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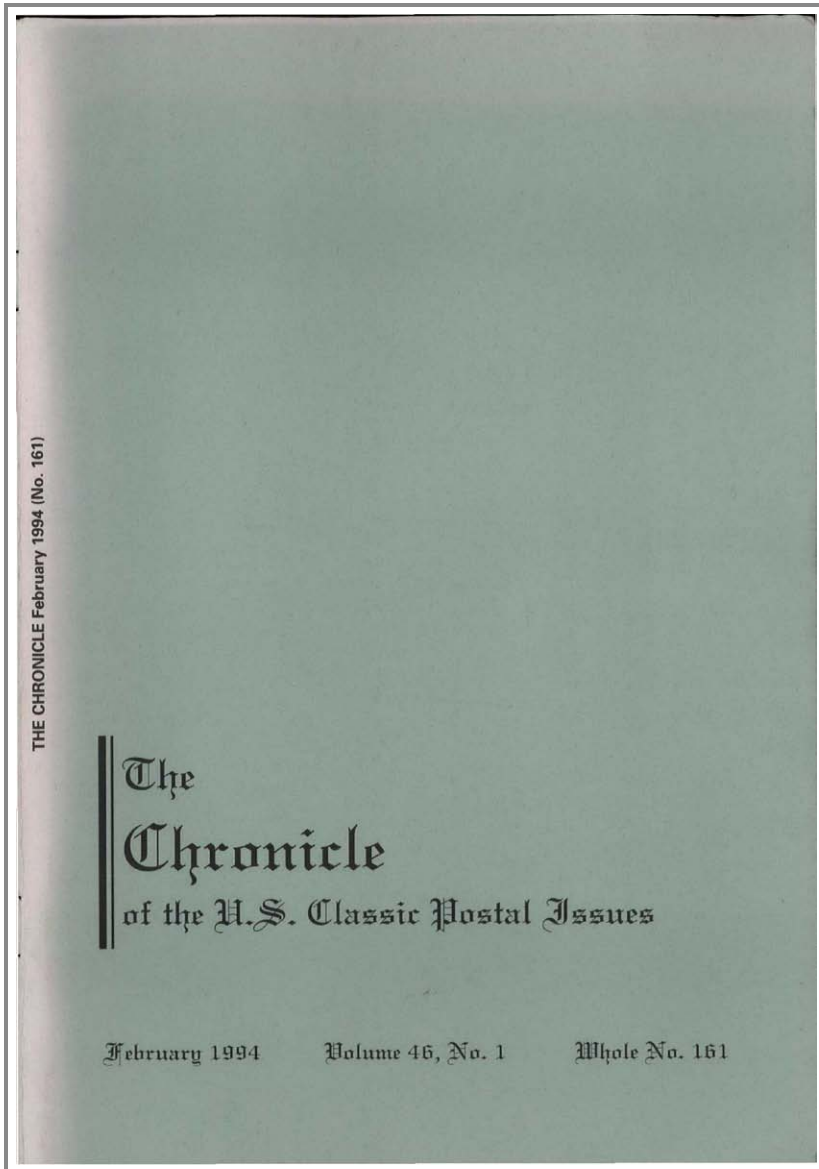


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THE WAR AGAINST THE PRIVATE EXPRESSES: AN EXAMINATION OF THE POST OFFICE'S MONOPOLY POWER

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I. Introduction

The Congress shall have Power . . . *To establish post-offices and post-roads.*¹

On the basis of this seven-word grant of authority, the Constitutional Convention planted the seed for the complex postal system we know today. While seemingly simple and straightforward in their scope, the granting words have given rise to controversy, fueling the struggle between those who would have a strong central government and those who would restrain the exercise of Federal power.

The arguments concerning the Establishment Clause that were proffered in the early days of the Republic reflected growing sectionalism in the Country, as well as the more specific clash between agrarian and urban/industrial/mercantile interests which had revealed itself during the period of Confederation. These points of contention were, in essence: did the Establishment Clause confer upon Congress the power to acquire land and to construct post offices and post roads or did it merely confer the power to *designate* from existing places and routes those that should serve as post offices and post roads? In due course these rudimentary questions changed. Because it is not obvious that the power "to establish" post offices and post roads includes either the power to provide delivery service or the power to create a monopoly to provide such service, another issue arose out of this grant: Was the authority to establish post offices and post roads an exclusive power granted to Congress, giving it a *monopoly*² over the collection, distribution and delivery of the mails? This became the central, critical issue of the 1840's and 1850's as the private mail carriers arose in great numbers, taking advantage of their ability to compete successfully with the Post Office Department. It is this latter question we will examine here.

