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Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service

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INTRODUCTION
Postal ratemaking seems an unlikely issue to engage all three branches of government in an epic struggle over White House control of independent agencies, the judicial role in the administrative state, and the President's authority to sidestep congressional controls through recess appointments. Think again. In the final days of the Bush Administration, a seemingly innocuous dispute over the use of bar codes in first class mailings was transformed into a glorious and gory battle over the scope of White House, congressional, judicial, and independent agency authority.

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The focal point of this dispute was the President's threat to fire any member of the Postal Service's Board of Governors who was unwilling to withdraw the Postal Service from ongoing litigation with the U.S. Postal Rate Commission. Rooted in the belief that the President is constitutionally empowered to direct the operations of all government entities, this presidential broadside failed miserably. Newspaper columnists and editorial writers savaged the President. More significantly, federal district court Judge John Oberdorfer enjoined the President from removing the Governors, and a unanimous D.C. Circuit Court of Appeals validated Postal Service authority to appear in court without Justice Department approval.

The Postal Service episode is generally understood as a last gasp effort by proponents of the "unitary executive" to flex their political muscle by treating independent agency heads as if they were at-will employees of the executive. President Bush's Postal Service gambit can be depicted as a battle between proponents of unitariness and independence. The Bush Administration, however, did not seek out this controversy; the triggering event was a Postal Rate Commission campaign to neutralize Postal Service authority.

The Postal Service episode is also instructive in sorting out some less obvious but equally important lessons in the unitariness-independence debate. A root cause of the Postal Service fiasco is the failure of the legislative branch to think through its parcelling out of governmental authority. When Congress removed the Postmaster General from the President's Cabinet in 1970, Congress paid insufficient attention to structure-of-government concerns. Despite a statutory scheme that envisions the airing of most Postal Service-Rate Commission disputes in federal court, Congress never considered the independent litigation authority issue. The courts' role in this matter also merits attention. Judge Oberdorfer's principal concern when enjoining the President seemed to be the judiciary's proprietary interest in resolving the independent litigation authority dispute.

This Commentary proceeds in three parts. Part I introduces the bizarre world of postal ratemaking by describing the Postal Service-Postal Rate Commission dispute. The actions and motivations of the Postal Service, Postal Rate Commission, and Bush Administration are considered. Part II examines the underlying causes of this dispute, focusing on Congress' failure in 1970 to give a nanosecond of thought to critical provisions

of its ratemaking statute. Finally, in Part III, I argue that the structure of postal ratemaking needs reform and that, in general, Congress must pay attention to structural concerns to reduce conflicts between the executive and other government entities free of White House control. Specifically, the Postal Rate Commission should be housed in the Postal Service, leaving the Postal Service as the principal policymaker and litigator in ratemaking matters.

Before turning to Part I, it is worth mention that I witnessed and participated in this struggle. Throughout much of this dispute, I served as a consultant to the U.S. Postal Service. With that said, my Commentary questions some of the arguments advanced by the Postal Service and, more importantly, shifts the focus of analysis away from the White House-Postal Service battle to the Congress.

I. THE SAGA OF U.S. POSTAL SERVICE v. POSTAL RATE COMMISSION

A. The Current Postal Ratemaking Structure

Postal ratemaking is a unique enterprise within the administrative state. Rather than having one government entity set postal rates and defend those rates against private party court challenges, postal ratemaking is the product of a byzantine relationship between two independent agencies that sometimes allows for private party court challenges. Let me explain. Postal rate proposals originate with the U.S. Postal Service's Board of Governors, a nine member body whose members are appointed by the President, serve staggered terms, and can only be removed for cause. The Board of Governors submits proposals to the Postal Rate Commission, a five member body whose members are similarly appointed by the President and can only be removed for cause. The Commission holds hearings on the proposed rate, considers evidence and testimony from the Postal Service and private mailers, and accepts, rejects, or modifies the proposal. [So far, so good.]

The Commission recommendation returns to the Postal Service Governors. Unlike an administrative law judge finding, however, the Governors may not modify the recommendation by a simple majority vote. Only a unanimous vote can accomplish that task. At the same time, the Governors are not limited to accepting or rejecting the Commission recommenda-

tion. [Here is where things get complex.] The Governors may accept the Commission recommendation under protest and let a federal appeals court settle Service-Commission differences. This procedure may take two forms. In one instance, the Governors may elect to let the rate take effect and allow disappointed private mailers to sue them as respondents. Alternatively, the Governors may directly sue the Commission over the disputed rate. Thus, the Postal Service chooses whether it will be petitioner or respondent.

A remarkable feature of this system is that Commission ratemaking may spur concurrent multiple lawsuits, some where the Service supports the ratemaking decision and others where the Service opposes the decision, sometimes as petitioner and other times as respondent. This is precisely what occurred in the bar code dispute. On January 4, 1991, the Commission responded to a Postal Service ratemaking request with a two-volume opinion addressing bar-code discounts, other proposed changes, and unrequested rate and classification changes. On January 22, the Service's Governors elected to sue the Commission directly on bar code discounts, but left it to private mailers to sue the Service on the unrequested change methodology toward certain city mail carrier costs.

The Governors' decision to sue and be sued, while unusual, is permitted by the statutory framework. Moreover, disputes between the Postal Service and Postal Rate Commission lie at the heart of this intricate statutory scheme and certainly are to be expected. What then distinguishes the dispute over bar codes, culminating in threats of presidential removal, from other Service-Commission squabbles? Well ... nothing. The bar code dispute was structurally indistinguishable from prior conflicts except that the Justice Department and the White House Counsel's Office voiced strong institutional objections to the ratemaking structure itself. The Bush Administration argued that neither the Governors nor Commissioners had independent litigating authority to present their views in court without Justice Department authorization. The decision to defend or attack Commission recommendations was to be made by the Justice Department alone. Unlike other administrations which either authorized separate Service and

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9. See Letter from C. Boyden Gray, Counsel to the President, to Postal Service Governors (Jan. 6, 1993).
Commission representation or otherwise ensured that the positions of both sides were represented, the Bush Administration sought to exercise unilateral control over ratemaking. The Bush Administration also attacked the ratemaking regime on Article III grounds, claiming that it was inappropriate for federal judges to resolve a purely intramural dispute between two government agencies.10

Bush Administration attitudes towards independent litigating authority within the intragovernmental litigation context introduced a new dimension in Service-Commission litigation. With that said, neither the Governors, the Commissioners, nor the Bush White House could have imagined the several unexpected turns taken by this controversy.

