investigate or compete with private competitors, i.e., the authority to make searches of private property under an express or implied threat of legal sanction and the authority to seize private property. I see no reasonable objection to the Postal Service investigating private competitors for possible violations of law in the same manner as, for example, Federal Express might investigate whether a competitor is contravening the antitrust law in a manner injurious to the interests of Federal Express.

2. LEGISLATIVE HISTORY

From the earliest days of the Post Office Department in the late 18th century, the Postmaster General has employed one or more trusted persons to travel about the country and investigate the operations of postal employees and contractors. Given the financial stakes and the geographic extent of postal operations, it is hard to imagine any alternative to a corps of trusted internal auditors. These persons were originally called "surveyors." After 1801, they were called "special agents." The term "postal inspector" was initiated in 1880.

Before 1872, special agents apparently exercised no special law enforcement authority in their investigations of private express companies. In 1840s, private express companies such as Wells Fargo and Adams Express posed a serious challenge to the Post Office Department in many markets, yet reports from special agents appear to rely on personal observation and market assessments of postmasters.[1]

So far as I have been able to determine, the postal act of 1872[2] represents the first occasion in which Congress gave general authority to the Post Office Department to search private property for violations of the postal monopoly and to seize illegally transported letters. Congressional motives, however, are unclear. The postal act of 1872 was the first codification of the postal laws since 1825. It was based on a draft codification and revision of the postal laws proposed by the Post

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[1] *See, e.g.*, "Report of the Postmaster General," S. Doc. 66, 28th Cong., 2d. Sess. (1845).

[2] Act of June 8, 1872, ch 335, 17 Stat 283.

Office Department in 1863.[3] Rather than acting on the Post Office's proposal immediately, Congress incorporated revision of the postal laws into a vaster project, revision of the entire body of U.S. statutes. The postal act of 1872 was in fact an advance specimen title of the Revised Statutes adopted by Congress in 1874.

Although the act of 1872 was portrayed by sponsors as primarily a codification of prior law, it introduced subtle but important changes, including changes which conferred on the Post Office search and seizure authority in respect to violations of the postal monopoly. The new provision authorizing special agents of Post Office to search for violations of the postal monopoly was set out in §299 of the 1872 act. In the original bill, H.R. 2295, the primary search power (§295) was printed in italics, identifying it as a revision (probably suggested by the Post Office) rather than a codification of existing law. Although neither the House nor the Senate discussed this new provision, it is clear from the text that the search authority was carefully limited.[4] Authority of special agents to seize letters carried in violation of the postal

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[3]"The Post Office Department, Prepared by the Post Office Department for the Committee on the Post Office and Post Roads" (Feb. 2, 1863), referred to in *Annual Report of the Postmaster General* (1862) (Dec. 1, 1862) at 23-34. Congress took no immediate action on this proposal. In 1866, Congress appointed three Commissioners to revise and consolidate the entire body of U.S. statutes. Act of June 27, 1866, ch 140, 14 Stat 74. On 26 January 1869, the two remaining Commissioners reported to the House Committee on the Revision of the Laws. They stated that several specimen titles had been prepared, including one containing the postal laws which was "in the hands of the congressional printer." "Report of the Commissioners to Revise the Statutes of the United States," H.R. Misc. Doc. 31, 40th Cong., 3d Sess (1869). The specimen postal title prepared by the Commissioners was sent to the Post Office Department for comment. On 29 October 1869, the Postmaster General appointed a committee to study the draft code. On March 30, 1870, the committee submitted a 30-page report. "Report of the Committee Appointed by the Postmaster General to Examine and Revise the Postal Code" (1870). The Commissioners' proposed postal code and comments of the POD Committee were sent to the House of Representatives. Less than two months later, on April 25, 1870, the postal code was introduced in the House of Representatives during the second session of the 41st Congress as H.R. 1860. The original bill contained printing errors, and it was reintroduced in corrected form as H.R. 2295 on June 24, 1870. From a study of the report of the Postmaster General's committee, it appears that H.R. 2295 presents the Commissioners' draft postal code in normal typeface with the revisions proposed by the Post Office, together with a few additions by the House Post Office and Post Roads Committee, printed in italics. H.R. 2295 was reported from committee in the third session of the 41st Congress and brought up for floor debate on December 7, 1870. In describing the reported bill to his colleagues, the Chairman of the House Committee on Post Office and Post Roads, Representative Farnsworth, assured the House that the Commissioners' draft was a codification of existing law, to which only specified revisions, noted in italics, were being proposed.

[4]Section 299, similar to current 39 USC 603, 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."

monopoly was provided in section 236 of the 1872 code.[5] In H.R. 2295, the typeface of this provision (§237) indicated that it was a codification of existing law, the marginal note citing §5 of an 1852 act.[6] The 1852 act, however, seemingly addressed only seizure of letters found on vessels arriving from foreign ports.[7] In H.R. 2295, the seizure provision authorized special agents to seize of letters and packets "on any post road." H.R. 2995 did not, by use of italicized typeface, indicate that this to be a revision of prior law, and during the debates leading to enactment of the 1872 act, Congress did not discuss the apparent enlargement of the scope of the seizure authority.

In this opaque manner, Congress, in 1872, first authorized the Post Office to exercise governmental police power to investigate private competitors. These provisions of the 1872 act are now found in sections 603 to 606 of title 39. Indeed, the maritime origin of the seizure provisions is still evident in current law. Thus, section 604 deals with seizure of letters carried contrary to law "on board any vessel or on any post road." Section 605 likewise deals with seizure of letters on board vessels and appears redundant. Section 606 deals with the disposition of seized items and grants to seizing officers the legal protection afforded customs officers. These provisions read as follows:

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[5]Section 236, similar to current 39 USC 604, read as follows: "Sec. 236. That any special agent of the Post-office Department, collector, or other customs-officer, or United States marshal or his deputy, may at all times seize all letters and bags, packets or parcels, containing letters which are being carried contrary to law or board any vessel or on any post-route, and convey the same to the nearest post-office, or may, by the direction of the Postmaster-General or Secretary of the Treasury, detain them until two months after the 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, such letters."

[6]Act of August 31, 1852, ch 113, 10 Stat 140.

[7]Section 5 read 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 . . . . 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-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 . . . . [emphasis added]" As the text of section 5 indicates, the key phrase "or on or over any post-route," describing the seizure authority, apparently pertained to letters which (a) were found on vessels and (b) which "shall have been sent or conveyed" contrary to law, whether by sea or land. As reworded in §237 of H.R. 2295, however, the seizure authority allows the seizure of letters and packets which are being carried "on any post road" regardless of whether they are discovered on board a vessel.

§ 603. Searches authorized

The Postal Service may authorize any officer or employee of the Postal Service to make searches for mail matter transported in violation of law. When the authorized officer has reason to believe that mailable matter transported contrary to law may be found therein, he may open and search any—

(1) vehicle passing, or having lately passed, from a place at which there is a post office of the United States;

(2) article being, or having lately been, in the vehicle; or

(3) store or office, other than a dwelling house, used or occupied by a common carrier or transportation company, in which an article may be contained.

§ 604. Seizing and detaining letters

An officer or employee of the Postal Service performing duties related to the inspection of postal matters, a customs officer, or United States marshal or his deputy, may seize at any time, letters and bags, packets, or parcels containing letters which are being carried contrary to law on board any vessel or on any post road. The officer or employee who makes the seizure shall convey the articles seized to the nearest post office, or, by direction of the Postal Service or the Secretary of the Treasury, he may detain them until 2 months after the final determination of all suits and proceedings which may be brought within 6 months after the seizure against any person for sending or carrying the letters.

§ 605. Searching vessels for letters

An officer or employee of the Postal Service performing duties related to the inspection of postal matters, when instructed by the Postal Service to make examinations and seizures, and any customs officer without special instructions shall search vessels for letters which may be on board, or which may have been conveyed contrary to law.

§ 606. Disposition of seized mail

Every package or parcel seized by an officer or employee of the Postal Service performing duties related to the inspection of postal matters, a customs officer, or United States marshal or his deputies, in which a letter is unlawfully concealed, shall be forfeited to the United States. The same proceedings may be used to enforce forfeitures as are authorized in respect of goods, wares, and merchandise forfeited for violation of the revenue laws. Laws for the benefit and protection of customs officers making seizures for violating revenue laws apply to officers and employees making seizures for violating the postal laws.

3. POSTAL INVESTIGATION OF PRIVATE EXPRESS COMPANIES, 1872-1970

Over the years since 1872, the Post Office Department's efforts to enforce the postal monopoly waxed and waned. As the investigative force of the Post Office Department, postal inspectors participated in these efforts. In 1879, Special Agent B.K. Sharretts undertook a substantial investigation of the letter carriage of business

of Wells Fargo in the western United States. [8] Between 1872 and 1951, the Chief Postal Inspector consulted the Solicitor of the Post Office Department on 36 occasions for formal legal opinions on the scope of the postal monopoly. Investigation of private express companies was not, however, confined to postal inspectors. Other senior postal officials and postmasters sought advice on postal monopoly issues from the Solicitor. In the 1890s, the Railway Mail Service, led by the Second Assistant Postmaster General (in charge of contracts for transport of mail), conducted a major campaign against the carriage of letters by railroads. In the Depression years of the 1930s, the Solicitor of the Post Office Department began the practice of giving legal advice directly to mailers, by letter and by pamphlet, to dissuade them from using private expresses.

Although the Post Office Department had its difficulties with private express carriers, it appears that it only very rarely employed its limited search and seizure authority. Special Agent Sharretts, for example, based his report on allegations of postmasters and personal observations. Between 1872 and abolition of the Post Office Department in 1970, there appear to be only two judicial opinions on the scope of the search authority of postal inspectors.[9] Neither involves a private express company or customer.[10] In this period, there appears to be only one case involving postal exercise of seizure authority in aid of the monopoly. In 1943, a postal inspector seized certain checks while being transported by a private messenger service operating in New York City.[11]

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[8]"Well, Fargo & Co.'s Letter Express: Report of a Committee Appointed by the Postmaster General" (January 5, 1880).

[9]*See also* , *Blackham v. Gresham*, 16 F.609 (S.D.N.Y. 1883) (search authority held constitutional).

[10]In *United States v. Helbock*, 76 F.Supp. 985 (D. Oregon, 1948), a postal inspector gained admittance to a private house in the company of a deputy U.S. marshal. After the deputy marshal left, the postal inspector seized some obscene pictures. The court ordered the persons released and the pictures returned: "The inspector gained access to this home as a real or apparent aide of the deputy marshal. His authority, if he had any, ended when the deputy marshal left the premises. At 986. In *United States v. Haas*, 109 F.Supp. 443 (W.D. Pa. 1952), the court took an only slightly less skeptical attitude towards the search authority of a postal inspector but held that "the defendant . . . voluntarily and willingly consented to the Postal Inspector entering his dwelling." At 444.