II. A Brief History of the Post Office Monopoly Power

A. The European and British Experience

There are ample reasons and discoverable models in European and British history to explain, if one is inclined to take a broad view of the interpretation of the Constitution, why the federal government could rightly assume that the Establishment Clause grant offered the Post Office a monopoly.³ These historical precedents, if one accepts them as binding or probative, also help to explain some exemptions from that power that Congress enacted when it passed statutes to carry out its declared monopoly.

The earliest postal systems originated in the ancient world to facilitate the transmission of governmental/royal instructions and information — what von Bertalanffy has described as

the *posts of state*, or more appropriately termed, the posts of courts and princes, tracing back much farther than any organized mode of public communication service.⁴

¹*United States Constitution*, Art.I, Sec.8,Cl.7.

²A monopoly, in its simplest economic terms, is the exclusive control by one group of the means of producing or selling a commodity or service. In a broader sense, the term is also used to designate the exclusive possession of or control over anything. *The American Heritage Dictionary of the English Language*, New College Edition (Houghton Mifflin, 1976).

³We discuss below in Sections II.B, II.C and II.D the arguments "for" and "against" the legitimacy of the assertion of the monopoly power.

⁴Ludwig von Bertalanffy, "The History of the Letter From the Late Middle Ages," *Postal History Journal*, XVII, Whole No. 33 (January 1973), pp. 10-11.

Accordingly, they developed with two corollary features: they were operated and controlled by the state; and, they were available only to the ruling person or entity and to those few citizens who were fortunate enough to fall within the favor of the government. As a practical matter, these restrictions denied the general populace access to the state operated postal system.

Although these first postal systems were government operated and controlled, they were not postal monopolies *per se*, since they were neither created to provide universal mail service, nor were they intended to prohibit others from providing mail service. Rather, they were simply intended as *personal* postal services, designed to perpetuate the domestic and foreign power of the then governing ruler. Private and commercial correspondence was carried out through personal messengers and commercial travelers, for the most part on an *ad hoc* basis. The only apparent restrictions on such communications related to the use of state-operated facilities: roads, stations, carriages and personnel.

With the disintegration of the Roman Empire came an effective cessation of organized governmental postal service in Europe. Charlemagne attempted to reestablish a postal system in 807, but with his death and the division of the kingdom this effort came to naught; by 843 all remnants of a centralized postal system had vanished.

Only the Church retained an effective, organized messenger service linking its by-now widely scattered parishes, bishoprics and monasteries. Gradually, as Europe began to wake from the Dark Ages, other institutions began to grow and expand, and other more or less organized communication networks appeared. Some served the internal needs of their own parent organizations (the university posts, the mail service of the Teutonic Knights, courier systems of individual guilds and commercial houses); others met obligations imposed by local or higher-level authorities (e.g., the butchers' posts of Germany); and, eventually, some developed as purely commercial enterprises to meet the needs of commercial, state and private customers (e.g., the Italian messenger companies). While many of these independent postal enterprises flourished for a considerable period of time, none had more than a localized or parochial significance. Organized state-wide postal service awaited the resurgence of strong, dynamic monarchies during the late Middle Ages—and ultimately, the greatest force in establishing centralized postal communications throughout most of Europe was the Holy Roman Empire, the over-arching political construct which was the theoretical temporal defender of Christianity and successor to Charlemagne's empire.

Evidence suggests that the postal monopoly was the invention of the dynastic monarchies which arose during the Renaissance in Europe. These absolute monarchs, using their plenary power over public affairs, either directly engaged letter carriers to transport official correspondence among the courts of Europe, or they granted concessions to favored subjects to perform this service for the Crown. For instance, the Emperor Maximilian and his successor Charles V each granted the concession for the carriage of letters to the Counts of Thurn and Taxis.⁵

In sixteenth century England the postal monopoly also was dominated by the monarch. The Crown controlled the mails not only to carry its despatches, but also because of its increasing concern with the vulnerability of the Throne to Court conspiracies and to the threat of the use of the mails for treasonable purposes. For this reason, the Crown issued a Proclamation, dated April 26, 1591, which prohibited the carriage of letters to or from countries overseas by any person other than the ordinary posts and messengers.⁶

⁵Howard Robinson, *The British Post Office* (Oxford: Oxford University Press, 1948).

