Postal Reform: Some Legal and Practical Considerations

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THE ORIGIN OF POSTAL REFORM

Enactment of the Postal Reorganization Act of 19701 will result in the most sweeping change in the Post Office Department since its establishment in 1775. In order to appreciate the full import of this legislation, it is helpful to recognize certain conditions leading to the passage of this bill.

In recent years the Department was hit by two catalyzing disasters which ultimately prompted postal reform legislation. These events dramatically highlighted the deteriorating conditions in the Department, evidenced by a never-ending treadmill of rate and salary increases and fiscal deficits, and causing gradual erosion of mail service defying piecemeal correction.

First came the 1966 mail stoppage in Chicago, when the Chicago Post Office, for a variety of reasons, simply stopped functioning. This caused the then Postmaster General, Lawrence F. O'Brien, to propose complete transformation of the Post Office Department into an independent government corporation, with the Postmaster General removed from the Cabinet and freed from congressional and administration pressures. This innovative approach proposed to free the Department to establish its own wage and postal rates independently of Congress, to collectively bargain with its employees, to purchase its transportation without Interstate Commerce Commission and Civil Aeronautics Board control, and to enable it to issue its own modernization bonds. Mr. O'Brien's proposal was in turn referred to a blue ribbon commission appointed by President Johnson and headed by Frederick R. Kappel, retired Chairman of American Telephone and Telegraph Company.

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Mr. Kappel and his eminent colleagues made an exhaustive study which resulted in what became popularly known as the “Kappel Report.”

This report, for the most part, endorsed the O’Brien proposal and called for action by the President and Congress to put it into effect.

While the Kappel Report was received with almost unanimous approval by the nation’s newspaper editors, it was welcomed with mixed emotion by some members of Congress and certain mail users, and it was initially bitterly opposed by the postal unions. The opponents of what came to be known as “total postal reform” generally maintained that the Post Office Department’s real difficulty stemmed from financial starvation, resulting in its inability to mechanize and modernize its facilities. Those opponents suggested that all that was necessary to rectify matters was a heavy dosage of money. The Report, on the other hand, found that the Department under its present system was unmanageable, unproductive, politically fettered, unable to set its own postal rates, unable to negotiate its own pay scales, and unable to contract for its own transportation rates. As a consequence, the Department was operating at a growing annual deficit in the billion dollar range while conducting a continually deteriorating mail service.

The second disaster was a mail strike which hit New York City on March 18, 1970, and quickly spread to other parts of the country.

Between the time the Kappel Report was issued and the New York strike took place, several versions of postal reform legislation had been introduced in Congress. The first version, introduced as H.R. 4 on January 3, 1969, by Chairman Dulski of the House Post Office and Civil Service Committee, contained considerably less reform than that prescribed by Mr. O’Brien and the Kappel Commission. Basically, H.R. 4 provided for an infusion of modernization capital into the Department, but it kept Congress in the business of setting postal rates and salaries. This version of postal reform was not endorsed by President Nixon or his newly-appointed Postmaster General, Winton M. Blount. The Administration took the position that it wanted to study both H.R. 4 and the Kappel approach, and to view postal problems firsthand before announcing its position.

Four months after H.R. 4 was introduced, the Administration openly supported the Kappel concept of total reform. The Administration


recognized that if reform were to be achieved, it had to be through bipartisan cooperation. Consequently, a prominent Democratic member of Congress, Morris K. Udall of Arizona, actually introduced the Republican Administration's Postal Reform Bill, H.R. 11750, on May 28, 1969.4

In the meantime, a bipartisan Citizens Committee for Postal Reform was organized under the joint leadership of Thurston B. Morton, former United States Senator from Kentucky and former Chairman of the Republican National Committee, and Mr. O'Brien, who, after he had served as Postmaster General, had become Chairman of the Democratic National Committee prior to entering private business. The aim of the Citizens Committee was to support the concept of total reform proposed in H.R. 11750, as contrasted with the less inclusive kind of reform typified by H.R. 4. These two approaches repeatedly clashed during lengthy hearings before the House and Senate Post Office Committees.

On March 12, 1970, the House Post Office Committee reported out a bill entitled H.R. 4, but which contained most of the elements of total reform represented by the O'Brien-Kapel-Blount philosophy.5 This bill included a 5.4 per cent salary increase for postal employees. Rejection of this salary figure as inadequate by postal employee unions in New York resulted in the first mail strike in the nation's history.

At this point, the Post Office Department and the postal unions scored another first; they sat down to collectively bargain in an effort to end the strike. Their negotiations produced a legislative package containing the kind of postal reform acceptable to the Administration and granting to postal employees an immediate 6 per cent pay increase, with an additional 8 per cent to follow upon actual passage of the postal reform bill.