[11] The procedural posture of this case was such that it offers no insight into scope of the Post Office's seizure authority. In *Goldman v. American Dealers Service*, 135 F.2d 398 (2d Cir. 1943), the plaintiff asked a court to order return of the checks arguing their were illegally seized. The district court agreed. The Post Office asked the appellate court to condone the seizure and Post Office custody of the checks regardless of the underlying merits. Hence, the appellate court was constrained to assume that the seizure was illegal (i.e., outside the scope of § 604 because the checks were not"letters"). The only issue addressed by the court was whether the Post Office could keep possession of illegally seized items for up to six months. The Second Circuit affirmed the district court's ruling that seized items may be ordered returned by the courts if forfeiture proceedings are not brought promptly by the U.S. attorney, as required by §606. In one other case, *Blackham v. Gresham*, 16 F. 609 (S.D.N.Y. 1883), a court denied a petition for an injunction to prohibit the Post Office from conducting searches for and seizures of privately carried letters. The court's opinion addresses whether the private express's activities violated the postal monopoly, not the scope of the Post

In summary, prior to 1970, it appears that, speaking generally, Congress, the Post Office Department, and the courts shared the view that postal inspectors should employ governmental authority to investigate postal monopoly violations only in extraordinary circumstances and that such authority should be employed only against private express companies, not against their customers.

4. POSTAL SERVICE'S 1974 MONOPOLY REGULATIONS

With establishment of the Postal Service in 1970, the Inspection Service became far more active in defending the postal monopoly by intrusion into the affairs of mailers and customers of private express companies. The legal basis for this increase in the activities of the Inspection Service lies in the comprehensive postal monopoly regulations adopted by the Postal Service in 1974. The 1974 postal monopoly regulations were different in kind, as well as degree, from anything promulgated by the Post Office Department. The practical effect of the 1974 regulations was circumvent normal legal process and place the Inspection Service in the business of enforcing the postal monopoly by intimidation of mailers.

The 1974 regulations adopted a fundamentally new approach to defining the scope of the postal monopoly and its enforcement.[12] Instead of determining the scope of the monopoly by interpreting the word "letter," the 1974 regulations defined every tangible communication to be a "letter" and fixed the scope of the monopoly by means of administrative regulations which purported to "suspend" the postal monopoly for specific types of communications or particular classes of mailers or services. The new definition of "letter" was held to be "a message directed to a specific person or address and recorded in or on a tangible object." 39 CFR 310.1(a). This definition of "letter" included all printed matter and commercial papers as well as non-verbal media such as photographs and blueprints. [13] To counter public opposition, the new regulations announced "suspensions" of the postal monopoly to

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Office's search and seizure authority.

[12]The 1974 regulations were adopted after two notices of proposed rulemaking and a third notice adopting the final rules; these notices are important because they illuminate the legal position underlying the regulations. 38 FR 17512-16 (Jul 2, 1973) (first notice of proposed rulemaking); 39 FR 3968-74 (Jan 31, 1974) (second notice of proposed rulemaking); 39 FR 33209-16 (Sep 16, 1974) (final regulations).

[13]The 1974 regulations provided that USPS's Law Department would issue "advisory opinions" on the scope of the monopoly. 39 CFR 310.6. Pursuant to this section, USPS lawyers have advised that the postal monopoly covers carriage of various items not normally considered "letters" in ordinary usage. PES Letter 74-24 (1974) and PES letter 75-1 (1975) (payroll checks); PES Letter 75-5 (1975) (Disney posters); PES Letter 76-5 (1976) (fishing license); PES Letter 75-32 (1975) (San Francisco 49er football tickets); PES Letter 75-11 (1975) (IBM punch cards); PES Letter 74-14 (1974) (blueprints); PES Letter 78-11 (1978) (data processing tapes and computer programs); PES Letter 76-8 (1976) (gasoline company credit cards). PES letter 75-9 (1975) (boxes of merchandise with advertisements enclosed); PES Letter 74-7 (1974) and PES Letter 74-15 (1974) (intra-company memoranda); PES Letter 78-14 (1978) (documents, which are electronically transmitted and converted to hard copy form, when being carried from the telecommunications receiver to the addressee or from the sender to the telecommunications transmitter).

allow for the private carriage of newspapers, magazines, checks (when sent between banks), and data processing materials (under certain circumstances). 39 CFR 310.1(a)(7) n. 1, 320.

By making the right to use private carriers a matter of administrative grace, the regulations forced mailers and private carriers to acquiesce in enhancement of the investigative powers by the Inspection Service. The first and second notices of proposed rulemaking attached reporting conditions for private express companies operating within the scope of proposed suspensions for intra-company and data processing documents; they would be required to register with the Postal Service and provide annual reports of their operations. The second notice also provided for affidavits from major customers of private carriers. The final notice of rulemaking abandoned most of these reporting procedures as "unworkable" and unnecessary since the proposed suspension for private carriage of intra corporate documents was deleted. 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 final rule further stated that the Postal Service may administratively withdraw the suspension with respect to a particular private carrier if it failed to abide by the terms of the suspension.[14]

When, in 1979, the Postal Service adopted a suspension of the postal monopoly to allow private carriage of urgent letters—the suspension that most directly affects private express companies—it strengthened the role of the Inspection Service still further. In the urgent letter suspension, enforcement provisions applied to customers as well as private express carriers. In addition, the suspension required that all records, not merely covers of shipments, be made available to postal inspectors. For good measure, the regulation provided that failure to cooperate with postal inspectors created a presumption of guilt.[15]

Another innovation of the 1974 postal monopoly regulations was the possibility of "alternate payment of postage agreements." Section 310.2(b)(1)(ii) provides that letters may be transmitted by private carriage if "the amount of postage which would have been charged on the letter if it had been sent through the Postal Service is paid by stamps, or postage meter stamps, on the cover *or by other methods approved by the Postal Service*." Private carriage of letters on which postage has been paid by affixing stamps or postage meter stamps is provided in 39 USC

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[14]"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 . . . ." 39 FR at 33213d codified 39 CFR 320.3(d).

[15]"The failure of a shipper or carrier to cooperate with an authorized inspection or audit conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (e) and shall shift to the shipper or carrier the burden of establishing the fact of compliance." 44 FR at 61182a, *codified* 39 CFR 320.6(e).

601(a)(2). In the italicized language, however, the Postal Service further authorized itself to negotiate individual deals with customers of private express companies. These, in turn, created a need for continual monitoring by the Inspection Service.

In addition to adopting an inherently more intrusive approach to defining the scope of the postal monopoly, the 1974 regulations added other provisions which added to the commercial risks of non-cooperation with the Inspection Service. The regulations proclaimed that mailers and private carriage contravening the postal monopoly were subject to a "back postage" fine, i.e., a civil fine equal to the postage that would have been due if privately carried letters had been posted instead. The first notice of proposed rulemaking explained:

> *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. [38 FR at 17513a (emphasis added)]

In 39 CFR 310.5, the back postage fine was adopted essentially as proposed:

> Payment of postage on violation.
>
> (a) 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.
>
> (b) The amount equal to postage will be due and payable not later than 15 days after receipt of formal demand from the Inspection Service unless an appeal is taken to the Judicial Officer Department in accordance with rules of procedure set out in Part 959 of this chapter.
>
> (c) Refusal to pay an unappealed demand or a demand that becomes final after appeal will *subject the violator to civil suit by the Postal Service* to collect the amount equal to postage.
>
> (d) The payment of amounts equal to postage on violation shall *in no way limit other actions to enforce the Private Express Statutes* by civil or criminal proceedings. [39 FR at 33212b *codified* 39 CFR 310.5 (emphasis added)]

For a large company, a back postage fine could amount to a substantial monetary penalty depending on the length of time over which back postage was calculated.

The 1974 regulations also introduced procedural rules for Postal Service adjudication of postal demands for back postage or withdrawals of suspensions as to particular individuals. The rules provided that the Judicial Officer of the Postal Service or an administrative law judge would preside over such cases. 39 CFR 959.16. Where the General Counsel is seeking withdrawal of a suspension as to an individual, facts alleged by the General Counsel and not denied within 15 days may

be considered proven. § 959.6(b)(3). Postmasters are designated as process servers. § 959.8. The accused has no right to trial by jury and no access to subpoena authority. § 959.18. If the Judicial Officer does not serve as the presiding officer, the losing party before the administrative law judge may appeal to the Judicial Officer. § 959.24. The Judicial Officer may, in turn, refer the case to the Postmaster General for decision. § 959.25. Mailers and customers of private express companies might reasonably consider compromise with postal inspectors preferable to adjudication under such circumstances.

Since 1974, the regulatory scheme has been amended but not substantially revised. Although the Postal Service proposed significant revisions to the 1974 regulations in 1978, it withdrew these proposals when the Department of Justice filed extensive comments concluding that the law required an analysis of competitive impact and adoption of least anti-competitive alternatives. The most significant amendments have been in the area of suspensions. Since 1974, the Postal Service has added regulations suspending the postal monopoly for intra university mail systems (1979), international shipping documents (1979), urgent letters (1979), advertisements included in packages (1980), and international remail (1986).

For present purposes, the main point to note is that *the 1974 postal monopoly regulations substantially increased the the authority of the Inspection Service to intrude into business operations of private companies, the administrative need for them to do so, and the penalties risked by businesses who failed to cooperate with the Inspection Service.* In addition, I am convinced that the 1974 postal monopoly regulations substantially exceed the legal authority of the Postal Service. The cornerstone of these regulations is the claimed authority to suspend the postal monopoly, yet it appears clear that Congress never authorized the Postal Service to suspend the postal monopoly.[16] Nor does it seem plausible that the Postal Service can itself create a new civil fine for violation of the postal monopoly [17] or establish

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[16]Others have noted the absence of statutory authority for administrative suspensions of the monopoly as well. *See, e.g.*, N. Schwartz, "Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Excerise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly," Postal Rate Commission Docket No. MC 73-1 (1974) at 33-43 ("a suspension under section 601 prevents private carriage; it does not permit private carriage as the Postal Service believes"); G. L. Priest, "The History of the Postal Monopoly in the United States," 18 J.L. & Econ. 33 (1975) at 79-80 ("Congress . . . has never delegated the power to repeal the private express statutes"). As statutory authority for these suspensions, the Postal Service cites an 1864 postal act. Act of March 25, 1864, ch. 40, 13 Stat 37, codified at 39 USC 601(b). However, it is apparent from even a superficial reading of the legislative history of the act that this provision was never intended to confer authority to suspend the postal monopoly. See Cong. Globe, 38th Cong., 1st Sess., 1243 (1864). The gist of the 1864 law was to allow the Postmaster General to reapply the postal monopoly by suspending, on a selective basis, an exception to the postal monopoly (the exception, found at 39 USC 601(a), allows private carriage of letters in stamped envelopes).

[17]In 1844, the Attorney General held that the Post Office Department had not authority to charge a mailer with the postage it would have received on letters dispatched by private express, even if the letters were dispatched illegally. 4 Ops AG 349. In 1918, the Solicitor of the Post Office

administrative courts for adjudication of postal monopoly violations. Indeed, it is questionable whether the Postal Service may, at least without approval of the Postal Rate Commission, establish alternate provisions for domestic postage payable on items transmitted by private carrier.