B. The Competing Interests of the Commission, Postal Service, and Justice Department

To understand the ratemaking dispute, one must understand the longstanding Commission dissatisfaction with Postal Service attorneys defending Commission ratemaking. Remember, if the Postal Service accepts Commission ratemaking under protest, and private mailers file challenges, the challenges are filed against a Postal Service that disagrees with Commission ratemaking.11 In other words, not only does the Postal Service choose whether it is petitioner or respondent in ratemaking challenges, it also determines whether the Commission is a party to ratemaking disputes.

To avoid this Postal Service dominance, the Commission lobbied both Congress and the Justice Department. First, the Commission, without success, supported legislation making it a party to private mailer challenges to postal ratemaking.12 Second, the Commission and some of its congressional overseers asked the Justice Department to defend private mailer challenges and block the Postal Service from using its own attorneys.13

10. See Letter from Stuart M. Gerson, Assistant Attorney General, Civil Division, to Mary S. Elcano, General Counsel, U.S. Postal Service (Oct. 27, 1992).

11. The Service’s ability to subordinate Commission factfinding distinguishes the Service-Commission arrangement from other split enforcement schemes. For example, the Secretary of Labor and the Occupational Safety and Health Review Commission often settle their disputes by suing each other in federal court. See Martin v. Occupational Safety & Health Review Comm’n, 111 S. Ct. 1171 (1991).


13. See id.; Letter from George W. Haley, Chairman, Postal Rate Commission, to Stuart M. Gerson, Assistant Attorney General, Civil Division (Feb. 26, 1991); Letter from George W. Haley to Stuart M. Gerson (Feb. 13, 1992); Letter from George W. Haley to Stuart M. Gerson (Sept. 22, 1992).
Noting that "[t]here is a significant risk that the Postal Service may not effectively defend the Commission's Opinion," the Commission argued that "only Department of Justice attorneys willing and able to use advice and assistance from both postal agencies would be able to present a balanced government position." The Commission, moreover, claimed the Justice Department was authorized to run herd over the Service because of statutory language requiring Attorney General consent to Postal Service self-representation.

The Justice Department was receptive to this argument. Traditionally, the Justice Department—pointing to statutory language recognizing Attorney General control "[e]xcept as otherwise authorized"—is a fierce defender of its authority to control government litigation. Although Congress has granted independent litigating authority to roughly thirty-five governmental entities, the Justice Department views any intrusion on its turf as a great affront. Justice's Office for Legal Counsel (OLC), for example, advised the Attorney General in 1989 that the authorization of private citizens to prosecute civil fraud claims "may well be the most important separation of powers question you will have to address." In past years, Justice ducked this representation issue in the ratemaking context by either representing Postal Service interests while taking note of divergent Rate Commission positions or authorizing Postal Service self-representation while allowing the Commission to present its views as an amicus curiae. No longer satisfied with this mealy-mouthed approach, the Justice Department decided to follow the Rate Commission's suggestion and assert control over private mailer litigation.

The Commission, however, got more than it bargained for. Keep in mind that the Commission's beef with the Service was limited to private mailer challenges where it was not a party to the litigation. When the Commission was a party to litigation (when sued directly by the Service), it thought that it and the Postal Service were authorized to present their competing views before the courts of appeal. The Bush Justice Department, and especially the White House Counsel, had a much different take on

17. See Olsen, supra note 16, at 73 n.12.
things. Unitary theorists within the administration advocated using Justice's Office for Legal Counsel, instead of Article III judges, to resolve disputes between the Postal Service and the Commission. Specifically, OLC should resolve ratemaking disputes and either remand the matter back to the Commission (if it agreed with the Service) or have Justice Department attorneys defend—in the Service's name—the proposed rate (if it agreed with the Commission).²⁰

The Postal Service did not appreciate this Commission-initiated Justice Department challenge to its litigating authority and to its institutional independence in ratemaking. Perceiving that independent litigating authority is relatively widespread, essential to independent agency policymaking, and no longer subject to even the slightest constitutional doubt, the Postal Service condemned the OLC “unitary executive” model as antithetical to the most basic tenets of the modern administrative state: the right of independent agency heads to make policy decisions free of executive coercion and the legitimacy of intra-governmental litigation. Rather than frame its attack in high sounding constitutional rhetoric, however, the Postal Service hinged its argument on the ratemaking statute. Noting that Congress’ choice of the D.C. Circuit as the preferred forum for the resolution of Service-Commission disputes assumes independent litigating authority, the Service also interpreted otherwise ambiguous statutory language to support its right to self-representation. First pointing to statutory language requiring the Justice Department to “furnish the Postal Service such legal representation as it may require” and to statutory language requiring Justice Department services to be “deem[ed] appropriate” by the Service, the Service characterized the Attorney General consent requirement as a limited opportunity for the Department to represent the Postal Service in a manner the Service deemed appropriate.²¹ Second, the Service broadly interpreted a statutory specification that judicial review of postal ratemaking be made “in accordance” with the Hobbs Act—a legislative garbage dump which, among other things, specifies that agencies may defend their final orders in their own name.²²

It came as no surprise that the Postal Service, Justice Department, and Commission proffered competing interpretations of the ratemaking statute. Each entity simply advanced the interpretation that maximized its litigation.

²⁰ See Intra-Executive Branch Resolution of Dispute Between Postal Service and Postal Rate Commission (fax transmitted from White House to Postmaster General Marvin Runyon) (Dec. 9, 1992).
authority. The Postal Service and Rate Commission each sought to preserve its independent voice before the courts. When the Service and Commission were opposing parties, each agency supported self-representation. In private mailer disputes, however, the Commission was not a party. Consequently, while the Service preferred self-representation, the Commission (which could not speak its own voice) sought to replace a hostile Service with a potentially hospitable Justice Department. The Justice Department, in contrast, disapproved of either the Postal Service or the Commission having an independent voice. Rather, Justice endorsed an "intra-executive" dispute resolution model that would transform all Service-Commission disputes into private mailer challenges against a Postal Service solely represented by the Justice Department.

C. The Battle Over the Ratemaking Authority

Justice, Postal Service, and Commission efforts to maximize their litigation authority are to be expected. What was unexpected was the lengths to which the Postal Service, the White House, and the Justice Department would go in standing their ground. Lines were drawn in the sand and a holy war was launched.