The House Post Office Committee met quickly to consider this negotiated settlement6 and shortly thereafter reported out a new bill, H.R. 17070.7 Although this legislation contained most of the elements of the Administration-postal union settlement, it failed in certain respects to reach total reform. In particular, the authority of the Post Office to

purchase its transportation at the best possible rates, without ICC or
CAB control, was materially weakened.  

While these events were taking place, the Senate Post Office Com-
mittee had also been considering several versions of postal reform. It pro-
ceeded to take up H.R. 17070 after that bill passed the House on June
18, 1970. The Senate Committee accepted that portion of the strike
settlement pertaining to postal salaries and collective bargaining, but it
rejected certain other elements of the settlement including postal rate
considerations.

After the Senate passed its modified version of H.R. 17070 on June
30, 1970, postal reform legislation was referred to a House-Senate Con-
ference Committee to iron out differences between the House and
Senate versions. What emerged was a postal reform bill establishing
not one but two new governmental agencies: the United States Postal
Service and the United States Postal Rate Commission.

As postal reform legislation moved from committee hearings to floor
debate to final enactment and presidential approval, it necessarily re-
lected conflicting views, as all controversial legislation which comes to
completion usually does. As a result of these conflicts and the establish-
ment of the new bipartite postal structure, some significant legal and
practical questions are posed.

The Act deals with a number of specialized areas such as transporta-
tion, labor relations, and finance. However, for the purpose of this
article, it is the authors' intention to deal primarily with those sections
of the legislation relating to postal rates and mail classifications.

Among the issues to be examined are:

1. The constitutionality of the Act, with emphasis on the power of
Congress to delegate to the United States Postal Service and the Postal
Rate Commission the constitutionally enumerated power of Congress to
establish post roads and post offices.

8. When H.R. 17070 was considered on the floor of the House, Congressman Tom
Steed (D., Okla.), Chairman of the House Appropriations Subcommittee on Postal
Operations, and his colleague, Congressman Silvio Conte (R., Mass.), proposed an
amendment to authorize the Post Office Department to buy its own transportation at
the lowest cost consistent with the best possible service. This amendment was de-

9. The Senate passed H.R. 17070 after striking out everything after the enacting
clause of the House bill and inserting, in lieu thereof, an amended S. 3842, the Senate's
own postal reform bill, which had been under consideration by the Senate Post Office

2. The problems raised by the complaint procedure, section 3662 of the Act, including the likelihood of mandamus in case of abuse of the discretion granted by Congress to the Postal Rate Commission to conduct hearings on rate and service complaints from the public.

3. The possibility that the United States Postal Service and the Postal Rate Commission might be adverse litigants before the courts.

4. Problems of interpretation, administration, and legislation relating to an annual public service appropriation for the Postal Service as a whole, and the congressional power to appropriate or withhold funds to cover deficits incurred in specific mail categories.

5. Questions raised under section 3628 of the statute pertaining to appellate review. In particular:
   a. The jurisdiction granted to the courts of appeals to review but not modify rate decisions made by the Postal Rate Commission, and
   b. Limitations of the right of appeal from a decision by a court of appeals on a rate or classification matter.

6. Matters of practical interest to lawyers:
   a. The Postal Rate Commission's Rules of Practice and Procedure, including the regulations of *ex parte* contacts.
   b. Standards of conduct governing employees of the Postal Rate Commission and the Postal Service.
   c. Development of a "Postal Bar" similar to those organizations of practitioners appearing before other regulatory agencies.

**Constitutionality of the Postal Reorganization Act**

From the outset of the debate over the organizational structure of the new postal service, two fundamental issues became apparent. There is, in the first place, the constitutionally established duty on the part of Congress to provide "Post Offices and post Roads." In furtherance of this mandate, Congress over the years established rates for various classes of mail. Regulations under which these classes were administered were necessarily developed by the Post Office Department under authority granted by Congress.

In its final form, the Postal Reorganization Act creates two independ-

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ent agencies to perform these duties.\textsuperscript{12} In order to effectively analyze the Act, it is necessary to separately examine the new Postal Service and Postal Rate Commission.

A congressional delegation of power to an administrative agency has traditionally been judged on the basis of adequate standards and procedural safeguards laid down by Congress. It follows that the constitutionality of the delegation to the Postal Service and the Postal Rate Commission of congressional power to establish post offices and post roads depends upon whether, assuming \textit{arguendo} that the standards are adequate, procedural safeguards are sufficient to insure that these standards are met.