5. INSPECTION SERVICE EFFORTS TO PREVENT DEVELOPMENT OF EXPRESS COMPANIES(1975-79)

Modern express companies first developed in the 1970s. The leading international express company, DHL, was founded in 1969. The pioneer in the domestic express market, Federal Express, began in 1972. The commercial *raison d'être* of these companies was their ability to make use of improvements in air transportation and telecommunications technologies to provide a faster and more reliable delivery service than available from the Postal Service, albeit one that was also more expensive to produce. In many ways, the 1970s were a replay of the 1840s. In the 1840s, the first generation of express companies, including Adams Express and Wells Fargo & Company, developed mainly because they adapted to the possibilities of early railroads more quickly and efficiently than the Post Office Department.

In 1973, the USPS Board of Governors expressed doubts about the equity of applying the postal monopoly statutes against these new express companies:

> In addition to the practical problems of detecting such violations and enforcing the [Private Express] 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.[18]

Despite the Board of Governors's appreciation of the economic benefits of private express companies, however, the Postal Service employed the Inspection Service to suppress their development. The 1974 postal monopoly regulations put mailers on notice that the Postal Service could, in its discretion, impose large administrative fines against companies making use of private express companies and deny a mailer the right to use private express companies for the vital business operations. The Law Department supplemented these regulations with numerous letters to mailers holding illegal the use of private express companies until particular circumstances. In many cases, Law Department opinions were generated in response to, or in coordination with, investigations conducted by the Inspection Service.

In this environment of legal intimidation, postal inspectors made numerous

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Department came to the same conclusion. 6 Ops Sol POD 619. There was no pertinent change in the postal laws prior to the 1974 postal monopoly regulations.

[18]"Statutes Restricting Private Carriage of Mail and Their Administration: A Report by the Board of Governors to the President and the Congress, Pursuant to Section 7 of the Postal Reorganization Act" (1973)*reprinted*, House Committee on Post Office and Civil Service, 93d Cong., 1st Sess., Comm. Print No. 93-5 (1973), Appendix E at 83.

calls on customers of private express companies to dissuade them from use of private express companies. The following letter, dated June 7, 1979, from a Postal Inspector N.H. Green to Otis Elevator, describes and exemplifies these efforts:

> This letter is in reference to our meeting of March 13, 1979, regarding your firm's use of private couriers. . . . At that time it was learned that inter-office deliveries are being made to Hartford (Connecticut), San Bruno (California), and Paris (France) on a daily basis by Purolator Courier Corporation and DHL. In addition the latter courier is providing weekly service to your office in Saudi Arabia.
>
> The items being carried include: (1) corporate reports; (2) internal directives in bulk (for internal use) and (3) blueprints and drawings (to Saudi Arabia only).
>
> As discussed, there presently exist a group of federal laws, collectively known as the Private Express Statutes and Regulations, which have legally monopolized the carriage of letter mail by the U.S. Postal Service. In this regard, a 'letter' has been defined as "a message directed to a specific person or address and recorded in or on a tangible object."
>
> With regard to internal directives, blueprints, and drawings, these items constitute letter mail. As such, their carriage outside the mailstream is not permitted unless proper postage is affixed as described in 39 CFR 310.2(b)(1)-(6). . . .
>
> As further discussed, the Postal Service has exercised its authority to suspend the operation of the Private Express Statutes to allow for the transportation of data processing materials outside the mailstream, provided that certain requirements are met. It appeared that your corporate records might qualify as 'output' for this suspension.
>
> As a means of correcting the impermissible carriages described, the use of Express Mail Service to Harford, San Bruno, and Paris was suggested in lieu of private courier usage. It is my understanding that such Express Mail Service had been explored, with the assistance of the Postal Customer Service Representative Phil Trille, and found unacceptable based on a cost comparison.
>
> In line with that decision, it becomes necessary to determine if your corporate reports qualify as 'output' for our data processing suspension. To assist in making this determination, responses to the following questions would be appreciated:
>
> 1) Please provide a brief description of the reports and the manner in which they are produced?
> 2) Are the reports the direct output of electro-mechanical or electronic processing?
> 3) Are the report produced on a regular, periodic basis?
> 4) Are the reports returned to the address' [sic] from where the data output used to generate them originated?
> 5) Are the shipment of these reports completed within 12 hours or by noon of the office of the address' [sic] next business day?
> 6) What percentage of the shipment (by weight) do these reports represent?
>
> The information requested should be sent to me at . . . .[emphasis original]

This letter illustrates several important aspects of the activities of the

Inspection Service. First, the Inspection Service's approach to competitive issues was, perhaps necessarily for a law enforcement agency, coercive not commercial. Customers of private express companies did not invite investigations by postal inspectors of their own volition. Second, the Inspection Service relied on the Postal Service's expansive regulatory definition of the letter monopoly as though it was vested with the same legal authority as statute. Unsuspecting mail room managers had no way to distinguish between the law of Congress and advocacy by the Postal Service Law Department. Third, the intricate details of USPS "suspensions" of the postal monopoly served to justify extensive Inspection Service investigation into the activities of mailers. Fourth, the Inspection Service's enforcement activities were closely related to the commercial activities of the Postal Service, especially the effort to persuade mailers to use the Postal Service's Express Mail services.[19]

As counsel for DHL at the time, I can attest to the fact that, in the late 1970s, the Inspection Service employed such tactics and arguments across the country in an effort suppress the emergence of private express services. In addition to calls on individual mailers, postal inspectors participated in large public briefings for mailers. In fall 1976, postal inspectors induced the Custom Service to conduct a large scale search of documents imported by couriers via the port of San Francisco.[20]

In June 1979, the express industry got its first glimpse of records of the Inspection Service relating to enforcement of the postal monopoly as a result of discovery in a proceeding before the Postal Rate Commission. In late 1978, the Postal Service filed with the Postal Rate Commission a proposal to begin an intra-city express mail service called Express Mail Metro Service.[21] As part of this proceeding, Purolator Courier sought of a complete accounting of efforts to use the Inspection Service and the postal monopoly laws to suppress competition by private

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[19]In February 1979, Inspector Greene sent to at least some customers of private express companies letters demanding a list of private couriers used, a detailed description of items sent by private express, a statement as to frequency of use and average weight. He concluded, "The information furnished will assist me is making a complete and proper application of the Private Express Statutes and Regulations." *See* testimony of James I. Campbell Jr., Legal Counsel, DHL Corporation, in *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) at 201. The letter in question was appended as Appendix A to my testimony and retained by the Subcommittee but not reprinted in the hearing record. See also, testimony of John Delany, Senior Vice President and General Counsel, Purolator Courier Corporation, id at 121, 127 ("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."). *See also Postal Service Amendments of 1978: Hearings on S. 3229 and H.R. 7700 Before the Subcommittee on Energy, Nuclear Proliferation, and Federal Services of the Senate Committee on Governmental Affairs*, 95th Cong., 2d Sess. (978) at 335 (testimony of Time Critical Shipment Committee).

[20]*See* Commission on Postal Service, *Report*, Volume 3b (1977) at 1934, 1938 (testimony of Philip Steinberg, President, Pacific Merchant Shipping Association). See also, id at 1948, 1951 (testimony of John Chambers, Bank of America).

[21]Postal Rate Commission, Docket MC 79-2, Express Mail Metro Service Proposal, 1978.

express companies. After numerous pleadings, the Commission granted Purolator's request but limited it to redacted records relating to three cities: Chicago, Gulfport (Mississippi), and Columbus (Ohio).[22] Records of 10 Inspection Service investigations were produced. They indicated that, on at least some occasions, enforcement efforts of the Inspection Service were closely coordinated with sales efforts. For example, in a report dated March 9, 1979, Inspector R.P. Bednarski described "numerous contacts" with an unnamed company in the Columbus area in 1978. Inspector Bednarski continues:

> On February 2, 1979, contact was made with Mr. J. Severe, [USPS] Customer Services Representative, located at the Columbus, OH, Post Office. The situation regarding United States Postal Service and [deleted] was related to Mr. Severe. Mr. Severe stated he would contact officials of [redacted] in an attempt to sign [redacted] to an Express Mail contract.
>
> After these records were produced, Purolator renewed its request for a complete set of Inspection Service records. The Postal Service resisted, and in the end, Purolator settled for a formal admission that Postal Service practices revealed in respect to the three cities "accurately reflect prevailing Postal Service policies and practices at the times they were prepared."

In its final order in the Express Mail Metro Service case, the Postal Rate Commission summarized its assessment of the evidence on the use of the Inspection Service to suppress competition in the following terms:

> Intervenors state that in carrying out its duty to enforce the Private Express Statutes, Postal Service, after warning customers of private couriers of putative Private Express Statute violations, improperly suggested that they switch from private courier to Express Mail, to avoid being in violation of the law. Postal Service counsel answered by saying that part of the function of a postal inspector is to advise persons as to how the Private Express Statutes can be complied with. The use of Express Mail is one form of compliance. Thus it is perfectly legitimate for the inspection service to inform people of Postal Service offerings they may not previously have been aware of. We have carefully examined [testimony of certain mailers visited by postal inspectors]. In addition, we have examined letters by postal inspectors to customers of private couriers, postal inspector reports, and the Formal Admission filed by the Postal Service, in which the Postal Service states that the postal inspector reports accurately reflect Postal Service policies and practices. *Upon review of this evidence there appears to be some indication that some postal inspectors have been over-zealous in their discussion of Express Mail Service with alleged violators of the Private Express Statutes. On several occasions the Postal Service inspectors too heavily emphasized the use of Express Mail as a means of complying with the law. As a result it is likely that customers of private couriers were intimidated into using Express Mail "just to satisfy the investigative point." It seems that there have been instances in which in any effort to encourage the use of Express Mail postal inspectors have stressed Express Mail and have not adequately explained to customers other ways to*

[22]Library Reference USPS-LR-12.

> *comply with the law, such as by affixing postage*. We find, however, that no such pattern of anticompetitive behavior in this regard would indicate a predatory design on the Service's part.[23]

In response to Postal Service efforts to suppress the growth of private express services, private express companies and their customers petitioned Congress for relief. By mid 1979, it was clear that Congress was prepared to adopt a legislative exemption from the postal monopoly for urgent letters. To forestall legislation, the Postal Service adopted the administrative suspension for urgent letters now codified at 39 CFR 320.6.[24]

6. SENATOR SYMM'S QUESTIONNAIRE (1982)

In 1982, Senator Steven Symms of the Joint Economic Committee posed a long list of questions to the Postal Service about the operation of the postal monopoly laws. One question, G-29, dealt with the activities of the Inspection Service in respect to private express companies.[25] Although Senator Symms did not pursue this inquiry, the question and answer provide the Postal Service's summation of the controversies of the 1970s.