1. Commission Efforts to Block Postal Service Self-Representation

The opening volley in the battle over Postal Service self-representation occurred on January 23, 1991, one day after the Governors' decision on the Commission's bar code ratemaking proposal.23 The Service notified the Justice Department of its decision to sue the Commission and sought consent for self-representation. For fifteen years the Attorney General had consented to such requests, leaving the knotty issue of the Service's independent litigating authority lurking in the shadows. But things were different this time. Having witnessed the Service raise concerns not raised by other petitioners in its purported defense of an earlier Commission proposal,24 the Rate Commission was no longer willing to quietly accede to Service control of private mailer disputes. In February 1991, the Commis-

sion formally petitioned the Justice Department to deny the Service self-representation. 25

The Commission petition was well-timed. Combustion with the Commission's request was the Department's traditional reluctance to consent to agency self-representation and Bush Administration efforts to develop a legal strategy for protecting presidential authority. Bush, more than any other president, embraced the "unitary executive" theory of White House control over government operations. 26

Under the "unitary executive" model, intragovernmental disputes are decided within the executive branch instead of before the courts. When the Postal Service represented the government in private mailer disputes, those concerns could be winked at because the White House could claim that the Postal Service was part of the executive and subject to presidential direction. In other words, even though Postal Service and not Justice Department attorneys represented the government, the White House could claim that Service attorneys were putting into place the executive's view of appropriate postal ratemaking. When the Service sued the Rate Commission, however, the fiction of presidential control evaporated. The Bush White House, through its counsel's office, therefore felt that the Service-Commission flap over bar codes had to be resolved within the Justice Department and not by the D.C. Circuit.

The Justice Department, however, did not want to engage in open warfare with the Postal Service. Because the "unitary executive" theory calls for resolution of all intragovernmental disputes within the executive branch, a postal Service and Justice Department fight in court over the self-representation issue would be to concede the authority of the Postal Service to take positions at odds with the White House (on the representation issue at least). The Bush Administration, therefore, sought to make the Postal Service dispute disappear without judicial involvement.

The Administration's strategy, at first, seemed to be one of delay, threats, and prayers. From late January, 1991 to September 25, 1992, the Justice Department never formally responded to the Service's request for self-representation. Instead, the Department sought to stare down the Service by threatening to deny its request. During this period, however, the

26. See generally Nelson Lund, Guardians to the Presidency: The Office of Counsel to the President and the Office of Legal Counsel (forthcoming 1994). For example, Ronald Reagan—a supposed believer in the unitary executive—never vetoed a bill because it intruded on the powers of his office. In contrast, each of the eleven bills that George Bush vetoed on constitutional grounds would have limited the President's constitutional authority. See id.
Service filed numerous pleadings in both the private mailer and Commission disputes, including the filing of its bar code dispute against the Commission. Finally, on September 25, 1992, twenty months after the Service made its initial request, Justice denied the Service self-representation in the private mailer dispute.\(^27\) One month later, on October 27, Justice directed the Service to withdraw from its dispute with the Commission.\(^28\)

2. The Battle Moves to the D.C. Circuit

The Postal Service did not follow the Justice Department's directive; on November 6, 1992, the Service filed a self-representation motion with the D.C. Circuit.\(^29\) Three days later it filed a respondent's brief in the private mailer case. (Justice also filed its own brief on behalf of the Postal Service in the private mailer case on the same day.)\(^30\) It is perfectly understandable that the Service did not succumb to Justice's cajoling. Postal Service influence on ratemaking is very dependent on control over its litigation position and its decision to either sue the Commission or be sued by private mailers. If this control disappeared, the ratemaking decision would rest with a Commission unchecked by Postal Service litigation authority; moreover, judicial resolution would not be informed by Postal Service advocacy. Justice was asking the Service's General Counsel to neuter the office of its most important power. Facing such dire consequences, the Postal Service could only improve its institutional position by going into court and fighting for its litigation authority.

The structure of Postal Service decisionmaking also explains the Service's refusal to comply with the Justice directive. Day-to-day Postal Service decisionmaking, including litigation strategy, is devoid of meaningful presidential influence. The Service's presidentially appointed Board of Governors only serve in a part-time capacity (typically two days a month) and generally leave the running of postal operations to the Postmaster General. The Postmaster General and his deputy are appointed by the

\(^{27}\) See Letter from Stuart M. Gerson, Assistant Attorney General, Civil Division, to Mary S. Elcano, General Counsel, U.S. Postal Service (Sept. 25, 1992).

\(^{28}\) See Letter from Stuart M. Gerson, Assistant Attorney General, Civil Division, to Mary S. Elcano, General Counsel, U.S. Postal Service (Oct. 27, 1992).

\(^{29}\) Motion of the United States Postal Service for Leave to Appear as a Party on its Own Behalf, Mail Order Ass'n v. United States Postal Serv., 986 F.2d 509 (D.C. Cir. 1993) (No. 91-1073). Before the Service filed this motion, it submitted a draft brief to Justice in the hopes that Justice would present the Service's views to the court.

\(^{30}\) Brief of the United States Postal Service as Respondent, Mail Order Ass'n (D.C. Cir. 1993) (No. 91-1073).
Governors, serve at the pleasure of the Governors, and vote as Board members on all non-ratemaking issues. Under this arrangement, Postal Service-Justice Department disputes are managed by professionals with no formal ties to the White House. The broad interpretation of their statutory authority and resistance to executive branch encroachments by these professionals should come as no surprise.

3. Bush Administration Attempts to Remove Postal Service Governors

After denying the Service’s request for self-representation in its dispute with the Commission, the Bush Administration next targeted the Service’s Board of Governors. By this time, however, George Bush had already been defeated in the 1992 election. Furthermore, the D.C. Circuit ordered the Justice Department to resolve its differences with the Postal Service or file a response to the self-representation motion. With so little time to act and no long term political capital to lose, the White House opted for strongarm tactics. On December 11, 1992, President Bush sent a memorandum to Postmaster General Marvin Runyon (with copies to all nine presidentially appointed Governors) “direct[ing]” the Postal Service to withdraw from its ongoing judicial dispute with the Rate Commission.

This presidential “directive” was undertaken “pursuant to the President’s authority as Chief Executive and his obligation to take care that the laws are faithfully executed.” On the same day, the Justice Department filed a letter with the D.C. Circuit declaring that “the controversy has been resolved” and that the unauthorized filings of the Postal Service “will be withdrawn.”

Three weeks later, on the very day that the Board of Governors were set to vote on whether to comply with the directive, the President sent a letter to each Governor informing them that, to ensure compliance with the directive, he “will if necessary exercise [his] authority to remove Governors of the Postal Service.”