Congressional delegation of power to the Postal Service is supported by the historical development of the Post Office Department and the office of the Postmaster General. David Nelson, Esq., the present General Counsel of the Post Office Department, stated in a memorandum prepared for hearings on the Administration’s original postal reform bill\textsuperscript{13} that precedent clearly supports the validity of a delegation of congressional authority to establish post offices and a postal service. As Mr. Nelson pointed out, “. . . under the Constitution, the Postmaster General has been given and has exercised the power to establish, and by implication to discontinue, post offices . . . Similarly, the Postmaster General has been given statutory authority to discontinue services on the post roads since at least 1861.”\textsuperscript{14}

While the power of Congress to delegate authority to an administrative agency is established, the constitutionality of such delegation must be judged by the adequacy of congressional guidelines to be followed by the agency in exercising its delegated powers. The Postal Reorganization Act does delineate the duties and powers of the Board of Governors of the Postal Service. The basic policy statements of the Act provide such guidelines as “prompt and reliable, and efficient services to patrons” (section 101a), and “highest consideration . . . for the most expeditious collection, transportation and delivery of letter mail” (section 101d). General duties of the Postal Service are outlined in detail

\textsuperscript{12} 39 U.S.C.A. \textsection 201 (Supp. 1971) establishes the United States Postal Service. The Postal Rate Commission is established by \textit{id.} \textsection 3601.


\textsuperscript{14} \textit{Id.}
in section 403. Section 404 likewise spells out specific powers of the new Postal Service.

   (a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees. Except as provided in the Canal Zone Code, the Postal Service shall receive, transmit and deliver throughout the United States, its territories and possessions, and pursuant to arrangements entered into under Sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.
   (b) It shall be the responsibility of the Postal Service—
      (1) to provide for the collection, handling, transportation, delivery, of the mail nationwide;
      (2) to provide types of mail service to meet the needs of different categories of mail and mail users; and
      (3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.
   (c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

16. Id. § 404:
   Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:
   (1) to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of the undeliverable mail;
   (2) to prescribe, in accordance with this title, the amount of postage and the manner in which it is to be paid;
   (3) to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed;
   (4) to provide and sell postage stamps and other stamped paper, cards, and envelopes and to provide such other evidences of payment of postage and fees as may be necessary or desirable;
   (5) to provide philatelic services;
   (6) to provide, establish, change, or abolish special nonpostal or similar services;
   (7) to investigate postal offenses and civil matters relating to the Postal Service;
   (8) to offer and pay rewards for information and services in connection with violations of the postal laws, and, unless a different disposal is expressly prescribed, to pay one-half of all penalties and forfeitures imposed for violations of law affecting the Postal Service, its revenues, or property,
Under the reorganized postal system, the Postmaster General will continue to be the administrator of the Postal Service. Under the new approach, however, he will not be appointed by the President or confirmed by the Senate. Rather, he will be elected by the nine presidentially-appointed Governors, and will be a voting member of the Board of Governors. These ten Governors will then elect the Deputy Postmaster General who will also be a voting Governor.\(^\text{17}\)

The Board of Governors have the authority to delegate to the Postmaster General those duties not exclusively assigned to the Board.\(^\text{18}\) This authority, however, "shall not relieve the Board of full responsibility for the carrying out of its duties and functions and shall be revocable by the Governors in their exclusive judgment."\(^\text{19}\)

In section 208 Congress has reserved the right to "alter, amend, or repeal" the Postal Reorganization Act. While this establishes congressional prerogative to make changes affecting the operation of the Postal Service and the Postal Rate Commission, Congress presumably will not become involved in the day-to-day managerial decisions of these new entities. It was this type of political involvement which those favoring total postal reform had tried for years to overcome. Congressional supervision will be maintained through the need of the new Postal Service for congressional appropriations, at least until the Service is self-supporting.

In addition to the retention of congressional supervision, the Postal Reorganization Act will facilitate scrutiny of postal operations by way of the complaint procedure in section 3662. Under this section, an "interested party" is permitted to petition the Rate Commission for a hearing, and he must establish that the service or rate in question does not meet the standards set forth in the Postal Reorganization Act. If the Rate Commission grants the hearing, the complaining party is entitled to

\[\text{to the person informing for the same, and to pay the other one-half into the Postal Service Fund; and}\]

\[\text{(9) to authorize the issuance of a substitute check for a lost, stolen, or destroyed check of the Postal Service.}\]

\(^{17}\) Id. \(\S\) 202. The nine Governors were nominated by the President in September 1970, but were not confirmed by the Senate during the 91st Congress. On January 5, 1971, the President made interim appointments to the Board of Governors, which means that the Governors can serve without Senate confirmation until the end of the next session of Congress. Members of the Postal Rate Commission are not subject to Senate confirmation; they have already been appointed by the President, have been sworn in, and are presently at work. \(116\) Cong. Rec. S16628 (daily ed. Sept. 28, 1970).