> *Question*: Have postal inspectors, at any time in the last ten years, used the possible threat of postal monopoly penalties to encourage persons to use the Postal Service's Express Mail? Have customer representatives from the Postal Service done so? Please submit all internal directives [etc.]
>
> *Answer*: It is important to keep in mind that the purpose of the Private Express Statutes is to enable the Postal Service to provide efficient, responsive, and convenient universal services at reasonable rates. The Statutes accomplish their purpose by protecting mail volume and postal revenues. It follows, then, that as a natural consequence of achieving compliance with the Statutes some volume of letters will be carried in the mails which had previously been carried privately. It follows also that as persons whose activities do not comply with the Statutes learn of this fact, some of them will wish to know how they may come into compliance through use of postal services.
>
> One of the duties of the Postal Inspection Service is to achieve compliance with the Private Express Statutes. In the course of carrying out these duties, postal inspectors will necessarily inform members of the public when their activities are considered to be in violation of the Statutes. In some such instances inspectors have informed these persons of the options of paying postage on letters carried by private courier or of using postal services such as Express Mail service as possible methods of fulfilling their delivery needs in a manner consistent with law.
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> Because of their knowledge of mailing patterns in a given community, postal customer service representatives have on occasion been contacted by

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[23]Opinion and Recommended Decision at 40-41 (1980) (footnotes omitted) (emphasis added).

[24]44 F.R. 40076 (July 9, 1979) (proposed rule); 44 F.R. 61178 (Oct. 25, 1979) (final rule).

[25]Senator Symm's inquiry was pursuant to his service on the Joint Economic Committee. To the best of my knowledge, material from this inquiry was not published.

> inspectors seeking general information that might be helpful in identifying persons not in compliance with the Private Express Statutes. Subsequently, these representatives might, if the mailer desired, contact the mailer to discuss service offerings such as Express Mail service.
>
> *We know of no instances in which either postal inspectors or customer service representatives can fairly be said to "threatened" mailers or in which inspectors can fairly be said to have "sold" Express Mail service.* Even those instances in which inspectors have discussed Express Mail service when the need for rapid delivery service was raised by the mailer have ceased since new instructions were issued in 1979. These instructions provide when a mailer has been identified as not being in compliance with the Private Express Statutes, the inspector may advise that such infractions are avoidable by using the Postal Service or by paying postage on letters shipped by private courier. If the mailer indicates a need for a rapid delivery or inquires about a specific service offering, such as Express Mail service, the inspector is to refer the mailer to a customer service representatives and is not to participate in the follow-up attention, if any, given by the customer service representative.
>
> It should be noted that this matter was the subject of Congressional hearings in 1979. . . . *Notwithstanding that no abuses were established, in response to Congressional concerns the Postal Service amended its instructions to inspectors to ensure so far as it could that no abuses would occur.* [emphasis added]

In brief, in 1982, the Postal Service informed Congress that no fair minded person could question the propriety of the Inspection Service's efforts in respect to the postal monopoly, and that nonetheless, in response to (apparently baseless) concerns of Congress, the Postal Service had instructed postal inspectors to be less engaged in the sale of Express Mail services.

7. DISCOVERY OF INSPECTION SERVICE RECORDS

In December 1988, a second set of Inspection Service records relating to the postal monopoly came to light as a result of a discovery request by the Air Courier Conference of America in the Postal Rate Commission's Express Mail Rulemaking. Docket No. RM88-2. In this docket, the Postal Service petitioned the Postal Rate Commission for expedited procedures for changing Express Mail rates. In discovery, interrogatory 2 of Air Courier Conference of America (ACCA) asked the Postal Service for documents and records relating to enforcement of the postal monopoly against private express companies or their customers. When the Postal Service protested against the burden of complying with this request, the Postal Rate Commission limited the interrogatory to "reports of the described activity which have been submitted to, or prepared by, Headquarters within the last 5 years." Presiding Commissioner's Ruling No. 4 (Sept. 9, 1988). In response, the Postal Service produced records of 24 Inspection Service cases.

On January 28, 1994, a private express company specializing in insurance documents, Insurance Courier Services, filed an Freedom of Information Act with the Inspection Service requesting records of Inspection Service investigations under the postal monopoly laws during the previous five years. In December 1994, the

Inspection Service provided a list of 141 postal monopoly cases initiated roughly from 1984 to 1990. This list includes all cases for which records were provided in response to the ACCA discovery request in RM88-2. In addition, the Inspection Service provided reports relating to 65 cases initiated between 1989 and 1994. Some of these related to cases included in the 1984-1990 list. Many of the cases are closely related to one another, so that the number of companies investigated is in fact, significantly less than suggested by the total number of "cases." Finally, the Inspection Service provided a list of 29 alternative postage agreements signed between 1990 and 1994. Of these, 17 were signed by Bell South, which was the object of many of the Inspection Service investigations.

This Postal Service's responses to these discovery requests provide that most complete picture available of the efforts of the Inspection Service in support of the postal monopoly. According to these files, targets of Inspection Service postal monopoly investigations in this period included the Federal Records Center, Patuxent Navel Air Station, Naval Federal Credit Union; the state governments of Florida, Georgia, Massachusetts, New Hampshire, and Oklahoma; familiar organizations such as Bell South, Blue Cross Blue Shield, IBM, the Old Time Gospel Hour, Kay Jewelers, and the Washington Redskins; various other banks, drug stores, realtors, retailers, farm bureaus, school boards, teachers unions, insurance companies, and a state prison; not to mention a handful of private express companies. Among other things, this file demonstrates the degree to which Inspection Service's postal monopoly investigations served to pressure specific mailers (most prominently, Bell South Corporation) into "alternate postage payment agreements" as the price for Postal Service's not carrying the mail.

8. INVESTIGATIONS OF FEDEX CUSTOMERS (1992-1994)

Beginning in 1992, the Inspection Service seemed to focus on customers of Federal Express, including a credit company, bank, insurance company, and paper products company. In June 1992, the Inspection Service led a briefing of federal agencies participating in a major contact between the General Services Administration and Federal Express, warning them not to use Federal Express in contravention of the postal monopoly laws and regulations. In response, Federal Express petitioned Congress for relief from what it considered to be unfair and unreasonable harassment of its customers by the Postal Service. This confrontation produced several interesting products.

On August 31, 1992, the Postal Service responded to an inquiry from Senator Jim Sasser of Tennessee concerning activities of the Inspection Service related to enforcement of the postal monopoly. This letter offered the first detailed explanation of the Postal Service's position on several issues. On the question of legal authority for Inspection Service searches of mailers' premises, the Postal Service referred not to the specific search authority in 39 USC 603 but to the general authority set out in 39 USC 404(a)((7), authorizing it "to investigate postal offenses and civil matters

relating to the Postal Service."[26] The Postal Service also cited 18 USC 3061, a 1968 statute which does not mention searches.[27] Most importantly, the Postal Service maintains that all interviews of mailers are voluntary and adds an ambiguous reference to the limits on search authority set out in 39 USC 603:

> Although the Postal Service has not, to our knowledge, conducted unconsented "searches" of the private property of the customers of private express companies or the private express courier, to the extent that 39 U.S.C. Sections 603-04 would not apply, general Federal law governing a search and seizure would apply.

The Postal Service also offered its first discussion of the legal authority for establishing, in the 1974 postal monopoly regulations, a civil fine equal to the postage that would have been charged by the Postal Service on items sent by private express. The Postal Service offers, in essence, no statutory justification for this penalty. Rather, it avoids an answer by stating:

> it has been the general practice of the Postal Service not to seek recovery of the "back postage."

In addition, the Postal Service's letter lists 31 pending Inspection Service cases "generated since January 1, 1991, pertaining to investigations of customers of private express companies for possible violation of the private express statutes." Of these, 14 do not appear in the answer to the ICS FOIA request (further analysis is needed to reconcile these two lists. A copy of the letter to Senator Sasser is placed in Appendix A to this statement.

In 1994, Senator Paul Coverdell of Georgia became interested in Inspection

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[26]Section 404 is a list of broad powers granted the Postal Service. The authority to investigate postal offenses and civil maters granted in §404(a)(7) appears to authorize investigations pursuant to powers and limits found in other provisions of the postal laws, not to authorize investigations of an unlimited nature in areas where Congress has specifically placed limits on postal investigations (as in postal monopoly investigations). Nonetheless, this issue has never been addressed by a court. *Cf. U. S. v. City of St. Louis*, 452 F.Supp. 1147 (E.D.Mo.1978) (Postal Service's authority to deliver the mail does not provide a basis for letter carriers to cut across private property in the course of mail delivery).

[27]39 USC 3061 provides: "(a) Subject to subsection (b) of this section, Postal Inspectors and other agents of the United States Postal Service designated by the Board of Governors to investigate criminal matters related to the Postal Service and the mails may—(1) serve warrants and subpoenas issued under the authority of the United States; (2) make arrests without warrant for offenses against the United States committed in their presence; (3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony; (4) carry firearms; and (5) make seizures of property as provided by law."

"(b) The powers granted by subsection (a) of this section shall be exercised only—(1) in the enforcement of laws regarding property in the custody of the Postal Service, property of the Postal Service, the use of the mails, and other postal offenses; and (2) to the extent authorized by the Attorney General pursuant to agreement between the Attorney General and the Postal Service, in the enforcement of other laws of the United States, if the Attorney General determines that violations of such laws have a detrimental effect upon the operations of the Postal Service."

Service visits to customers of private express companies. He proposed a amendment to the postal law to decriminalize use of private express companies. S. 1541 103d Cong., 1st Sess. If the Coverdell amendment were adopted, the Inspection Service would be required to confine enforcement efforts to private express companies, leaving undisturbed the relatively innocent and ignorant customers. The Postal Service fought this amendment fiercely. To relieve pressure for the Coverdell amendment, on March 24, 1994, in testimony before the Senate Governmental Affairs Committee, Postmaster General Marvin Runyon promised that

> the Inspection Service will no longer take the lead in conducting these types of audits. Where called for, our marketing professionals will meet with customers to explain any laws and regulations, and offer whatever help we can to serve their mailing needs.

In response, Senator Coverdell withdrew his amendment.

In addition, Senator Coverdell posed a number questions to the Postal Service about use of the Inspection Service to enforce the postal monopoly laws. These questions were similar to those propounded by Senator Sasser in 1992. This time, the Postal Service answered still more circumspectly. On the question of legal authority for searches of mailers' offices, the Postal Service referred primarily its self-proclaimed authority to terminate the right of an uncooperative mailer to make use of the postal monopoly "suspension" that allows access to the services of a private express company:

> The Postal Inspection Service does not search businesses or people without a warrant. No searchers have been conducted to enforce the Extremely Urgent Suspension. *Under the express terms of that suspension, those who elect to use it are bound to show the Postal Service, on request, that they are complying with it.* . . . If a company is not willing to comply with these terms of the suspension, then postal service may bring an action before the Judicial Officer to revoke the suspension at to that company. [emphasis added]

The Postal Service also explained its reasons for believing that decriminalization of the use of private expresses would be contrary to sound public policy, noting the difficulties that private express companies would face in determining whether a given envelope contained a "letter."

> Many times . . . *only the sender may know whether the contents of an envelope include letters, or whether they will lose their value if not delivered on time.* If enforcement against the sender in such a case were not permitted, then the Postal Service could find it necessary to change some its rules, including the Extremely Urgent Letter Suspension, to define eligibility more narrowly in terms of delivery times, price, or similar matters fully disclosed to or known by the carrier.