These White House and Justice Department maneuverings were truly extraordinary. The President’s assertion that he could “direct” Postal Ser-

33. Memorandum of President George Bush to Postmaster General Marvin Runyon (Dec. 11, 1992).
34. Id.
vice decisionmaking was squarely grounded in the theory of his authority as "Chief Executive" over a unitary government. The nine presidentially appointed Governors, along with the Postmaster and Deputy Postmaster General, however, stood up to this presidential onslaught, and by a six to five vote the Board refused to withdraw its self-representation motion. The noncomplying Board members subsequently obtained a preliminary injunction against the President blocking their threatened removal on January 7, 1993. Recognizing the ongoing dispute between Justice and the Postal Service before the D.C. Circuit, district Judge John Oberdorfer reasoned that "a district court in this Circuit has the responsibility and the authority to protect the jurisdiction of our Court of Appeals" and that the threatened Service removal from the suit could be "irrevocably disruptive" to postal operations. Even though Supreme Court rulings disfavor injunctive relief against the President, the court held that preservation of D.C. Circuit jurisdiction over the litigation authority dispute "is necessary for the performance of the Judiciary's constitutional function" and warrants the exercise of judicial authority over the President.

The White House, subscribing to the adage that desperate times call for desperate measures, responded with a vengeance to its district court defeat and immediately appealed the Oberdorfer order. Furthermore, on January 7, the same day that Judge Oberdorfer issued his injunction, the Justice Department filed on behalf of the Postal Service separate motions to withdraw the Postal Service from both the private mailer and Commission lawsuits. Although clearly allied with Justice in the private mailer dispute, the Commission signed onto Justice's motion to withdraw even the

37. It is also a bit misleading to characterize the Board vote as a six to five decision not to comply. Seven of the eleven Board members voted to table a motion to comply with the White House directive and, instead, to write a letter to the President. See Bill McAllister, Divided Postal Board Seeks to Forestall Firings, WASH. POST, Jan. 6, 1993, at A15; Michael York, Bush Blocked From Firing Postal Board, WASH. POST, Jan. 8, 1993, at A1. The very next day, however, Governor Tirco del Junco switched sides and refused to join forces with the six noncomplying Board members.

40. Mackie, 809 F. Supp. at 146. Oberdorfer did not conclude that the Postal Service possessed litigation authority, only that the D.C. Circuit was constitutionally entitled to resolve the litigation authority issue. Id.
41. See Notice of Withdrawal of Motion for Separate Representation and Brief as Respondent, Mail Order Ass'n v. United States Postal Serv., 986 F.2d 509 (D.C. Cir. 1993) (No. 91-1073); Joint Motion for Voluntary Dismissal of Petition for Review, Mail Order Ass'n v. United States Postal Serv., 986 F.2d 509 (D.C. Cir. 1993) (No. 91-1073).
Service-Commission suit. The Commission, apparently, was willing to forego whatever litigating authority it might possess to undermine Postal Service independence.

4. A Last Ditch Effort: The Recess Appointment

The White House also attacked Service independence through the President's January 8 recess appointment of his longtime friend Thomas Ludlow Ashley to the Service's Board of Governors. Ashley was appointed to replace Crocker Nevin, whose official term had expired and who was serving in a "holdover" capacity. By substituting Nevin with a governor who supported the Bush directive, the Ashley appointment was designed to turn the administration's six to five defeat into a six to five victory. Named on the first day of a twelve day recess (a recess, incidentally, in which Senate committees were holding confirmation hearings of President-elect Bill Clinton's nominees), Ashley's appointment was—to put it mildly—controversial. It raised profound constitutional and somewhat mundane statutory questions.

Before the dust could settle, the D.C. Circuit on January 13 scheduled oral arguments on the Postal Service's self-representation motion. The Court heard those arguments on January 14, and decided on January 15 that the Postal Service had a right to air its views on ratemaking matters. Working from the premise that Congress intended courts to resolve disputes between the Postal Service and Commission, the D.C. Circuit accepted the common sense argument that the Postal Service's ability to vigorously present its own views in judicial proceedings presupposes independent litigating authority. Not only did the D.C. Circuit validate the Postal Service's reading of statutory language, it also chided the Department for its efforts to keep Service-Commission disputes out of court. "Through this refusal," wrote the court, "the Department effectively substitutes its own review for judicial review of disputes between the [Commission] and the Postal Service... [W]here Congress has specifically authorized judicial

43. The Ashley appointment, occurring during the first day of a twelve day recess, squarely raised the question of whether the recess appointment power is unqualified or whether the Constitution limits this power to recesses of a significant period of time. The statutory issue raised by the Ashley appointment was whether there was a vacancy on the Service's Board of Governors. See infra note 47.
44. Mail Order Ass'n v. United States Postal Serv., 986 F.2d 509, 516-17 (D.C. Cir. 1993).
review of such disputes, . . . we [cannot] permit [Justice] unilaterally to repeal that statutory authority."

Incredibly, the D.C. Circuit decision did not end the Postal Service-Justice Department dispute. The Ashley recess appointment still lingered in the background, and the Clinton Justice Department picked up exactly where the Bush Justice Department left off. While ostensibly committed to independent agency authority, the Clinton Justice Department advanced an expansive view of the President's recess appointment power and challenged the Service's filing of an amicus curiae brief without Department consent. Like other Justice initiatives in its war with the Postal Service, these arguments were rejected. On July 23, Judge Oberdorfer wrote the final chapter of this saga, invalidating the Ashley appointment on statutory grounds.

D. Analysis of the Outcome

The failure of White House efforts to overtake the Postal Service is a story of structure and politics. The Bush Administration's first mistake was to target the wrong adversaries within the Postal Service. The Postmaster General and General Counsel are fierce advocates of Postal Service independence. The Board of Governors, in contrast, is more likely to be sensitive to White House concerns. Serving in a part-time capacity, these individuals do not develop the same types of relationships with professional staffs or the same institutional commitments as full-time independent agency heads. Moreover, all of the Governors had either been appointed by Presidents Bush or Reagan. In fact, a majority of five of the nine presidentially-appointed Governors voted to comply with the directive. It was

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45. Id. at 527.
47. Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993). Oberdorfer reasoned that the case did not call into question the President's recess power appointment because there was no vacancy among the Board of Governors. Pointing to a statutory specification that holdover governors remain in office until a "successor qualified," Oberdorfer concluded that Ashley could only succeed Nevin if he had been "nominated by the President and confirmed by the Senate." Id. at 57-58. Ashley, along with the Justice Department, appealed this decision. On March 9, 1994, after the Clinton administration nominated and the Senate confirmed Einar Dyhrkopp to fill Nevin's seat, the D.C. Circuit mooted the Ashley case. Mackie v. Clinton, No. 93-5287 (D.C. Cir. Mar. 9, 1994) (per curiam order).
only the additional votes of the Postmaster General and his deputy (who vote as Board members on non-ratemaking issues) that created the six-to-five vote against compliance. Had President Bush appointed Ashley in a timely fashion, it seems likely that he would have garnered an additional vote in favor of following the directive, thereby achieving a majority of votes for compliance.