\(^{19}\) Id.
titled to all the procedural safeguards of the Administrative Procedure Act\textsuperscript{20} and of the Postal Reorganization Act.\textsuperscript{21}

The constitutional issues presented by the establishment of a postal rate-making Commission are similar to those raised and tested in connection with other regulatory bodies, such as the Interstate Commerce Commission, Civil Aeronautics Board, Federal Power Commission, Federal Communications Commission, and others. In the postal situation, Congress relied upon some of the standards and procedural safeguards applicable to other regulatory agencies. For example, section 3624(a) of the Postal Reorganization Act provides that a hearing must conform to the standards of the Administrative Procedure Act, applicable to all regulatory agencies, which establishes a party’s basic rights before a Commission authorized to hold hearings either \textit{en banc} or before a hearing examiner.\textsuperscript{22} Section 3624(b) sets forth procedures to expedite regulatory proceedings. Judicial review of action by the Board of Governors on Rate Commission recommendations is provided for in section 3628.\textsuperscript{23} Section 3622 establishes standards for rate setting by the Postal Rate Commission.\textsuperscript{24} The Postal Service and the Rate Commission will also be responsible for revising existing mail classifications.\textsuperscript{25} The same administrative procedures governing postal rates will also apply to classification matters.\textsuperscript{26}

\begin{footnotes}
\item[24] Id. § 3622(b).
\item[25] Id. § 3623.
\item[26] See id. §§ 3624, 3625.
\end{footnotes}
Congressional guidelines call for postal rates to be "fair and equitable" (section 101) and "not unjustly discriminatory" (section 403(c)). Similar standards have been provided by Congress to other rate-making agencies. The Interstate Commerce Commission and the Federal Power Commission Acts set forth a "fair and reasonable" standard, and the Federal Aviation Administration statute provides that rates shall "not be unjust or unreasonable." From the foregoing, similar to constitutionally tested standards for other agencies, it is likely that the operating and regulatory functions of the Postal Service and the Postal Rate Commission will withstand constitutional challenge. It should be noted, however, that if the courts should find the functions of either the Commission or the Service unconstitutional, it would be impossible for one agency to operate independently of the other without remedial legislation. If the Service and its Board of Governors ceased to exist, the Commission's rate and classification recommendations could not be put into effect, since only the Postal Board of Governors can do so. On the other hand, if the Commission should be declared unconstitutional, the Service would be unable to recommend rate and classification changes without further enabling legislation.

Problems Raised by the Complaint Procedure of Section 3662

The Postal Reorganization Act establishes a complaint procedure for presentation of objections by interested parties to rates and services which, in their judgment, are not in conformity with the Act. An interested party can petition the Postal Rate Commission for an administrative hearing. The Commission, at its discretion, may then grant a hearing in accordance with procedures established in section 3624. The question arises, whether mandamus will lie to compel a hearing should the Commission decline to grant one. The answer depends on whether or not the Commission's discretion to hear a complaint is absolute.

This question is complicated by the fact that section 3628, which gives any court of appeals jurisdiction to review a decision by the Rate Commission or the Board of Governors, would also appear to limit
appeals from that court. Section 3628 states: "No court shall have jurisdic-
tion to review a decision made by the Commission or Governors un-
der this chapter except as provided in this section." The only provision
for judicial review in that section is for any court of appeals to review a
Board of Governors' decision on a Rate Commission recommendation.
The court of appeals may affirm or send a recommendation back to the
Board of Governors; however, it may not modify. In view of this
limitation, it remains for future judicial determination whether or not any
court would be competent to compel the Commission to hold a hearing
on a rate or service complaint.

Assuming an alleged abuse of discretion by the Postal Rate Commiss-
ion, a court's willingness to review this abuse, if the court follows the
approach of similar cases,12 will depend to a great extent on the legisla-
tive history of the Postal Reorganization Act and the nature of the com-
plaint. The Supreme Court has held that lower courts should permit re-
view of administrative decisions unless there is "... a showing of 'clear
and convincing evidence' of contrary legislative intent." 33

In Cappadora v. Celebreeze,34 the Court of Appeals for the Second
Circuit suggested three standards to apply to determine whether a court
should review a grant of discretion to an administrative agency:

1. From a practical point of view, the court must have the capaci-
ty to handle the case.
2. There must be adequate legislative guidelines on which to act.
3. A useful purpose must be served by the review.

As to practicability, the subject matter set forth by Congress in the
Postal Reorganization Act is not so technical or unique that a court
could not effectively deal with it. Congress itself apparently saw no
problem in this regard when it authorized, in section 3828 of the Act,
any court of appeals to review the record of a hearing before the Postal
Rate Commission on the basis of either evidentiary or procedural suffi-
ciency. The requirement of adequate legislative guidelines is met by a
provision35 requiring that the rate or service in question conform to the
Congressional policies as expressed in the Act.36

686 (8th Cir. 1967); Garvey v. Freeman, 263 F. Supp. 573 (D. Colo. 1967).
34. 365 F.2d 1, 5-6 (2d Cir. 1966).
The requirement that a useful purpose be served by judicial review would be fulfilled if the complaining party has exhausted all other remedies. A hearing by the Postal Rate Commission on a permanent rate or classification proposal from the Board of Governors is mandatory under section 3624. A hearing by the Commission on a rate or service complaint emanating from an interested party (section 3662) is discretionary. This raises the question of whether refusal by the Postal Rate Commission to grant a hearing on a rate or service complaint would enable an interested party to seek judicial relief in a district court. Likewise raised is the question of what happens if the Commission grants a discretionary hearing and issues a public report to the Postal Service, a procedure called for in section 3662. If the Postal Service fails to act on the report, it would seem that an interested party could seek appropriate judicial relief.