When asked to state the amount of "back postage" collected from enforcement of that provision in the 1974 postal monopoly regulations, the Postal Service replied

vaguely, "Since the real measure of the success of any enforcement program is prevention . . . the full answer to this question is not available." The Postal Service's carefully phrased answers to Senator Coverdell's questions are reproduced in Appendix B to this statement.

9. ENFORCEMENT OF THE POSTAL MONOPOLY AFTER 1994

Since 1994, the Postal Service's Rates and Classification Division has taken over from the Inspection Service the task of contacting mailers and private express companies to enjoin compliance with the postal monopoly laws. I know of only a few such contacts along these lines, so it appears likely that the incidence of enforcement efforts has declined. On the other hand, the 1974 postal monopoly regulations continue to threaten mailers with the prospect of back postage fines and withdrawal of the privilege of using private express services. Many U.S. companies are no doubt influenced by these regulations.

10. COMPETITIVE ADVANTAGES OF THE INSPECTION SERVICE

In the last few years, another type of competitive issue relating to the Inspection Service has become evident. By means of the Inspection Service, the Postal Service has the ability to offer products which are secured by the police power of the U.S. government. For example, parcels transported by Express Mail are protected by the Inspection Service, whereas parcels shipped via Federal Express are not. Similarly, electronic mail services provided by the Postal Service may be protected by the Inspection Service whereas similar services provided by private companies would not be so secured. In a commercial market, it is obvious that federal police protection could offer an important competitive advantage. Federal Express, for example, would likely be delighted to advertise that its parcels are protected by the Federal Bureau of Investigation while parcels entrusted to a competitor are not.

As a matter of principle, the Inspection Service should not be employed to confer competitive advantage on the Postal Service's competitive products. One can imagine more than one way to translate this principle into statutory provisions. One approach would be to limit the jurisdiction of the Inspection Service to non-competitive postal products. A second approach would be to make the Inspection Service independent of the Postal Service and extend the jurisdiction of the Inspection Service to include some products of private delivery services. While I do not presume to know the best answer, I believe this issue deserves serious consideration.

11. CONCLUSIONS

The Postal Service has, since 1970, used the Inspection Service to intrude into the business practices of mailers and customers of private express companies to a degree that appears far greater than ever intended or sanctioned by Congress. In many cases, these efforts have been directed towards suppression of forms of competition which it is apparent, at least in retrospect, should have been encouraged

rather than discouraged as a matter of public policy. While the role of the Inspection Service in postal monopoly cases has been reduced since 1994, a shift in the organization chart of the Postal Service does not address the public policy issues raised.

On policy grounds, the Postal Service's basic defense is that it has done no more than use the tools given by Congress to defend its revenues and protect universal service as mandated by Congress. There is at least some merit in this defense, certainly in regards to the activities of the Inspection Service itself. The Postal Service's intrusive and anticompetitive use of investigative authority over the last 30 years has revealed not so much shortcomings in the Inspection Service, but flaws in the Postal Reorganization Act of 1970 and related statutes and regulations. In this respect, I believe the 1974 postal monopoly regulations are especially culpable because they increased the authority of the Inspection Service to intrude into business operations of private companies, the administrative need for them to do so, and the penalties risked by businesses who failed to cooperate with the Inspection Service.

A related, but somewhat different, problem is posed by the potential for competitive advantage based on the Postal Service's exclusive access to the services of the Inspection Service.

Accordingly, I suggest that the Subcommittee may wish to consider the following reforms relating to competition issues posed by the activities of the Inspection Service:

1) *Simplify the definition of the postal monopoly.* The postal monopoly should be defined in a simple manner that does not depend for its effectiveness upon extensive investigation of mailers or customers of private express companies or upon exercise of administrative discretion. Appropriate simplification of the postal monopoly law is relatively straightforward task in light of the numerous foreign precedents. In essence, the postal monopoly should be described in terms of the weight of items transmitted and the price of carriage. A reasonably low price threshold obviates the need for extensive monitoring or investigation. H.R. 22, the Postal Modernization Act of 1999, indeed, proposes one such approach.

Simplification of the definition of the postal monopoly would also make possible decriminalization of the use of private express companies as proposed by Senator Coverdell in 1994. I believe this would be a desirable reform. American businesses generally have been unfairly and unfortunately targeted by the Postal Service because it is reluctant to pursue enforcement of its inflated claim of monopoly against private express companies who are fully informed about the intricacies of the law and highly motivated to defend themselves.

2) *Transfer responsibility for enforcement of the postal monopoly to an impartial agency*. Enforcement of the postal monopoly should be shifted to the

Department of Justice or, possibly, another federal agency.[28] The Postal Service itself should have no greater authority than a private company to investigate its commercial competitors for legal violations. Such a transfer could be effected either by transferring the entire Inspection Service or by divesting the Inspection Service of this particular function.

3) *Transfer responsibility for administration of the postal monopoly to an impartial federal agency* . As important as impartial enforcement is impartial administration. The 1974 postal monopoly regulations reflect a commingling of regulatory and commercial functions that is inconsistent with due process of law and fundamental fairness. A more simply defined postal monopoly will require much less in the way of implementing regulations. Nonetheless, residual administrative functions should be exercised impartially by, say, the Postal Rate Commission.

4) *Limit the ability of the Postal Service to use the Inspection Service for competitive advantage*. As noted, this reform will entail consideration of a range of policy options from contraction of the Inspection Service's jurisdiction to non-competitive postal products to expansion of its jurisdiction to transportation of all documents and parcels.

Thank you for this opportunity to present my views on the competition policy questions raised by the role of the Postal Inspection Service.

[28]The Department of Treasury is another possible candidate, but I would be concerned about the commingling of ownership and governmental responsibilities.

3

An Introduction to the History of Universal Postal Service (2002)*

Universal service does not represent a set of public services permanently associated with the national post office even as an ideal. As the needs of the nation have changed, Congress has continually revised the overall mission of the post office and the attributes of its national service. It was not until the beginning of the twentieth century that Congress embraced the goal of a creating a universal delivery network and not until halfway through the twentieth century that this goal was more or less achieved. However, the historic process of continual redefinition of universal service was substantially halted when, in 1970, Congress established the Postal Service. The Postal Service is an agency designed to provide postal services more efficiently than the old Post Office Department, but it is independent of the national policy making process which must ultimately be engaged to adapt the definition of universal service to changing times.

In 2002, the universal service provided by the Postal Service is shaped by the Postal Reorganization Act of 1970, primarily sections 101 and 403. While the 1970 act does not specify every detail of universal service, it is generally accepted that the "universal service obligation" includes a requirement that the Postal Service provide rapid and reliable delivery of standard one-ounce letters to all addresses in the United States for a price that is both affordable and uniformly priced throughout the United States. Then, too, "universal service" connotes the additional capacity to handle larger letter packages and parcels weighing up to 70 pounds. Many would consider "universal service" to include as well six-day per week service and maintenance of convenient accessibility to postal services through a network of almost 40,000 post offices, substations, and contract post offices. Whatever the precise ingredients, "universal service" is a mass service; in 2001, the Postal Service transmitted 208 billion pieces of mail, or 737 pieces per year for every person in the United States.

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*Paper presented at a seminar at the Brookings Institution "The Future of Universal Postal Service in the United States," June 18, 2002 (2002).

Looking back over the history of the national post office since 1790, it is apparent that the national notion of universal service has evolved substantially. A quick sense of the evolution of universal service may be obtained by considering the growth in the number of mail items per capita transmitted by the national post office each year since 1790, its first full year of operations under the present government. As shown in figure 1, annual mail volume per capita has risen dramatically but unevenly. Annual mail volume did not reach 10 items per person until 1854 and did not exceed 100 items per person until the beginning of the twentieth century. The mass mail volumes that characterize modern postal service did not develop until after World War II.[1]

This paper offers a brief introduction to the history of universal postal service in the United States. The paper first describes the changing mission of the national post office and its relation to the evolving postal monopoly law. It then reviews the origins of specific elements of universal service. Finally, the paper offers a few summary observations.

1. EVOLVING MISSION OF THE POST OFFICE

The uneven increase in the annual mail volume per capita reflects not only the shifting nature of the U.S. economy but also substantial changes in the mission of the

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[1]The Post Office did not regularly collect and report information on mail volume until 1886 and failed to report mail volume in selected years thereafter. For such years, the calculations shown in Figure 1 were derived from very rough estimates of annual mail volume by the author. The major sources were these estimates were as follows. Mail volume from 1790 to 1845 was calculated from estimates of letter volume using the ratio of paid letters to total mail reported in H.R. Rept. No. 477, 28th Cong., 1st Sess. (May 1844). Letter volumes for these years were estimated as follows: (a) Letter volume for 1790-1829 from Wesley Everett Rich, *The History of the United States Post Office to the Year 1829* at 182-81(1924). Rich was quoting from Pliny Miles, a former Post Office official. (b) Letter volume for 1836 from *1836 Postmaster General Ann. Rept*., quoted by Senator Merrick, Cong. Globe App., 28th Cong.,. 2d Sess., 265 (1845). (c) Letter volume for 1837 to 1842 based on interpolation from 1836 to 1843. (d) Letter volume for 1843 from H.R. Rept. No. 477, 28th Cong., 1st Sess. (May 1844). (e) Letter volume for 1844 and 1845 based on revenue and 1843 revenue per letter.

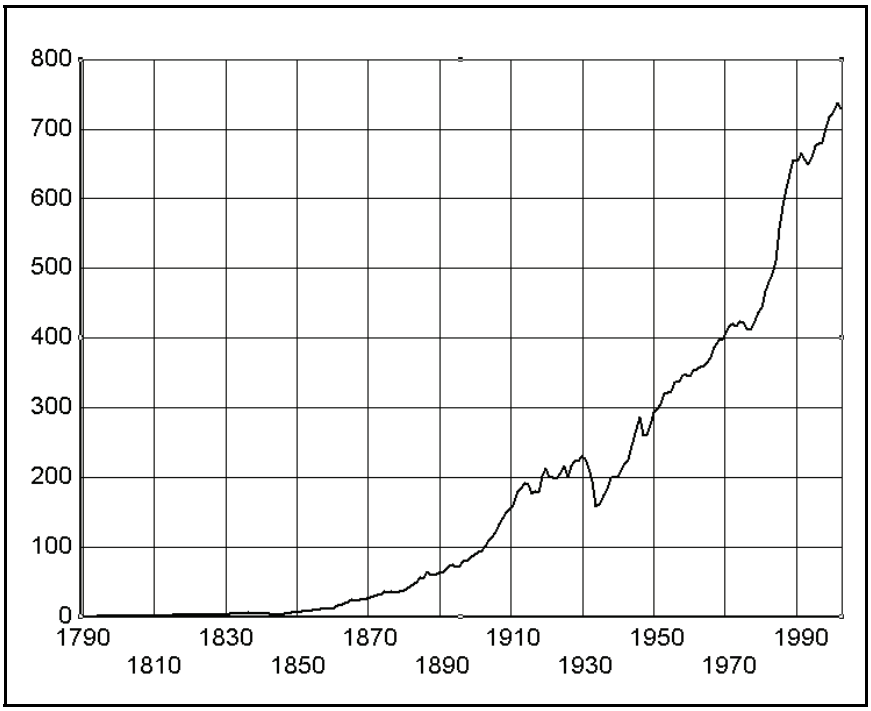
Mail volume from 1847 to 1886 is based on a variety of sources. Mail volume for 1847 is based on *1847 Postmaster General Ann. Rept*. Mail volume 1848-1851 based on annual revenue and revenue per piece in 1847. Mail volume 1852 from *1852 Postmaster General Ann. Rept*. Mail volume 1853 based on annual revenue and revenue per piece in 1852.Mail volume from 1854 to 1863 is based on estimated volume for 1852 increased by annual increase in city delivery letters. Mail volume for 1864 to 1872 based on annual revenue and mail volume per piece in 1873. Mail volume for 1873 and 1874 from an article, Gardiner G. Hubbard, "Our Post Office," *Atlantic Monthly* 35 (1875): 87-104. Mail volume for 1875 to 1882 based on annual revenue and revenue per piece in 1873. Mail volume 1883-1885 based on annual number of stamps and estimated pieces per stamp in 1882.