⁶A.D. Smith, *The Development of Rates Of Postage*, reprint ed. (Lawrence, Mass.: Quarterman Publications, Inc., ND), p. 7.

The postal service in the sixteenth century consequently fulfilled a political function for the monarch; it was not yet a revenue raising enterprise.⁷ Letter writing among private citizens (including the merchant class) was discouraged and was carefully supervised.⁸ This changed in the seventeenth century, however, when British merchants began making extensive use of the Post Office. Eventually, as a result, King Charles I on July 31, 1635 issued a Proclamation creating a regular post between London and Edinburgh, and eventually between London and other towns in England.⁹ The postal monopoly, indeed, became quite profitable for the Crown, which now viewed it as a valuable source of revenue.¹⁰

Although the so-called "Long Parliament" had condemned the post office monopoly in 1642 (only to have it reestablished in 1656 by its successor body¹¹), the Cromwellian government, like its predecessor monarchies in England, resisted attempts by independent carriers to provide mail service, and reasserted the monopoly in the Act of Parliament of 1656.¹² Unlike its predecessors, however, Cromwell's government encouraged merchants to use *the government post* in connection with their trading activities. Thus, while the Act of 1656 reasserted the postal monopoly, it also contained two exceptions: letters could be transported by carriers of goods along with the merchandise referred to by them; and, persons were permitted to send letters by messengers "...on purpose for their own affairs."¹³ Upon the occurrence of the Restoration, and the ascension to power of William and Mary, the postal monopoly continued. Private citizens continued to use illegal means to send letters. This occurred because the government could not adequately respond to the demand for better service that developed among the growing mercantile class. Carriers of merchandise secretly handled letters that did not relate to their cargo, and stagecoach drivers and passengers began to carry letters for others.¹⁴

In 1680 William Dockwra, who established the London "Penny Post", argued with good reason that his service did not interfere with the government's monopoly because the Crown provided no comparable (i.e., delivery) service. The government responded by harassing Dockwra which legal actions. Eventually, the Postmaster General took over Dockwra's Penny Post, and made delivery part of its monopoly service. Meanwhile, the practical pressures that argued for evasion of the government postal service continued to mount. As a result, for example, in 1709 Charles Povey invented a system of using bell ringers to collect letters, which he then delivered anywhere in London for one halfpenny. The Post Office prosecuted Povey for violating the monopoly; the court convicted and fined him. Thereafter, the Post Office adopted his system of bell ringers for the government's delivery service.¹⁵

⁷*Ibid.*, pp. 6-7.

⁸*Ibid.*, p. 7.

⁹J Wilson Hyde, *The Post In Grant And Farm* (London: Adam and Charles Black, 1894), pp. 75-77.

¹⁰*Ibid.*, pp. 69-77.

¹¹Parliament acknowledged this shift from a purely political rationale to an economic basis for the postal monopoly in 1656 when it reaffirmed the postal monopoly through appropriate legislation. William Smith, *The History of the Post Office in British North America 1630-1870*, reprint ed. (New York: Octagon Books, 1973), p. 3.

¹²William Smith, *loc. cit.*

¹³Robinson, p. 46. These exemptions, which would be carried forward in United States postal legislation, demonstrated the classic division between possessing a power and choosing to exercise that power.

¹⁴*Ibid.*, p. 67-68.

¹⁵*Ibid.*, p. 69-102.

In 1710, Parliament reorganized the entire postal system with the passage of the Act of Queen Anne.¹⁶ This statute, among other things, prohibited private express carriers from transporting letters not related to their goods, and altogether foreclosed stagecoaches from carrying mail.¹⁷ Parliament, in passing this Act, intended it to be an instrument of taxation, raising revenue for the general Treasury to help finance the War of the Spanish Succession.¹⁸ Evasion of the monopoly remained wide-spread in eighteenth century England.