The Bush Administration's failure in the Postal Service dispute is largely attributable to poor political judgment. The President's failure to fill a possible Board vacancy certainly limited his influence over the Governors. More strikingly, the timing of the President's directive was horrendous. Rather than object to independent Postal Service advocacy soon after the Service filed its claim, the Administration waited close to twenty months before launching its offensive. The D.C. Circuit expressed disapproval of this footdragging in its December 8 order. It is also unlikely that these delay tactics enamored the Service's Board of Governors.

The D.C. Circuit was unsympathetic for other reasons as well. Congress, for better or worse, made the courts of appeals postal ratemaking czars when it statutorily specified that Service-Commission disputes be resolved in those courts. The D.C. Circuit, never one to shy away from an active participatory role in government decisionmaking, undoubtedly saw Justice's power grab as an attack on itself as well as the Postal Service. Indeed, Judge Oberdorfer rooted his injunction in protecting the D.C. Circuit's jurisdiction. Furthermore, the D.C. Circuit's self-representation decision, for example, takes aim at the Justice Department for seeking to "substitute[] its own review for judicial review."

It is also significant that the Bush directive came a month after his electoral defeat. The brevity of his remaining time in office certainly curtailed the President's ability to work his political will. For example, if the President had more time, he could have engaged the Governors in some type of dialogue before threatening removal. By threatening removal and naming a recess appointee in the final days of the Administration, the White House action came under fire from the press and the Congress. Whether this political firestorm enhanced Postal Service resistance or made

52. See Lewis, supra note 1, at A17; Tempest in an Envelope, supra note 1, at A20; Letter from George Mitchell et al. to President George Bush (Jan. 12, 1993).
the D.C. Circuit skeptical of Justice Department arguments is hard to know. What is clear is that the political fallout did not help the President.

President Bush's Postal Service gambit was clearly a political failure. When all was said and done, the tension between the Postal Service and Justice Department was replaced by a slam dunk judicial victory for the Service. Moreover, claims of unitary presidential authority over independent agency heads suffered a stinging rebuke in both the courts and the popular media.

Nevertheless, the Postal Service dispute is about more than the failure of "unitary executive" claims, the steadfastness of independent agency officials, and the D.C. Circuit's view of its jurisdiction as a sacred cow. It is also about Congress. Throughout this dispute, Congress hardly broke a sweat even though the structure of postal ratemaking is a creature of Congress. What Congress did and did not do, as the next Part reveals, should not be underestimated.

II. CONGRESSIONAL INTENT AND POSTAL RATEMAKING

Part I describes a system of postal ratemaking that would amaze Rube Goldberg. Congress and the courts, however, have applauded this Service-Commission-Courts troika. In approving Postal Service self-representation, the D.C. Circuit argued that "this was not a piecemeal or haphazard effort," but a "unique," "deliberately chosen," "complex and delicate," "carefully crafted . . . ratemaking structure" "that created a deliberate tension between the Postal Service and the Rate Commission." The 1970 Congress was equally laudatory in touting its deliberateness. The House's Post Office Committee reported "[fourteen months] of almost total immersion in [the] controversial and complex subject [of postal reorganization];" the Senate Committee similarly described its efforts as "one of the longest and most intensive studies in the committee's history."

There is little doubt that Congress invested significant energy and resources in establishing the Postal Service and Rate Commission in 1970, thereby removing postal operations from executive control and postal ratemaking from legislative control. Even so, the division of responsibility between Postal Service and Postal Rate Commission over ratemaking was crafted in the eleventh hour, and the question of independent litigating authority was never considered by the Congress.

53. Mail Order Ass’n, 986 F.2d at 513, 519–21.
Worse yet, when presented with opportunities in 1975 and 1992 to illuminate its views on self-representation, Congress was either mute or indifferent. As can be seen in its handling of self-representation issues in other contexts, independent litigating authority is an issue that does not enter Congress' radar screen. This Part, on calling attention to Congress' blemishes, will suggest that Congress was a silent partner in the Bush Administration's failed takeover of postal ratemaking.

A. Congress and Postal Ratemaking

The story begins in 1966. Following a debilitating Christmas-time mail strike in Chicago, President Lyndon Johnson appointed a commission headed by AT&T chair Frederick Kappel to assess postal operations. In May 1968, the Kappel Commission issued a two-volume report recommending that the Postal Service become an independent government agency with a rate commission within that agency. The Commission would function like an administrative law judge, whose findings could be accepted, rejected, or modified by a simple majority of the Service's Governors. Congress, moreover, would retain significant control over ratemaking through a legislative veto mechanism that would enable either the House or Senate to vote down ratemaking proposals. Judicial authority, finally, would be severely constrained. There would be no Administrative Procedures Act review for substantiality of evidence; courts would only consider constitutional and procedural defects.

One year later, in May 1969, President Richard Nixon and his Postmaster General Winton Blount endorsed the Kappel Report. Congress moved slowly on the Nixon proposal until a March 1970 mail strike in New York jump-started comprehensive postal reform. From April to June 1970, Congress held hearings and worked out the details for "[c]onverting the Post Office Department into an independent establishment in the

58. Id. at 153.
59. See Saltstein & Resh, supra note 56, at 767-68.
Executive Branch of the Government, freed from direct political pressures. 60

The structure of postal ratemaking figured prominently in these deliberations. The Nixon Administration and House sponsors favored the Kappel Commission model which supported the legislative veto as a congressional check on Postal Service ratemaking. The House Report, for example, stated that Congress "must not abandon its general responsibility for seeing to it that the American public is not required to pay clearly unreasonable postage rates." 61 The Senate, in contrast, favored judicial review as the principal check on postal ratemaking. Speaking of the need to "take . . . the Congress of the United States out of the lobbying business itself," 62 the Senate endorsed substantial-evidence review by the D.C. Circuit. The Senate also supported the lodging of principal ratemaking authority in an independent Postal Rate Commission. Disapproving of the creation of a Postal Service Board of Governors to oversee an internal commission, the initial Senate version also envisioned a presidentially appointed Postmaster General empowered to approve or send back for reconsideration Commission ratemaking proposals. 63

Despite differences, the Nixon Administration, House, and Senate proposals all envisioned a single body principally responsible for postal ratemaking. Under the Nixon and House plans, Rate Commission recommendations would figure prominently in deliberations, and the Service's Board of Governors would have plenary authority over ratemaking. The Senate bill empowered both the Commission and Postmaster General, but placed principal ratemaking responsibilities with the Commission. The Commission would ultimately be responsible for proposing and justifying postal rates.