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in this title or who believe that they are not receiving postal service in accordance with the policies of this title may lodge a complaint with the Postal Rate Commission in such form and in such manner as it may prescribe. The Commission may in its discretion hold hearings on such complaint. If the Commission, in a matter covered by subchapter II of this chapter, determines that the complaint shall be justified, it shall, after proceedings in conformity with section 3624 of this title, issue a recommended decision which shall be acted upon in accordance with the provisions of section 3625 of this title and subject to review in accordance with the provisions of section 3628 of this title. If a matter not covered by subchapter II of this chapter is involved, and the Commission after hearing finds the complaint to be justified, it shall render a public report thereon to the Postal Service which shall take such action as it deems appropriate.

Sub-chapter II refers to permanent rates and classes of mail. Sub-chapter III refers to temporary rates and classes of mail, and sub-chapter IV refers to postal service and complaints. Section 3624 requires the Postal Rate Commission to forward a decision to the Board of Governors. Section 3625 requires the Governors to approve, accept under protest and appeal to the courts, or resubmit the cause to the Postal Rate Commission. Section 3628 provides for judicial review by the U.S. Courts of Appeal. Thus, if the matter relates to temporary rates and classes, or to postal service and complaints about service, the Postal Rate Commission issues a public report but action by the Postal Service is not mandatory. Under the latter circumstance, the word "appropriate" in section 3662 above becomes important, because if the Postal Service does not take action which to a complainant is "appropriate", the question arises as to whether or not mandamus by a United States District Court may be an available remedy.

36. Id. § 101.
Establishment by Congress of both the Postal Service and the Postal Rate Commission presents the possibility of inter-agency litigation. Section 3628 states that a party aggrieved by the Board's decision to accept, reject, or modify a recommendation of the Postal Rate Commission can seek review by any court of appeals, provided the party was involved in the hearing before the Commission. Section 3624(a) states that one of the parties to appear before the Postal Rate Commission shall be an officer of the Postal Rate Commission, whose responsibility shall be to represent the public interest. Thus, one of the aggrieved parties entitled to seek judicial review could conceivably be the Postal Rate Commission by way of its officer representing the public interest. If this be the case, the opposition would certainly be the U.S. Postal Service, which would have to defend the Board's action.

The fact that both the Postal Rate Commission and the U.S. Postal Service are government agencies would not preclude the two from being adverse litigants. The Supreme Court in a recent case stated that it was not unusual "... that two great departments of the government [the Anti-Trust Division of the Department of Justice and the ICC], each charged with responsibility to protect the public interest, took opposing positions; vigorous advocacy of divergent views on this difficult problem has narrowed and sharpened the issues and aided the Court in their resolution insuring that no factor which ought to be considered would elude our attention."

While the Postal Reorganization Act in section 3628 states that any party to a hearing before the Postal Rate Commission is entitled to appeal the decision of the Board of Governors to any court of appeals, an argument could be made that an officer of the Postal Rate Commission should be precluded from taking such an appeal. Since the basic goal of both agencies is an efficient postal service at fair and reasonable costs, any litigation between the two agencies could arguably be disruptive of the kind of cooperative relationship necessary to achieve this end. On the other hand, Congress apparently did not consider this a problem be-

37. On March 5, 1971, in its Notice of Prehearing Conference in connection with Docket No. R71-1, the first rate proceeding before the Postal Rate Commission, the Commission designated its Assistant General Counsel, Litigation Division, as the officer of the Commission who shall represent the interests of the general public.
39. Id.
cause the Act specifically permits judicial review of differences between the two agencies. "[T]he Governors may, under protest, allow a recommended decision of the Commission to take effect and seek judicial review thereof under section 3628." 40

In the final analysis, assuming mutual cooperation, judicial confrontation need not necessarily interfere with the ability of the Board and the Commission to work together toward the common goal of an efficient postal service. Only time will tell how effectively the relationship between the two agencies will evolve.

**Congressional Appropriations under the Postal Reorganization Act**

One of the purposes of the Postal Reorganization Act is to provide for an eventually self-supporting postal service. The difference between cash income and cash out-go for the Department at present is estimated at $2 billion for fiscal year 1971.

Section 2005 of the Postal Reorganization Act authorizes the U.S. Postal Service to issue up to $10 billion in revenue bonds. Of these, $2 billion may be issued in any one year. Up to $1.5 billion of this amount may be used for postal modernization and up to $500 million may be earmarked for operating expenses. The Act also gives the Service the right to call upon the United States Treasury to purchase up to $2 billion of Postal Service obligations. The Treasury may, however, purchase additional amounts if it so desires. In addition to the Service's call on the Treasury for $2 billion, and the Treasury's option to purchase obligations issued by the Service, full faith and credit of the United States government may from time to time be given to Postal Service obligations by the Secretary of the Treasury at his discretion. The net result is to add flexibility to the Service's borrowing power.