B. The American Experience: The Case for the Monopoly

In America, the postal system developed as an offshoot of the British monopoly. Thomas Neale, Master of the Mint, petitioned the Crown for authority to establish a postal system in North America. In his memorial accompanying his petition, Neale pointed out that there never had been a post for the conveying of letters within or among Virginia, Maryland, Delaware, New York, New England, East and West Jersey, Pennsylvania and northward as far as the King's dominions reached in North America.¹⁹ On February 17, 1692, William and Mary granted a twenty-one year Patent to Thomas Neale, giving him a monopoly over the posts in all thirteen colonies,

for the receiving and despatching of letters and pacquets, and to receive, send, and deliver, . . . same under such rates and sums of money as the planters shall agree to give.²⁰

This gave Neale the right to receive and retain all profits from the operation of the posts. The Patent exempted the letters of merchants and others who might choose to employ messengers.

Neale did not himself travel to the colonies to carry out his Patent. Rather, he appointed Andrew Hamilton as his on-site deputy, charging Hamilton with the responsibility for organizing the postal service. Hamilton's first task was to attempt to arrange for the operation of the service in each colony. This was not easy to achieve since each colony previously had been free to make its own postal arrangements. Because the Patent was not self-executing, and because there was controversy over the scope of the grant that had been given to Neale, Hamilton was required to seek from each colonial legislature the passage of implementing legislation. He succeeded only in New York, Pennsylvania, Massachusetts and New Hampshire, and then only to a limited extent.²¹

Although these four colonies did comply with the Patent in measured terms, they did so only after passing colonial acts containing mutual obligations, penalties and exceptions to the Patent.²² New York, for example, carved out an exception for all letters going up or down the Hudson River or to or from Long Island, which comprised most of the corre-

¹⁶*Act Of 9 Anne* c.10, §2 (1710), effective 1711.

¹⁷The Act also required that the ship's captain, upon landing, immediately turn over to the Post Office all letters carried on board by him, thereby suggesting that there then existed another popular method of evading the monopoly.

¹⁸A.D. Smith, *op. cit.*, p. 15.

¹⁹William Smith, *op. cit.*, p. 8.

²⁰Quoted in A.D. Smith, p. 60. Actually, the rates were to be same as the rates set forth in the Post Office Act of 1660, or such other rates as the planters were willing to pay.

²¹Virginia went so far as to obstruct Hamilton's efforts by enacting a statute prohibiting the implementation of the Patent. *Act of March 3, 1692*, in *Commonwealth of Virginia Colonial Statutes at Large*, 112 (Hening ed., 1823).

²²U.S. House of Representatives. *Report of the Committee on Post Office and Civil Service*, June 29, 1973, p. 56.

spondence in New York colony during this period.²³ New York's act of selectively accepting the Patent not only reflected its desire to gather to itself all of the mail revenue from letters that originated and terminated within its borders, it also suggested general growing hostility toward the British system of taxation under the Act of Queen Anne (1710) through the use of the postal monopoly by the Home Office.²⁴ Evasion of Neale's monopoly persisted, with stage drivers giving letters to passengers to carry, or themselves tying letters to bundles of straw so that they could claim that the letters related to cargo.²⁵

The postal system struggled under Neale and Hamilton. Because the geographic area to be serviced was vast and the population was sparse, revenues were insufficient to meet the cost of operations. As a result, Neale suffered great personal financial losses under the Patent. After he died bankrupt, his successors to the balance of the term, Hamilton (and, ultimately, Hamilton's widow) and a creditor named West, were unable to reverse the situation. Eventually, the Crown purchased the remainder of the Patent's term.

Subsequent management of the colonial post by the British Postmasters General was without distinction. The Crown's Parliamentary Post Office continued to serve the colonies poorly. For example, the Home Post Office rarely approved requests from the colonies for extensions of postal routes. If a community not having postal service wanted it, the local government generally was compelled to take up private subscriptions from its citizens, and to hire its own post riders. The assemblies of five of the thirteen colonies established individual postal systems in this manner to supplement the British post, giving rise to postal systems that ultimately would compete with the Crown's post.