How then did Congress ultimately settle on a scheme of spreading ratemaking authority among the Service, Commission, and courts of appeals? The answer, which makes little sense, is that Congress wanted to strike back at Postmaster General Blount for his plans to raise first class postage. The Senate Report, for example, speaks of the "temptation . . . [of] charging the lion's share of all operational costs to first class" and the "necessity for . . . [protecting] the only class of mail which the general public uses [as] one of the reasons why the Postal Rate Commission should be

60. Message from the President of the United States Relative to Postal Reform, PUB. PAPERS, 117 (April 16, 1970).
independent of operating management." 64 At the same time, Congress also embraced the House-proposed Postal Service Board of Governors. In melding two independent agencies into a single ratemaking apparatus, Congress granted significant authority to both agencies and left it to the courts to arbitrate Service-Commission disputes. 65 Introduced in the Senate on May 14, 1970, and reported out of committee on June 3, this curious creation was quickly embraced by House-Senate conferees. 66

Whether the Postal Service and/or the Rate Commission had independent litigating authority in ratemaking was never seriously considered by the House, the Senate, or the bill conferees. The principal House bill specified that "with the prior consent of the Attorney General, the Postal Service may employ attorneys by contract or otherwise to conduct litigation." 67 The bill, however, did not contemplate an independent Rate Commission or a significant judicial role. The original Senate bill, which substituted judicial review of independent Commission ratemaking for the legislative veto, also failed to mention litigation authority. The enacted bill does presuppose adversarial litigation between an independent Postal Service and an independent Rate Commission, but makes limited, ambiguous, and ultimately unhelpful reference to possible sources of independent litigation authority.

The Act contains no provisions that explicitly exempt Attorney General control or that clearly grant the Service independent litigating authority. The only Act provision that unequivocally addresses representation is horribly ambiguous. The provision requires Attorney General consent to litigation conducted by the Postal Service, directs the Justice Department to "furnish the Postal Service such legal representation as it may require," and refers to statutory language requiring services rendered to the Postal Service to be "deem[ed] appropriate" by the Service. 68 Because this provision was lifted from the principal House bill, legislation that envisioned a de minimis judicial role in ratemaking disputes, it is un instructive in ascertaining Service litigation authority in ratemaking matters.

Act ratemaking provisions are equally ambiguous. The bone of contention here is a cryptic reference to a series of statutory provisions governing process, venue, jurisdiction and the like, including chapter 158 of title 28,

better known as the Hobbs Act. Among the Hobbs Act's hundred provisions is the specification that an agency may defend its final orders in its own name when it is dissatisfied with Justice Department representation. 69

What did Congress intend by this Hobbs Act reference? Did it only intend to apply the jurisdiction and venue-related provisions to ratemaking procedures? Or did Congress also intend to incorporate the self-representation provisions of the Hobbs Act? The answer, not surprisingly, is a bit strange. Had Congress given the matter any thought it almost certainly would have supported self-representation. Congress, however, did not consider the actual operation of its ratemaking scheme and it probably included its generic Hobbs Act reference as part of a process-venue-jurisdiction provision. The legislative history is devoid of any reference to litigation authority issues. Congress imagined that Service-Commission disputes would be resolved in adversarial litigation before the federal appellate courts, but apparently never contemplated limiting traditional Department of Justice control over government litigation. When Congress exempts government entities from Justice Department control, it typically inserts explicit grants of independent litigation authority. 70 With reference to the Hobbs Act grants of litigation authority, moreover, postal ratemaking presents a unique situation. Rather than one government agency defending its final order, ratemaking disputes involve two independent entities, with the Postal Service challenging the Rate Commission order and the Commission defending its workproduct. No other statutory reference to the Hobbs Act authorizes either the initiation of litigation or the granting of litigation authority exceptions to two government entities. It seems unlikely that Congress would sub silentio deviate so much from past practice.

It is more likely that Congress simply ignored the litigation authority issue. The apparent source of the Hobbs Act reference supports this conclusion. The principal House bill incorporated "[t]he provisions of title 28 relating to service of process, venue, [etc.] ... and the rules of procedure adopted under title 28." 71 The final bill's specification that "[t]he Court shall review the [Commission] decision in accordance with ... chapter 158 and section 2172 of title 28" 72 simply seems a more precise articulation of principal House bill language.

Congress' apparent indifference to the litigation authority is also revealed by its refusal to clarify the self-representation issue when the opportunity arose in 1975. From 1970 to 1974, the relationship between the Justice Department and Postal Service was rocky. The Postal Service had asked to represent itself in five cases, but the Attorney General denied permission in each case. 73 When Congress debated the Postal Reorganization Act in 1975, the Service requested that it be permitted "to choose whether to conduct its own litigation." 74 The Service maintained that an amendment was necessary to "clarify the point that the relationship intended between the Department of Justice and Postal Service is that of attorney-client." The Service, however, also complained of being "handicapped by having to rely on the Justice Department in specialized areas such as postal rates." 75 The Rate Commission supported the amendment which would have accorded it independent litigating authority, but conceded that "Justice controls court litigation . . . and Justice determines the representation which will be made to the court." 76 The Justice Department opposed an amendment and stressed the propriety "of an attorney representing the interests of the government as a whole" and the propriety of continued Attorney General control over ratemaking. 77 Congress did not settle this dispute and the litigation authority issue died in committee without comment. 78

Congress' blasé attitude towards litigation authority continues. During the Postal Service's dispute with the Bush administration, Congress was silent about Postal Service self-representation as well as the President's threat to fire disobedient Governors. The only matter to get a rise out of Congress was President Bush's recess appointment. Viewing the appointment as a threat to their confirmation authority, ranking Senate Democrats sent a letter of protest to the White House and sought to file an amicus

75. Letter from Lewis A. Cox, General Counsel, U.S. Postal Serv., to David N. Henderson, Chairman, House Comm. on Post Office and Civil Service (Feb. 20, 1975) reprinted in H.R. REP. NO. 243, supra note 73, at 9-10, 10; see also H.R. REP. NO. 243, supra note 73, at 4.
76. 1975 Hearings, supra note 74, at 163 (statement by Clyde S. DaPont, Acting Chairman, Postal Rate Commission).
78. The House Subcommittee, however, did report out the litigation authority provision. See H.R. REP. NO. 243, supra note 73, at 3.
brief in opposition to the President. Even that congressional interest quickly dissipated. When Postmaster General Marvin Runyon testified before a Senate Governmental Affairs subcommittee in March, the litigation authority dispute was not mentioned. Congress, instead, was much more interested in why Runyon tossed Federal Express packages into the trash, the Postal Service's ability to deliver priority mail in two days, and a range of issues connected to the restructuring of postal operations. With the D.C. Circuit filling in the gaps left by Congress, it is unlikely that the litigation authority issue will ever receive serious examination in Congress.