Mail volume 1886-1913, 1923, and 1926 to 1970 is reported in Bureau of Census, *Historical Statistics of the United States: Colonial Times to 1970* (1975). Mail volume for 1914 to 1922 based annual revenue and interpolation of change in revenue per piece from 1913 to 1923. Mail volume for 1924 is from annual revenue and revenue per piece in 1923. Mail volume for 1925 from annual revenue and revenue per piece in 1926.

Mail volume 1971-2000 is reported in Bureau of Census, *Statistical Abstract of the United States* (annual). Mail volume for 2001 is from *2001 Postmaster General Ann. Rept.*

post office. The post office was not always charged with the universal delivery func-

Figure 1. Annual mail volume per capita, 1790-2001



tion of today. Indeed the mission of the post office may be divided into four distinct phases.

Post office to post office service. At first, the Post Office Department provided only transmission of letters and newspapers between post offices, one post office to a city or town. There was no collection or delivery service for intercity letters and no local, intracity postal service. Postage rates were very high. The fee for receiving a letter from a distant part of the country was roughly equal to the cost of transporting a bushel of wheat. Postage was customarily collected from the addressee, not the sender. [2] The early postal system was so expensive and inconvenient that was virtually unusable for ordinary personal correspondence. Most letters, even many business letters, were carried by travelers outside of the mails.

From the earliest days of the Republic, the federal government was determined to use the Post Office to distribute the news and build a national sense of community. In colonial times, the basic concern of the British Post Office had been transmission of letters. Newspapers, printed on a single sheet of paper, were carried by the post rider when there was extra room in the saddle bags. The new American government, however, encouraged the transmission of news. Newspapers were admitted to the mails and rates were kept far below cost. The early postal system became, in essence, a tax on letters that generated funds to subsidize the national distribution of newspapers. Newspapers soon comprised half the number of items in the mail and

[2]In some cities, the postmaster made use of letter carriers to deliver intercity letters to certain addressees. The letter carriers operated as independent contractors; addresses paid the letter carriers a separate fee for delivery in addition to the postage due on the letters.

the great bulk of its weight although they contributed a very small percentage of the revenue. Extension of the only national news network was highly popular with Congress, which invariably approved proposals for new "post roads," that is, roads with designated relay stations for the use of post riders or mail stagecoaches. By 1829, when the energetic Postmaster General John McLean left the Department for the Supreme Court, the Post Office had offices in most cities and towns located in what was then the United States.

As roads improved, the Post Office also became a federal mechanism for subsidizing and coordinating the Nation's stagecoach industry. Members of Congress encouraged the Post Office to contract with a stagecoach operator to transport the mail even if a post rider would have sufficed because the stagecoach also provided freight and passenger service in rural areas. By 1830, the Post Office accounted for about one third of stagecoach revenues and, through scheduling clauses in mail transportation contracts, coordinated operations of much of the Nation's stagecoach system.

In the 1840s, the early postal system was revolutionized by the "cheap postage" movement. This campaign resulted from postal reforms adopted in England in 1840 after advocacy by Rowland Hill. Hill argued that, contrary to the practices of the day, postage rates should not vary with distance (because the cost of transport was relatively insignificant), should not vary with the number of sheets of paper carried (too costly to administer), and should be prepaid rather than collected on delivery (again, too costly to administer). Hill further proposed that a sharp reduction in postage rates would generate enough new business to produce a net increase in profits. Hill's reforms, adopted over the opposition of the British Post Office, resulted in a tremendous increase in mail volume in England and put nationwide postal communications within the reach of ordinary citizens. In the United States, Congress drastically reduced the postage rates in 1845 and again in 1851 despite opposition from the Post Office and members of Congress from the southern and western states.[3] Postage stamps and stamped envelopes were also introduced in this period. Annual mail volume per capita rose from about 4 items in 1844 to 11 in 1860.

Free city delivery. The first major expansion in the mission of the Post Office occurred in 1863 when Congress authorized the Post Office to provide "free city delivery" for intercity and local mail. Delivery of mail was "free" in the sense that it was covered by ordinary prepaid postage and did not require separate compensation of the letter carrier by the addressee. With free city delivery, the Post Office entered the local mail business, displacing private "penny posts" that had been operating in major cities since the 1840s. Congressional blessing for the Post Office's entry into local mail service was made possible by the absence of congressmen from southern states during the Civil War. Southerners favored further improvements to rural postal services rather than enhancement of city services, a

[3]Act of Mar. 3, 1845, ch. 43, 5 Stat. 732; Act of Mar. 3, 1851, ch. 20, 9 Stat. 587.

quite different concept of "universal service." Free city delivery was begun in five cities in 1863 and was available in 50 cities by 1890. Stimulated by free city delivery, annual mail volume per capita rose to 80 items by 1890.

Rural and parcel services. At the beginning of the twentieth century, the Post Office embarked on the enormous task of providing a delivery system to unite the major cities and towns with the 60 percent of the population that lived in the vast rural heartland of the country. Rural free delivery, started as an experiment in 1896, was established as a permanent service in 1902. Village free delivery, begun in 1912, offered delivery of mail in towns of less than 10,000 inhabitants. By 1917, according to one post official, the Post Office was delivering to about 80 percent of rural Americans.[4]

In 1913, the Post Office began parcel post to bring big city goods to the farmer. After 1914, parcels weighing up to 20 pounds were accepted. Parcel post facilitated the growth of the great Chicago mail order companies, Sears Roebuck and Montgomery Ward. Parcel post provided 20 to 25 percent of postal revenues from 1925 until 1960. Annual mail per capita reached 200 pieces by 1925.

United States Postal Service. The most recent revision in the mission of the national post office occurred in 1971 when the Post Office Department was abolished and the United States Postal Service was established. The Postal Reorganization Act of 1970 authorized the Postal Service to change prices and products without permission of Congress, phased out public subsidies for the postal system, and freed the Postal Service from day to day supervision by political institutions.

In an era of rapid advances in communication and transportation technologies, a more "business-like" Postal Service has tuned its services to the demands of customers and realities of the market. In particular, the Postal Service has focused on carriage of advertising mail, which has risen from 11 to 24 percent of revenue since 1971. The Postal Service has also introduced presort and dropship discounts which emphasize its role as a provider of "last mile" services and permit private companies to provide upstream transportation and sorting services, activities in which the Postal Service has little or no competitive advantage over rivals.

2. UNIVERSAL SERVICE AND THE POSTAL MONOPOLY

Today, the ability of the Postal Service to maintain universal service is often said to depend upon its statutory monopoly over the carriage of "letters and packets."[5] Moreover, by precluding private carriage, the postal monopoly necessarily implies a minimal duty of "universal service" on the Postal Service. While the history of the postal monopoly law is beyond the scope of this paper, the monopoly

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[4]Daniel C. Roper, *The United States Post Office* 145 (1917). Roper was former First Assistant Postmaster General.

[5]The postal monopoly is created by criminal laws that prohibit any person from carrying "letters and packets" outside the mail. *See* 18 U.S.C. §§ 1694-99 (2000).

and universal service are so closely linked in current postal policy discussions that a few points should be noted.

The postal monopoly was introduced into English law when the British Post Office was established on a permanent basis in 1660.[6] The original purpose of the monopoly was not to fund universal postal service in England but to allow the king to spy on his enemies and enrich his friends. The English postal monopoly law was effective in the American colonies prior to the Revolution and reenacted into American law after the Revolution. After 1794, however, the American version of the postal monopoly did not prohibit private carriage of letters by individual travelers; it barred only establishment of private systems of horse posts or stagecoach posts to compete with the government post. In fact, it appears that most letters were carried outside the mails by travelers.

As described above, the post office to post office service of the early American Post Office was revolutionized by the cheap postage movement in the 1840s. The act of 1845 not only reduced postage rates, it also addressed a related phenomenon, the rise of private express companies. In the late 1830s, the Industrial Revolution came to the United States. Railroads and steamboat lines became commercially viable enterprises. Private messenger companies quickly adapted to these new technologies, sending couriers aboard trains and steamboats with letters in their baggage and contracting for entire railroad cars where feasible. In the early 1840s, Postmasters General complained strenuously about loss of business to private express companies. The private express companies substantially undercut postage rates, adding further impetus to the cheap postage movement. The government prosecuted the private express companies but federal courts in New York and Boston, where popular sentiment strongly favored lower postage rates, ruled that the old law against establishment of horse posts and the other systems of posts did not specifically bar the new private express services.[7]

The postal act of 1845 reversed the courts and decreed that the traditional postal monopoly over horse posts should be applied to private expresses as well. This was the last occasion on which Congress seriously debated the scope of the postal monopoly. Today, many focus on the private express provisions of this act and argue that the act demonstrates Congressional endorsement of use of the monopoly to cover the costs of universal service. A more complete review of the history of this act suggests otherwise. The act of 1845 represented a defeat, not a victory, for proponents of what we would today call a broad view of universal service (a term which, in any case, risks characterizing this early congressional debate in inappropriately modern terms). Members of Congress from the south and

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[6]The British Post Office was established on permanent basis in 1660 soon after the restoration of Charles II. The government post was first opened to public in 1635 but this, and subsequent trials of public postal service, were short-lived. On each occasion, the government post was protected by a monopoly.