The Act authorizes Congressional appropriations to make up that portion of the annual postal deficit which is not covered by rates.41 A public service appropriation is authorized in an amount equal to ten percent of the sum appropriated by Congress to the Post Office Department in fiscal year 1971. Since that sum equalled $9,200,000,000, Congress will presumably appropriate $920 million for general public service. This means that those costs would be attributable to and made up by Treasury funds.

41. Id. § 2401.
The Act provides that the 10 per cent public service allowance will remain constant until 1980, at which time it will de-escalate 1 per cent per annum until it reaches 5 per cent in 1984. The Board of Governors may then recommend to Congress either abolition, modification, or continuation of the remaining 5 per cent public service expense.

Section 2401(c) authorizes another type of congressional appropriation for the Postal Service. This will cover the difference between what any class of mail actually pays in postage by virtue of certain reduced rate provisions of the Act and what the rate-making mechanism of the Board of Governors, the Postal Rate Commission, and the courts determine any particular class of mail should be paying.

When the rates for certain types of mail are increased, mailers will be given five and in some cases ten years to pay the difference between what they are paying at that time and what the rate-making mechanism determines the increased rate shall be. The Postal Service is directed to spread such rate increases in equal annual increments over a five or ten year period. In-county newspapers and non-profit second, third, and fourth class mail make up the ten year category. In contrast, profit-making second class publications, controlled circulation publications, third class mail, and books have five years in which to make up rate increases.

The Act states that the five and ten year provisions shall be applicable if any class of mail is paying less than what it should be paying as of the date of the first rate decision. However, it is highly probable that rates will be increased not only initially, but in future years. In that case, the Act is not clear as to whether rate increases after the first increase shall be spread out over five or ten year periods. Since there will, no doubt, be some who favor and some who oppose any five and ten year spread for subsequent rate increases, this ambiguity in the Act will probably be the subject of future litigation.

Although one of the prime purposes of the Postal Reorganization Act was to free the Postal Service from direct congressional control, Congress will still play an important role by way of the appropriations process. Section 3627 of the Act provides that if Congress fails to appropriate funds, where authorized, to carry certain classes through the five and ten year reduced rate periods discussed above, any class for which Congress makes no appropriation will be charged its full amount. The importance of the House and Senate appropriations committees to

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42. Id. § 3626.
various groups of mailers can easily be seen. By specifically discussing in section 3627 what happens if Congress fails to make an appropriation, the Act makes it clear that section 2401 is merely an authorization to appropriate, and is not an appropriation in itself.

To prevent procedural delays from interfering with postal finance, the Act provides that the Rate Commission has ninety days in which to act on a rate recommendation from the Board of Governors. If the Commission does not act within that time, the Governors may initiate a temporary rate increase which will remain in effect until thirty days after the Commission does make a decision. Such temporary rates may not exceed one-third of the rate in effect for any particular class of service at the time a new rate is requested.43

The newly appointed Postal Rate Commission was unable to conclude full hearings on the first permanent rate increase proposal submitted by the Postal Service on February 2, 1971. Consequently, the Service placed into effect a temporary increase on May 16, 1971.44 In connection with this first increase, the basic power of the Service to initiate temporary rates came under judicial challenge, but thus far has been successfully upheld.45

43. Id. § 3641.
44. The first permanent rate proposal under the Postal Reorganization Act was submitted by the Postal Service to the Rate Commission on February 2, 1971. At the same time the Service announced temporary rates which would go into effect if the Commission failed to reach a decision on the permanent rates within ninety days. After disposing of pre-hearing matters, the Commission had hoped to begin formal hearings on April 19, 1971. This plan had to be abandoned, however, due to discovery procedures undertaken by the Postal Service and by the large number (56) of intervenors in the proceeding, representing hundreds of mail users. Instead, the hearings got underway on May 10, 1971, with the appearance and cross examination of Post Office witnesses. Direct testimony of the intervenors was filed on June 4, and the appearance and cross examination of witnesses should take place sometime in late June or early July. At this point it is impossible to estimate when the proceedings will conclude. In the meantime, the Service's temporary rates took effect on May 16, 1971. See Postal Rate Commission's Press Release of April 5, 1971, 36 Fed. Reg. 2431, 2571 (1971).
45. The authority of the Postal Service to initiate temporary rates was challenged on April 15, 1971, in the U.S. District Court for the District of Columbia when a group of mailers, representing various classes of mail, sought to enjoin the Service from putting temporary rates into effect. Magazine Publishers Ass'n, Inc. et al. v. U.S. Post Office Dept. et al. (CA No. 755-71). The plaintiffs argued that temporary rates could not be instituted, under terms of the Postal Reorganization Act, in the first instance, until the Rate Commission had completed its full review of permanent rates and issued a recommended decision to the Board of Governors. The District Court, the United States Court of Appeals for the District of Columbia, and the Supreme Court in refusing to issue a preliminary injunction, rejected this argument, and temporary rates went into effect as scheduled on May 16, 1971. The courts have yet to rule on the question of a permanent injunction.
Section 3628 provides that "[a] decision of the Governors to approve, allow under protest, or modify the recommended decision of the Postal Rate Commission may be appealed to any Court of Appeals of the United States ... by an aggrieved party who appeared in the proceedings ..." The extent and effectiveness of this judicial review, however, is limited as the section further provides "[t]he Court may affirm the decision or order that the entire matter be returned for further consideration, but the Court may not modify the decision." [Emphasis added.] The section also states, "No Court shall have jurisdiction to review a decision made by the Commission or Governors ... except as provided in this section."