The question of whether the D.C. Circuit went too far in concluding that Congress authorized Postal Service self-representation still remains. The legislative record suggests that Congress did not bestow independent litigating authority on either the Service or Commission. Because Justice Department control is presumed in the absence of a specific statutory exception, there is some reason to think that the D.C. Circuit reached the wrong conclusion.

With that said, it would be incorrect to conclude that Congress intended to constrain Service or Commission independence before the D.C. Circuit. The 1970 Congress emphasized that "insulation from partisan politics" was the principal aim of postal reform and "that all of the shortcomings of the Post Office Department are bound up in the fact that responsibility for managing the system is shared by a number of executive agencies and by several congressional committees." To keep postal rate-making removed from partisan politics, Congress explicitly left it to the D.C. Circuit to resolve ratemaking disputes between the Service and Commission. Consequently, one could sensibly conclude that the Hobbs Act self-representation provision extends to the Postal Service simply because it

79. See Letter from George Mitchell to President George Bush, supra note 52; 139 CONG. REC. S8544 (daily ed. July 1, 1993) (remarks of Sen. Mitchell and copy of draft Senate amicus brief, the submission of which was blocked by Republican opposition).
81. Dan Kahan, commenting on an earlier draft of this piece, defended the D.C. Circuit by suggesting that the right approach would be to resolve any doubts in favor of independent litigating authority for independent agencies. Since Congress presumably intends independent agencies to be free of direct executive control, a presumption in favor of independent litigating authority seems quite reasonable. The problem with this presumption—and I think it is fatal—is that Congress has statutorily specified that Justice Department control should be presumed unless "otherwise authorized." 28 U.S.C. § 516 (1988).
82. H.R. REP. NO. 1104, supra note 54, at 12, 5.
makes no sense for Service-Commission dispute resolution authority to be lodged in the Justice Department.

Congress, of course, need not make sense when it acts. The Postal Reorganization Act evidences a clear failure to think through the consequences of sharing postal ratemaking authority among two competing agencies. Congress' failure here is not unusual. Litigation authority issues are often given short shrift by the Congress despite the prominent role they play in agency policymaking.83

B. Congress and Independent Agency Self-Representation

Court action often plays a decisive role in regulatory agency decision-making. In many instances, judicial review is the principal constraint on regulatory rulemaking. A joint letter to President Carter, signed by ranking majority and minority leadership of several Senate committees, illustrates this point. Cautioning the President against excessive White House management of agency rulemaking, these Senate leaders argued that "in exercising the quasi-judicial and quasi-legislative authority which Congress has delegated to the agencies, agency actions shall not be subject to review or modification by either Congress or the executive; only the courts may review final agency actions."84

The predominant role of judicial review and control over independent agency litigation authority go hand in hand. Without litigation authority, an agency's decision could be modified or rejected by the Justice Department. For example, Justice's proposal that Postal Service-Rate Commission disputes be channelled through the Office of Legal Counsel would have significantly reduced the ability of both the Postal Service and Rate Commission to advance their competing approaches to postal ratemaking policy. The Postal Service episode may be an extreme case but it leaves no doubt that agency policymaking oftentimes is a function of litigation authority.

In spite of the importance of the litigation authority issue, Congress has not carefully thought through agency self-representation. Postal ratemaking is an extreme example of legislative incoherence, but it is not the only example. Years after Congress created the Federal Trade Commission (FTC), Congress finally took notice of inadequacies in Justice Department

83. This topic is addressed in some detail in Neal Devins, Unitariness and Independence: Solicitor General Control of Independent Agency Litigation, CAL. L. REV. (forthcoming).
representation and granted the Commission independent litigation authority. The Federal Communications Commission (FCC) provides a more striking example of the haphazard nature of Congressional grants of litigation authority. The Department of Justice has plenary responsibility over actions launched in district court. The Commission handles appeals of radio and television licensing decisions before courts of appeal and the Solicitor General deals with those matters before the Supreme Court. Appeals of other FCC decisions are handled by the Commission before the courts of appeal and in some instances to the Supreme Court through the filing of a certiorari petition.

Congressional treatment of the FCC, FTC, and Postal Service exemplifies the randomness of legislative grants of independent litigating authority. To leave no doubt that congressional exceptions to Department of Justice control lack a coherent pattern, consider the following: some entities have independent litigating authority on all matters before all courts (the Federal Election Commission, the Senate’s Office of Legal Counsel, special prosecutors appointed under the Ethics in Government Act, and others); some entities have independent litigating authority on some matters before all courts (the Department of Agriculture, the FTC, and others); some entities have independent litigating authority on some matters before some courts (the Environmental Protection Agency, the Department of Health and Human Services); some entities have independent litigating authority on all matters before some courts (the Securities and Exchange Commission, the Equal Employment Opportunity Commission, the Federal Energy Regulatory Commission, the Internal Revenue Service, and others); and some entities have independent litigating authority on some matters before all courts and on other matters before some courts (the FCC, the Federal Maritime Commission, and others).

To expect Congress to have a coherent vision of the structure and purposes of independent agencies is to expect the impossible. The Senate Committee on Governmental Operations admitted as much when it casually noted that “[a] decision on structure is after all a political issue, very much influenced by the prevailing political situation. And that situation

87. See generally ADMIN. CONFERENCE OF THE U.S., supra note 19; Devins, supra note 83; Olson, supra note 16.
can neither be quantified nor predicted." Congress' cavalier attitude toward independent litigating authority is nonetheless disheartening. The choice to create an independent agency, in some measure, is a choice to empower agency heads to reach policy decisions at odds with the White House. Otherwise, there is little reason to limit presidential authority to dismiss agency heads only "for cause." It is senseless to encourage agency heads to speak their mind without considering the scope of litigation authority. For those who contend that "random selection" explains Congress' choice of an independent agency format over an executive format, this unsystematic divvying up of litigation authority seems only par for the course. For Postal Service Governors threatened with removal, however, Congress' failure to clarify Service litigation authority seems a cruel hoax.

CONCLUSION: THOUGHTS ON REFORMING POSTAL RATEMAKING

The controversy between the Bush Administration and the Postal Service is revealing at several levels. On the surface, the drama of a president directing independent agency heads to follow his lead or risk removal calls attention to the wide gulf between our jerry-built administrative state and the orderly hierarchical model envisioned by "unitary executive" proponents. This drama, moreover, questions the political sensibility of a White House that targets its jawboning at presidentially-appointed agency heads instead of the professionals whose day-to-day responsibilities directly correlate to agency independence.