[7]The leading cases were United States v. Adams, 24 F. Cas. 761 (S.D.N.Y. 1843) and United States v. Kimball, 26 F. Cas. 732 (D. Mass. 1844).

west, as well as the Postmaster General, envisioned a wide ranging public service mission for the Post Office, a mission that historically included, as noted above, hefty subsidies for newspapers and stagecoaches financed by high postage rates on letters. They opposed cheap postage and advocated extension of the postal monopoly to all mailable matter. The other side—while agreeing that it made no sense to prohibit letter carriage by horse posts and allow letter carriage by private expresses—urged a radical reduction in letter postage and opposed extension of the monopoly beyond the carriage of letters. On both points, the advocates of a broad view of universal service were decisively defeated. The act of 1845 was fundamentally a Congressional decision to experiment with cheap postage, while keeping the monopoly essentially unchanged, and thus a decision to cut back substantially on use of the postal monopoly to generate large subsidies for distribution of newspapers and operation of rural stagecoach lines.[8]

In 1861, Congress approved a crucial extension of the postal monopoly law by prohibiting private local delivery services. In 1860, a federal court ruled that the traditional monopoly over post office to post office services did not forbid private collection and delivery of letters within a postal district, i.e., within a city or town.[9] The Postmaster General appealed to Congress. On February 15, 1861, the House of Representatives elected to the 36th Congress in November 1858, was sitting in a lame duck second session and standing on the very brink of civil war. In the preceding weeks, representatives from South Carolina, Mississippi, Alabama, Georgia, and Louisiana had left Congress as these states seceded from the Union. Five days earlier, on February 10, Jefferson Davis, a former U.S. Senator from Mississippi, was chosen to be president of the Confederate States of America. Inauguration of Abraham Lincoln and convening of the 37th Congress, both elected the previous fall, were several weeks in the future. Amidst these momentous events, at the close of consideration of the annual Post Office appropriations bill, the House adopted an obliquely worded amendment offered by the chairman of the post office committee to extend the postal monopoly to local delivery services.[10] There was no

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[8]The act of 1845 also limited the franking privileges of government officials.

[9]On July 17, 1860, the Postmaster General ordered penny posts in Boston, New York City, and Philadelphia to close. The Postmaster General's order was grounded in section 10 of the postal act of 1851, which authorized the Post Office to establish post routes within cities and to employ carriers to collect and deliver letters. The 1851 act did not, however, provide for a regular, prepaid local delivery service as provided by the penny posts; for the Post Office collection and delivery were adjuncts to intercity postal service. As the Postmaster General commented in his 1859 annual report, as far as local letters were concerned, "this correspondence remained almost entirely in the hands of private expresses." Kochersperger, owner of Blood's Dispatch in Philadelphia, challenged the authority of the Postmaster General to order closure of the penny posts, arguing the postal monopoly applied only to carriage of letters between postal districts, not within a postal district. In an exceptionally scholarly opinion, the court agreed with Kochersperger. United States v. Kochersperger, 26 F.Cas. 803 (E.D. Pa. 1860).

[10]The amendment, adopted as introduced, read: "And be it further enacted, That the provisions of the third section of an act entitled 'An act amendatory of an act regulating the Post Office

debate or discussion of the amendment by either the House or the Senate.

In 1861, extension of the postal monopoly to local delivery services was not inevitable. Indeed, it was almost incomprehensible. As noted above, in the United States, as in many other countries,[11] local delivery services developed independently from traditional intercity postal service. Private penny posts had operated in major American cities since the 1840s. Assuming the desirability of adding local collection and delivery to intercity postal service, there was no apparent reason or justification for extending the postal monopoly and displacing the private penny posts at that time.[12] In 1861, the Post Office provided no local delivery service comparable to that provided by the penny posts; Congressional authorization of the first experiments in "free city delivery" was still two years in the future. In fact, private penny posts continued to operate in New York City until 1883, when, with the local delivery capabilities of the Post Office finally established, a federal court relied on the 1861 extension of the postal monopoly to put Boyd's Dispatch out of business.[13]

Current postal monopoly laws are little changed from their nineteenth century antecedents.[14] Today, the postal monopoly is in fact largely a monopoly over "last mile" local collection and delivery of letters. Dropship discounts and Postal Service regulations permitting private carriage prior to posting[15] have rendered virtually meaningless the traditional postal monopoly over long distance, post office to post office carriage of mail. Whatever purpose may be divined from the cryptic legislative history of the 1861 amendment to the postal monopoly, it difficult to imagine that Congress then envisioned the funding of anything like what is today considered universal service.

Department,' approved March second, eighteen hundred and twenty-seven, 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 an act entitled 'An act to reduce and modify the rates of postage in the United States, and for other purposes,' approved February twenty-seven, eighteen hundred and fifty-one." Act of Mar. 2, 1861, ch. 73, § 4, 12 Stat. 204, 205.

[11]In England and France, local postal services were developed by private individuals and later incorporated into the government post.

[12]In Spain, the traditional postal monopoly was never extended to local delivery services.

[13]Blackham v. Gresham, 16 F. 609 (C.C.S.D.N.Y. 1883).

[14]The various threads of the postal monopoly laws were incorporated in the postal code of 1872, the first codification of the postal laws since 1825. The main provisions of the postal monopoly were reenacted in the first criminal code, adopted in 1909, and reenacted in the second criminal code, enacted in 1948, which remains in effect today with amendments. Although Congress has not revisited the postal monopoly laws since 1872 except for minor amendment, the postal monopoly has been subject of extensive administrative interpretation by the Post Office and Postal Service, most notably in the postal monopoly regulations of 1974. *See* 39 C.F.R. parts 310, 320, and 959 (2001).

[15]The postal monopoly statutes only permit private carriage to the nearest post office. 18 U.S.C. § 1696(a) (2000). This provision dates from 1879. Act of Mar. 3, 1879, ch. 180, § 1, 20 Stat. 355. There is no apparent statutory basis for Postal Service regulations permitting unlimited private carriage prior to posting. 39 C.F.R. § 310.3(e) (2001).

3. ELEMENTS OF UNIVERSAL SERVICE

In light of this historical background, let us consider the specific origins of elements of "universal service" as presently conceived.

Universal service obligation. As noted above, the legislative mandate that requires the Postal Service to maintain universal service is found primarily in sections 101 and 403 of title 39. Section 101, for example, provides that

> The Postal Service shall have as its basic function the obligation to provide postal services *to bind the Nation together through the personal, educational, literary, and business correspondence of the people*. It shall provide prompt, reliable, and efficient services to patrons *in all areas and shall render postal services to all communities*.

Section 403 declares, "The Postal Service shall serve *as nearly as practicable the entire population of the United States*."

Reference to universal service as a statutory objective of the Post Office was first introduced into U.S. postal law in 1958. In that year, there erupted in Congress a fierce debate over how to apportion the first increases in postage rates since 1932. Should increases fall more heavily on first class mail, which was already covering its direct costs, or more heavily on second and third class mail, which did not? The 1958 act raised the basic stamp price from 3 to 4 cents and, in an effort to shorten congressional debate over future postal rate increases, adopted "a postal rate policy to serve as a guide in the determination and adjustment of postage rates by the Congress" (as the conference committee report explained). The postal rate policy formula of 1958 became sections 2301 and 2302 of the 1960 postal code, the first codification of postal laws since 1872.

In the Postal Reorganization Act of 1970, the postal rate policy of 1958 was reworked and given a much enhanced statutory role. As the first section of the 1970 act, the revised language became a mission statement for the new Postal Service. In this manner, "universal service" became an explicit statutory obligation placed on the Postal Service instead of a rate policy consideration explicated for the guidance of future congresses.

Universal delivery. As noted above, delivery of mail did not begin to be an attribute of basic postal service until introduction of free city delivery in 1863. Free city delivery was available to about 30 percent of the population by 1890. Introduction of rural free delivery substantially expanded the reach of postal delivery services. As late as 1950, however, mail delivery to the door (or curbside) was unavailable for 23 million persons living in small towns, about 15 percent of the total population.

Uniform letter rate. The longevity of the uniform rate for letters lies somewhat in the eye of the beholder. In 1851, Congress adopted a 3-cent rate for carriage of pre-paid letters up to 3000 miles, effectively a uniform nationwide rate. This rate did not include delivery of mail, however, and higher rates were later introduced for letters to and from the Far West. The postal act of 1863 was the first law to explicitly

adopt a first class stamp rate, 3 cents, that had no distance limitation; at the same time, however, local letters in the handful of cities where free city delivery had been established were collected and delivered for 2 cents. Intercity and local stamp rates were not merged until 1885, when for the first time a 2-cent stamp would purchase delivery of a letter across town or across the nation. Even so, delivery of a letter cost extra, or was unobtainable, outside the compass of free city delivery cities. Indeed, the Post Office did not terminate its "drop letter" rate—a rate for transmission of a letter to a post office without delivery to an address—until 1968. Thus, it might be said that uniform letter rates in the modern sense were introduced in 1885 but were not universally applicable until 1968.

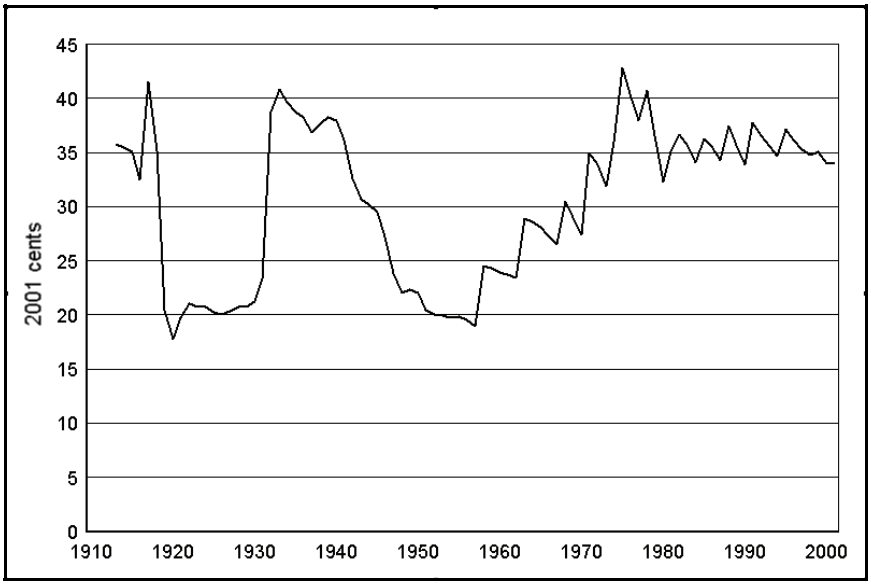
Adoption of the 2-cent rate in 1885 did not mean that uniformity of letter rates was considered a necessary principle of universal service. In 1932, Congress raised the intercity rate to 3 cents while keeping local letter rates at 2 cents. Stamp prices became uniform again in 1944, when the local rate was raised to 3 cents. In 1958, the Senate again proposed different intercity and local stamp rates (5 and 4 cents respectively), although the final bill adopted a uniform increase to 4 cents. The current statutory requirement that the Postal Service maintain an uniform letter rate was introduced in the Postal Reorganization Act of 1970.

After adoption of the Postal Reorganization Act, in 1976, the Postal Service began to introduce discounts for "worksharing" by mailers who sorted their mail or transported to a post office near the addressee. While such discounts are today considered appropriate and consistent with the principle of uniform letter rates, it may be noted that as late as 1973, the Board of Governors argued that a primary purpose of the postal monopoly laws was to prevent private express companies from "creamskimming" the national postal system by introducing such pricing policies.