It can be asked whether the prohibition imposed on the appellate court against modifying a decision of the Commission or Governors is constitutionally valid, particularly since statutes pertaining to most regulatory agencies permit such modification. The Supreme Court, however, in dealing with a similar limitation, stated, "Congress cannot infringe upon due process by withholding from federal appellate courts a jurisdiction which they never possessed." Since courts of appeals have only that jurisdiction which Congress sees fit to grant, it would follow that there is no inherent right of these courts to modify a postal rate decision, even though Congress has bestowed upon them such power to modify in the case of other regulatory agencies. It remains to be seen what effect the absence of this power will have in the postal area.

Unlike enabling statutes for other regulatory agencies which specifically spell out Supreme Court appellate jurisdiction, there is no mention of Supreme Court review in the Postal Reorganization Act. It is open to conjecture whether, by purporting to limit appellate jurisdiction on rate and classification matters to the courts of appeals alone, the Postal Reorganization Act precludes review by the Supreme Court. This point will probably be judicially challenged. At that time attention will once again be focused on the continuing controversy over the power of Congress to limit appellate review.\(^49\)

\(^{48}\) For judicial review provisions of other representative agencies, see 49 U.S.C. § 1486(f) (1964) (CAB and FTC); 15 U.S.C. § 45(d) (1964) (FTC).
\(^{49}\) A discussion of Supreme Court jurisdiction is beyond the scope of this article. For an excellent treatment of congressional control of Supreme Court jurisdiction, see C. WRIGHT, FEDERAL COURTS § 10 (1963).
Development of a Postal Bar—Rules of Practice—Ex Parte Contacts

The creation of the U.S. Postal Service and, in particular, the Postal Rate Commission suggests the eventual development of a postal bar. Traditionally, the establishment of a new regulatory agency has resulted in an association of practitioners who regularly appear before that body. In its Rules of Practice and Procedure, promulgated on January 12, 1971, the Postal Rate Commission sets forth standards designed to assure that proceedings before it are conducted in a professional, legal manner, with regard for the requirements of procedural due process.

With respect to appearances, section 6(a) of the Commission’s Rules provides that “an individual may appear in his own behalf; a member of a partnership may represent the partnership, and an officer may represent a corporation, trust, incorporated association, or governmental agency.” If an individual, partner, or officer does not elect to appear pro se and as a practical matter most will not, appearance may be “by an attorney at law admitted to practice and in good standing before the Supreme Court of the United States, the highest court of any State or Territory of the United States or the District of Columbia, or the Court of Appeals or the District Court for the District of Columbia.” Notwithstanding the capacity in which they appear, the Commission prescribes a high standard of conduct for its practitioners when it states in section 6(d) of its Rules: “Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.”

Presumably, practitioners who appear before the Postal Rate Commission will also appear under similar procedural rules before the Postal Service’s Judicial Officer and hearing examiners. In the past, the Post Office Department’s Judicial Officer and subordinate hearing examiners determined questions relating to mailability of certain matter, mail classification, and contract disputes. The Postal Reorganization Act provides for continuation of the Judicial Officer. The scope of his jurisdiction in the new Postal Service remains to be determined, but it will no doubt follow to a great extent its former pattern.

Incidental but quite important to the development of a postal bar is the matter of ex parte contacts with the Board of Governors and the Postal Rate Commission. In the past, mail users have dealt primarily

with members of the House and Senate Post Office Committees in postal rate and classification matters. Because of the need for congressional appropriations, as previously discussed, Congress will continue to play a key role under the new Act. However, the Postal Rate Commission and the Board of Governors now have the principal authority to make rate and classification decisions. Consequently, the rules established by the Postal Rate Commission and the Board with regard to *ex parte* contacts will be extremely significant.