The Postal Service saga is also a story about the politics of adjudication. The D.C. Circuit's validation of its authority in postal ratemaking and punishment of the Bush Administration for its hardball efforts to keep the controversy out of court helps explain the resolution of this dispute. Indeed, Judge Oberdorfer's injunction makes clear that the courts did not simply view this battle as a fight between the Bush Administration and Postal Service. The courts considered themselves a player with their own turf to lose. With that said, it is at least plausible, however, that a more contrite Justice Department might have convinced the D.C. Circuit that Congress failed to exempt the Service from Attorney General control.

88. Senate Comm. on Governmental Affairs, 5 Study on Federal Regulation 79
89. For Oberdorfer, the turf at issue was the D.C. Circuit's authority to determine whether the Postal Service possessed independent litigation authority. See supra note 40 and accompanying text.
The Postal Service dispute extends beyond the front line players—the Service, the Bush Administration, and the courts. Congress and the Rate Commission also played important roles in this controversy. This dispute is very much a by-product of Congress' failure to consider litigation authority concerns when it enacted the Postal Reorganization Act in 1970 and amended the Act in 1975. Had Congress devised a workable representation scheme at those times, the circumstances prompting this dispute would not have arisen. Congress' failure here is not simply the failure to consider representation issues in one statutory scheme. Congressional inattentiveness here is symptomatic of Congress' more prevalent failure to seriously consider litigation authority issues.

Congress would be ill-advised to consider the D.C. Circuit decision as a solution to the ratemaking dispute. Although it is tempting for Congress to lean on courts that are willing to fix defective regulatory statutes through policy-laden rules of construction, judicial action is a poor substitute for meaningful legislative deliberation and careful legislative drafting. Indeed, the D.C. Circuit decision is no more than a band-aid on a much larger hurt. Remember, the circumstance that prompted Bush Administration intervention was Rate Commission dissatisfaction with the Postal Service, acting as party-defendant, "defending" Commission rates. The D.C. Circuit decision exacerbates this problem. By recognizing Postal Service authority to represent itself, the Rate Commission's worst fears have been realized. In its ultimate resolution of the private mailer case, the D.C. Circuit both approved Postal Service arguments and forbade the Rate Commission from filing an amicus brief.90

What then should be done with postal ratemaking? The present system is premised on the mistaken belief that the Postal Service and Rate Commission will only occasionally lock horns with each other. The 1970 Senate Committee Report, for example, speaks of the "expect[ation] that the Commission will work in harmony with the Board of Governors."91 Furthermore, in language quoted by the D.C. Circuit, the Senate Report cautions that "[i]f a bureaucratic struggle between the Board and the Commissioners develops, then the whole theory of independent ratemaking judgments will have failed and the Congress will probably be called upon to revise the system."92 One need not be a consultant to the Postal Service

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90. Mail Order Ass'n of America v. United States Postal Serv., 986 F.2d 509 (D.C. Cir. 1993) (private mailer dispute); Mail Order Ass'n v. United States Postal Serv. II, 2 F.3d 408 (D.C. Cir. 1993) (order denying Rate Commission request to file amicus curiae brief).
92. Id. at 13, quoted in Mail Order Ass'n, 986 F.2d at 527.
to recognize that, despite “infrequent disputes,” the Service and Commission are not especially fond of each other. The Commission, for example, did much more than side with the Bush Administration in its dispute with the Postal Service. It launched a clandestine attack against the Service by writing letters to the Justice Department that were not shared with the Service and lobbying Senators to pressure Justice into opposing Service self-representation. The Service, in kind, opposed the Commission’s efforts to file an amicus brief in the private mailer dispute. These disputes are longstanding. In a scathing criticism of Service ratemaking in 1983, former Commission Chair A. Lee Fritschler (apparently oblivious to a statutory requirement to the contrary) asked, “What kind of confidence can the public have in our largest government corporation if it does not keep its books according to generally accepted accounting principles?” In a 1985 story about Rate Commission efforts to get the Postal Service to turn over a “potentially embarrassing” report, the Washington Post noted that the relationship between the Service and Commission “has always been a stormy one.”

And the “stormy” relationship will likely continue. The Rate Commission owes its existence to Congressional distrust of a too-powerful Postmaster General. As a watchdog agency, the Rate Commission only exercises its statutory authority when it checks Postal Service desires. In other words, Rate Commission power depends on how confrontational the Commission is in its review of Postal Service proposals. By the same token, Postal Service ratemaking authority is directly correlated to its willingness to do battle with the Rate Commission.

When phrased in such adversarial terms, it is apparent why the bar code dispute provoked such fierce reactions from both the Service and Commission. Postal Service control of private mailer litigation enables the
Service to strike back at the Commission by controlling ratemaking litigation in cases where it disagrees with the Commission. This type of Postal Service control effectively treats Commission recommendations as little more than glorified administrative law judge rulings. Unwilling to have its ratemaking authority undercut, the Commission fought back.

Awarding complete litigation authority to both the Commission and Postal Service would not ease tensions between these agencies. Each agency would still have the incentive to maximize its authority by limiting the other. A better solution would be to lodge principal ratemaking authority and litigation authority to defend its decisionmaking in court through independent litigation authority—with either the Commission or Postal Service. Between the two, the Postal Service seems the better choice. The Postal Rate Commission is too far removed from the cost side of postal operations to have primary ratemaking authority. Nonetheless, it would be a mistake to abolish the Rate Commission. The dangers of a too powerful Postmaster General, as the 1970 Congress contended, cannot be ignored. Without a quasi-independent Rate Commission, the Service's part-time Board of Governors would be ill-prepared to provide a meaningful check on a Postmaster General who controls all aspects of postal operations. It is therefore sensible that a presidentially nominated and Senate confirmed group of ratemaking experts provide high profile review of Postal Service proposals. That way the Service's part-time Board of Governors will be hesitant to ride rough-shod over Commission recommendations. At the same time, the Governors are the principal ratemakers and should be able to accept, reject, or modify Commission findings by a simple majority vote. With the Postal Service empowered to modify Commission recommendations, the Commission will take extra pains to work with the Service to convince the Governors and Postmaster General of the correctness of its findings.

The above model, amazingly, is almost identical to the one proposed in the Kappel Report and the original House bill. The only significant difference is the substitution of judicial review for the now unconstitutional legislative veto. Congress, admittedly, is unlikely to retrace its steps. After all, the Bush Administration dispute, rather than serving as a rather loud wake-up call, was hardly noticed by Congress. This is unfortunate. The current postal ratemaking scheme is badly in need of repair.

98. See supra note 63 and accompanying text.
99. See supra notes 57-61 and accompanying text.