Individuals in the colonies, as well as communities, attempted to supplement or to substitute for the unsatisfactory Parliamentary Post. William Goddard of Baltimore, the publisher of the *Maryland Journal*, suggested the establishment of "an American Post Office on Constitutional principles."²⁶ The Committee of Correspondence in Boston, early in 1774, sent Goddard to Salem with a letter of introduction suggesting that it would be advisable to establish an independent post office in the colonies. His mission to Salem was successful. The Committee of Correspondence in Salem, replying to its counterpart in Boston a few days after Goddard's visit, wrote that the act of the British Parliament establishing a post office in the colonies was dangerous in principle. The Salem Committee demanded preemptory opposition, and it raised funds to establish a post office in Salem. With the encouragement he received from Salem and Boston, Goddard laid his plan before all the Committees of Correspondence throughout the colonies. On May 2, 1774, he placed a notice in a Boston newspaper, inviting the public to make subscriptions.²⁷ While his fund-raising efforts met with much success, he was not triumphant in realizing his postal system for a variety of reasons, including his inability to get along with people.²⁸

²³New York, however, in 1692 also passed a law which stated that any persons or body politic or corporate other than the Postmaster General presuming to "carry, re-carry, or deliver letters for hire, or to set up or employ [*sic*] any foot-post, horse-post or packet-boat whatsoever" for the carrying of letters or packets should forfeit 100 pounds. A.D. Smith, p. 60, n.1.

²⁴Rich, *The History Of The United States Post Office To The Year 1829* (Harvard University Press, 1924), pp. 14-15. The Post Office Act of 1710 made it unnecessary to continue to consult with each colonial legislature in order to set charges for the conveyance of letters. Now, the supreme control and management of the postal system throughout the British Empire, beyond the seas as well as at home, rested with the Postmaster General in England. The Act fixed the postal charges at uniform rates. It even provided for the disposal of surplus revenue arising from the operation of the post office. William Smith, *op. cit.*, p. 19.

²⁵Rich, *op. cit.*, pp. 43-44.

²⁶*Pickering Papers*, Vol. 39 (Mass. Hist. Soc.), quoted in William Smith, *op. cit.*, p. 63.

²⁷William Smith, *op. cit.*, pp. 60-65.

²⁸*Ibid.*, p. 63.

Substantively, however, his failure to institute a system of provisional posts contesting the Parliamentary Post mostly resulted from the closing of Boston Port by the British on June 1, 1774, and the concurrent interest that the Continental Congress was beginning to show concerning the establishment of a centralized patriotic post office.²⁹

In Philadelphia in September 1774, the delegates to the Continental Congress assembled and, by degrees, gradually took upon themselves all of the functions of government. The question of providing for the speedy and secure conveyance of intelligence was submitted to the Congressional Delegates on May 29. Congress instructed a committee, of which Benjamin Franklin was a member, to render a report concerning the creation of a patriot post.³⁰ On July 26, 1775, with the report of the committee before it, the Continental Congress established its own Post Office, operating in opposition to the British Parliamentary Post.³¹

The first official statement by the new government concerning the postal monopoly power was set forth in the Articles of Confederation, which provided, *inter alia* (in the form finally adopted, effective March 1, 1781),³² that Congress would have,

the sole and exclusive right and power of . . . establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office...³³

Three points are obvious in this grant of power: it was to be “*sole and exclusive*,” thereby evidencing the intent to create a monopoly; the monopoly was to apply only to *inter-state* service; and, the postage was to be sufficient to cover only the expenses of operating the system (there was to be no surplus revenue, i.e., a tax, as there had been under the Parliamentary colonial system).

In 1782, under the power granted by the Articles of Confederation, the Continental Congress revised all prior regulations affecting the Post Office, and reduced them to one

²⁹*Pickering Papers* (Mass. Hist. Soc.), Vol. 39, 38 (Mar.21,1774), 75 (April 4, 1774), 86 (April 20, 1774); cited in A.D. Smith, *op. cit.*, p. 63. Goddard’s proposal was for a partially decentralized post office, created and maintained by subscription. Control of the post would rest in the hands of a committee, which would be appointed annually by the subscribers. The committee would appoint postmasters and would hire post riders. It would also fix the rates of postage. The whole operation would be under the direction of a postmaster general, who would be elected annually by the subscribers.