The Act is silent on what limits or controls should be set with regard to contacts by individuals or groups having an interest in the decisions of the Commission and the Service. However, Congressmen David Henderson of North Carolina and Morris Udall of Arizona, in a letter to the President on August 12, 1970, stated that the Rate Commission should incorporate Executive Order No. 11222,52 and go even further in establishing a code of conduct. This Order specifically prohibits federal employees from:

1. using public office for private gains;
2. giving preferential treatment to any organization or person;
3. impeding government efficiency or economy;
4. losing complete independence or impartiality of action;
5. making a government decision outside official channels; or
6. affecting adversely the confidence of the public in the integrity of the government.

Congressmen Henderson and Udall further suggested that any informal contact with the Commission be reported to all concerned parties.

President Nixon affirmatively dealt with this matter on November 24, 1970, when he issued Executive Order No. 11570, “Providing for the Regulation of Conduct for the Postal Rate Commission and its Employees.”53 This order makes it clear that “[t]he Commission is subject to Executive Order No. 11222...” It also authorizes the Civil Service Commission to prepare standards of conduct regulations for the Postal Rate Commission and, in the case of *ex parte* contacts, it provides for

strict control of *ex parte* contacts with the Commission and the Commissioners or employees of the Commission regarding particular matters at issue in contested proceedings before the Commission. The control of such contacts shall include, but not be limited

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to, the maintenance of public records of such contacts which fully identify the individuals involved and the nature of the subject matter discussed . . .

Following these statements of legislative and executive intent, the Commission in its Rules of Practice and Procedure states in depth policies to be followed with respect to *ex parte* communications and the conduct of its hearing officers.

54. Section 3001.7 (Ex parte communications), 36 Fed. Reg. 397 (1971), provides:

(a) *Prohibition.* To avoid the possibility or appearance of impropriety or of prejudice to the public interest and persons involved in proceedings pending before the Commission, no person who is a party to any on-the-record proceeding or his counsel, agent, or other person acting on his behalf, nor any interceder, shall volunteer or submit to any member of the Commission or member of his personal staff, to the presiding officer, or to any employee participating in the decision in such proceeding, any *ex parte* off-the-record communication regarding any matter at issue in the on-the-record proceeding, except as authorized by law; and no Commissioner, member of his personal staff, presiding officer, or employee participating in the decision in such proceeding, shall request or entertain any such communication. For the purposes of this section, the term "on-the-record proceeding" means a proceeding noticed pursuant to Section 3001.17. The prohibitions of this paragraph shall apply from the date of issuance of such notice.

(b) *Placement in public file.* All written *ex parte* communications prohibited by paragraph (a) of this section shall be delivered to the Secretary of the Commission for placement in a public file associated with the case but separate from the record material upon which the Commission may rely in reaching its decision.

(c) *Offer of communications.* A Commissioner, member of his immediate staff, presiding officer or employee participating in the decision in any on-the-record proceeding who receives an offer of any communication concerning any matter at issue in such proceeding shall decline to listen to such communication and explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he will not consider the communication and shall promptly and duly inform the Commission in writing of the substance of and the circumstances attending the communication, so that the Commission will be able to take appropriate action. Such written report shall be included in the file maintained by the Secretary pursuant to paragraph (b) of this section.

(d) *Opportunity to rebut.* Requests for an opportunity to rebut, on the record, any facts or contentions contained in an *ex parte* communication which the Secretary has associated with the record may be filed in writing with the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. Generally, in lieu of actually receiving rebuttal material, the Commission will direct that the alleged factual assertion and the proposed rebuttal be disregarded in arriving at a decision.

On March 23, 1971, pursuant to the President’s mandate in Executive Order No. 11570, the Civil Service Commission developed and published its standards of conduct applicable to all employees of the Postal Rate Commission. These standards likewise contain a detailed procedure applicable to ex parte communications.⁵⁶ As cases move forward under these new rules, an organization of those who practice before the Postal Rate Commission and the Postal Service could well become necessary and important.

**Conclusion**

The sweeping changes called for in the Postal Reorganization Act will take time to become effective. Although it is fair to say that the Act represents a large step forward in a most troublesome area, many problems remain to be resolved. At this stage, the new concepts envisaged in the Act have yet to be fully accepted and implemented. However, if faithfully executed, supported by Congress and the general public and administered fairly and impartially, the Act provides a realistic basis for faster and more efficient postal service at reasonable cost, while affording legal protection for the rights of all citizens.

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⁵⁶ Standards of Conduct, § 3000.735-501, 36 Fed. Reg. 5419 (1971): An employee shall not, either in an official or unofficial capacity, participate in any ex parte communication—either oral or written—with any person regarding (a) a particular matter (substantive or procedural) at issue in contested proceedings before the Commission or (b) the substantive merits of a matter that is likely to become a particular matter at issue in contested proceedings before the Commission when it is a subject of controversy in a hearing held under 39 U.S.C. 3624 or 3661 (c). However, this section does not prohibit participation in off-the-record proceedings conducted under regulations adopted by the Commission for hearings held under 39 U.S.C. 3624 or 3661(c).