Affordable postage rates. Whether stamp prices are uniform or not, Congress has embraced the idea that national postage rates should be affordable since the triumphs of the cheap postage movement in 1845 and 1851. As may be seen from figure 2, the basic stamp price during the twentieth century has been kept within a range of roughly 20 to 40 cents in constant 2001 prices.

Daily mail delivery six days per week. Since the Post Office was originally organized to provide post office to post office transportation, it functioned seven days a week because delay in transporting the mail along one portion of a route would delay arrival at all subsequent points along the route. Whenever the government mail passed through a town—albeit, much less than daily in the early days—the postmaster was obliged to open his office for business, including distribution of mail to local residents. Indeed, Sunday was a popular day for gathering at the post office to collect mail and gossip since farmers and their families came to town for church services. In 1810, some citizens demanded closure of the Post Office on Sunday out of respect for the religious significance of the Sabbath, but Congress instructed the Post Office to operate seven days a week. The Post Office continued to provide all types of services on a daily basis until 1912, when an alliance of religious groups and postal employees persuaded Congress to end postal

Figure 2. Basic stamp rate in constant 2001 dollars



delivery on Sunday. This was the origin of today's six-day per week schedule.[16]

Daily, rather than twice daily, delivery to residences became the norm in 1950. Prior to that date, about half the population received two residential deliveries each day. Another quarter or so received mail delivery once per day or, in some rural areas, three times per week. On April 17, 1950, Postmaster General Donaldson ordered the second residential delivery stopped to save costs. Despite tremendous opposition from letter carriers, Congress failed—by one vote—to overturn the Postmaster General's order.[17] Twice or trice daily delivery of mail to businesses in major cities continued until 1976, when service once per day became the standard for business addresses as well.[18]

Mailbox delivery. The Post Office began experiments with mailbox delivery to urban households in Washington and St. Louis in 1891. By delivering to a mailbox attached to the exterior of a house, a letter carrier avoided delay while the householder came to the door. Afer 1909, city postmasters intensified efforts to encourage adoption of letter boxes. In 1923, the Post Office began a policy of refus ing delivery to households lacking exterior mailboxes.[19]

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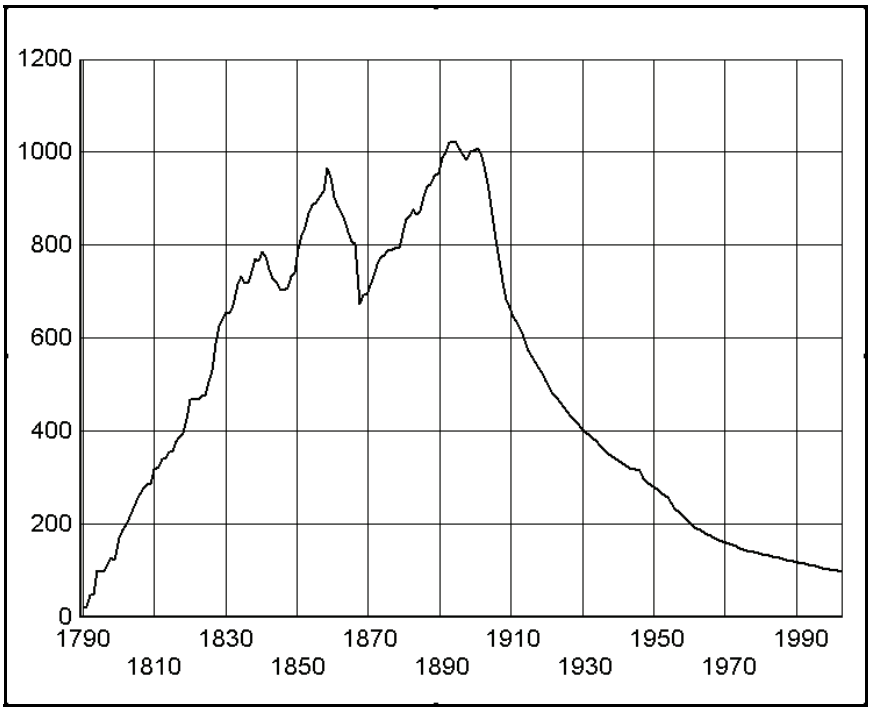
[16]Richard R. John, *Spreading the News* 169-205 (1995).

[17]9 Cong. Rec. 12548 (Aug. 15, 1950) (Statement of Postmaster General J.M. Donaldson, Aug. 11, 1950).

[18]Ibid. *See also Postal Reorganization: Hearing on S. 2844 Before the Senate Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess., part 3, 22 (testimony of Postmaster General Benjamin Bailar) (confirming reduction from twice to once a day service in business districts in 10 northeast cities).

[19]C.H. Scheele, *A Short History of the Mail Service* 140 (1970).

Figure 3. Post offices per million population



Although roadside mailboxes were a feature of rural delivery, curbside urban delivery mail boxes were first tried in 1939 in Cleveland and Salt Lake City. They were not introduced in additional cities until 1953. [20] In the mid 1960s, the Post Office tried to implement a policy of mandating curbside box delivery in new service areas, but congressional opposition forced retreat. In 1972, the Postal Service again decreed that it would provide only curbside or cluster box delivery in new residential areas. The Postal Service's policy faced substantial congressional opposition (and a one year suspension) until 1978 when it became permanent.[21]

Post offices. Figure 3 shows the number of post offices per million U.S. residents from 1790 to 2001. From the first days of the Post Office, post offices have provided access to postal services, including collection and posting of mail and (after 1847) purchase of stamps. With improvements in personal transportation, especially introduction of the automobile in the early 1900s, the need for small post offices declined. The absolute number of post offices peaked in 1901 at 76,945 and has fallen steadily ever since although further reductions have been restrained in recent years by provisions added to annual appropriations bills. In 2001, the Postal Service operated 27,876 post offices, not including another 10,247 substations and contract post offices.

Postal savings system. Consideration of the postal saving system illustrates how a whole category of services can pass into and out of the concept of universal

[20]Ibid. 182.

[21]J.T. Tierney, *The U.S. Postal Service: Status and Prospects of a Public Enterprise* 94-97 (1988).

service. The Post Office entered the banking business in 1864 when Congress authorized postal money orders. In 1911, the Post Office introduced postal savings accounts to provide a secure depository for financially unsophisticated persons with small balances.[22] Use of the postal savings system increased during the Great Depression, a time when many private banks failed, and peaked in 1947 with deposits of $3.4 billion. Over the next two decades, federal deposit insurance for private banks and their increasing availability rendered the postal savings system unnecessary. In 1966, Congress terminated the program. [23] Today, no one would consider postal banking to be part of the universal service obligation of the Postal Service, even though banking remains an important function of the national post office in many countries.

4. SUMMARY OBSERVATIONS

In light of this short review of the development of universal service, and by way of introduction to later presentations in the seminar, the following observations seem appropriate.

1) *The concept of universal postal service has changed substantially over time, although evolution of universal service has been restrained by the Postal Reorganization Act of 1970.* While service by the national post office has, since early days, been "universal" in the vague sense that it has aimed to serve that Nation as a whole, the nature of that service has changed fundamentally over time. Most dramatically, the "last mile" delivery service emphasized by the Postal Service today represents an almost complete reversal in mission from the days when the Post Office provided transportation without delivery, the primary service offered by the Post Office Department for most of its 180-year history.

Just as important for current policy considerations, the concept of universal service has changed more slowly since the Postal Reorganization Act of 1970. Consider the 30 years prior to 1971 compared to the 30 years since. In the first period, significant changes in universal service included permanent alignment of intercity and local letter rates, completion of the universal delivery network, reduction in service frequency (or in some cases increase) to daily service, introduction of curbside delivery (later withdrawn due to congressional pressure), termination of the postal savings system, adoption of a congressional statement of rate policy, and at the end, reorganization of the Post Office. Since 1971, the concept of universal service has evolved relatively little because the Postal Service, as a subsidiary executive agency, has neither the authority nor the breadth of responsibility needed to revise basic social policy. While Congress could and did continually tinker with the definition of universal service, the Postal Service can do so only to a limited degree. Nor did Congress in the 1970 act delegate to an executive department continuing responsibility for long term postal policy. The 1970

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[22]Daniel C. Roper, *The United States Post Office* 208-24 (1917).

[23]C.H. Scheele, *A Short History of the Mail Service* 171 (1970).

act failed to create an institutional framework capable of its own reform.

2) *Universal service developed independently from the postal monopoly* . Although the postal monopoly may generate monopoly rents that underwrite the costs of modern universal service,[24] history offers reveals no occasion on which Congress deliberately embraced an economic rationale linking the two concepts. If anything, the evidence is to the contrary. What is today the more important aspect of the postal monopoly, prohibition of private local collection and delivery services, was enacted in 1861 without any explicit or implicit relation to universal service.

3) *The modern concept of universal service originated in the urban/rural division of America, a divide that largely disappeared over the course of the twentieth century.* The modern concept of universal service flowed primarily from a decision by Congress at the turn of the twentieth century to use the Post Office to bridge the gap between urban and rural America. While still laudable and necessary in 2002, the social significance of this mission has been greatly diminished by demographic and technological trends in the twentieth century. The proportion of Americans living in rural areas declined from 60 percent in 1900 to 25 percent in 1990 (2000 census figures are not yet available). The telephone system, which served less than 3 percent of farm households in 1903, reached 30 percent of such households as early as 1912. By 1920, revenues of the Bell telephone companies surpassed those of the Post Office. In the last quarter of the twentieth century, satellites brought television to the most remote corners of the nation. Moreover, the need to use the Post Office to distribute big city goods to rural America has declined with the expansion of private parcel companies, vast improvements in roads and automobiles, and the spread of retail outlets. In 2002, there is simply no equivalent to the grim isolation of the farmhouse in 1900.

4) *Telecommunications is transforming postal service from a communications service into a transportation service*. The national post office was established and fostered by the federal government because of the preeminent importance of communications both to the maintenance of a national community and to the functioning of a continental democracy. The social importance of letter communications is the bedrock upon which policy concepts such as the postal monopoly and universal service rest. Gradually, however, as telecommunications technologies have advanced, delivery services such as the Postal Service have increasingly become conduits for the distribution of things rather than the transmission of ideas, news, and sympathy. This transition is not yet complete, but a basic shift in the center of gravity of the Postal Service is manifest. In the *2001 Statistical Abstract*, the Bureau of the Census has, for the first time in the 122-year history of that compilation of national data, placed statistics of the national post office in the *transportation* section rather than in the *communications* section.

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[24]Or, as some economic studies suggest, monopoly rents may be dissipated entirely in paying for inefficiencies induced by the monopoly. *See* Robert H. Cohen and Edward H. Chu, "A Measure of Scale Economies for Postal Systems" in M. Crew and P. Kleindorfer, *Managing Change in the Postal and Delivery Industries* (1997).

Looking to the future, the national concept of "universal postal service" will need to be adapted to the changing role of delivery services in the national infrastructure.