³⁰*2 Journals of the Continental Congress* [hereafter *JCC*] 71 (1774).

³¹*Ibid.*

³²When the Articles of Confederation were submitted to the states for their consideration, there was no objection to the grant of the postal power because the grant was limited in scope. Originally, *in the first draft*, Article VIII gave the United States “the sole and exclusive right and power of . . . establishing and regulating post-offices throughout all the United Colonies, on lines of communication from one colony to another.” It further provided that, *the United States* “*shall never impose or levy any taxes or duties except in managing the post office.*” 5 *JCC* 551 (1780). [Emphasis added] This suggests that Congress’ power, as set forth in the first draft, reached only inter-colonial mail, and left the regulation of internal, intra-colonial mail to each state. The scope of the postal power set forth in the second draft was identical to the power adopted as part of the final Articles. The taxing restriction, however, was relaxed in the final Articles. *Ibid.*

³³Art.IX, para. 4. The Continental Congress considered establishing a postal monopoly in 1775 in order to suppress the British Post, but the proposal was rejected. 3 *JCC* 488 (1775). In 1776 the Continental Congress indirectly moved toward establishing a monopoly when it reduced the wages of government messengers who carried private letters or packets. *Act of Nov. 5, 1776*, 6 *JCC* 927 (repealed 1782). A Report in 1782 suggests that in enacting the 1776 statute Congress may have intended to create a monopoly, 22 *JCC* 123 (1782), but it is not certain. Clearly such was the intent when the Ordinance of 1782 was passed.

statute.³⁴ This Ordinance, too, provided for a Post Office monopoly:

The Postmaster General of these United States for the time being... and [his] agents, post-riders, expresses and messengers, respectively, and *no other person whatsoever*, shall have the receiving, taking up, ordering, despatching, sending post or with speed, carrying and delivering of any letters, packets or other despatches from any place within these United States for hire, reward, or other profit or advantage...³⁵ [Emphasis added]

Note that the Ordinance did not carve out an exemption for letters relating to cargo, although it did elsewhere exempt persons who were on their own business carrying their own letters. It also permitted the creation of private cross posts and post roads with the approval of the Postmaster General, where the general Post Office did not yet provide service, until government service commenced.³⁶

Although the Ordinance was clear that the federal government had a monopoly over the carriage of the mail, several states presumed to grant monopolies over post roads for stage routes within their jurisdictions. This, in turn, led to the clandestine carriage of letters by the stage operators. Virginia in 1784 granted a monopoly over the main post road to Nathaniel Twining and John Hoomes for the road between Alexandria and Petersburg;³⁷ Maryland in 1785 granted a monopoly to Gabriel Van Horne (Twining's partner) to run stages between the Susquehanna and Potomac Rivers.³⁸ This grant gave Twining and Van Horne (because of their partnership) virtual control of the main post road from Philadelphia to Alexandria, thereby arousing opposition from within the Commonwealth of Virginia and the State of Maryland, as well as from the federal government.³⁹ New Jersey, on the other hand, did not grant monopolies, but encouraged the brisk business in staging that had developed. In 1786, the State began to levy tribute by exacting an annual tax of \$400 from each stage line crossing New Jersey between New York and Philadelphia. This, too, brought protests from the federal government.⁴⁰

In December 1784, Postmaster General Hazard instituted suit against Gershom Johnson of Philadelphia for his practice of regularly carrying letters on his stage line between Philadelphia and New York. Although Johnson was typical of most stage drivers in this regard, it is likely that Hazard wanted to make an example of him because of the importance of Johnson's route.⁴¹ Hazard wrote to Congress that

[n]otwithstanding the Prosecution of Johnston [*sic*] Many Letters ... are carried by the Owners of Stages, or their Agents; but it is done in such a Way as to evade the Ordinance ... Perhaps the Wisdom of Congress may find a Remedy for this Evil which, there is Reason to think, is a growing one.⁴²

³⁴*Ordinance of Oct. 18, 1782*, 23 JCC 670 (1782).

³⁵A comparison of this language with the almost identical language of the Act of Queen Anne (1710) demonstrates that in 1782, at least, Congress intended to incorporate into its postal system the British concept of postal monopoly.

³⁶For a discussion of private post roads under the Confederation and Constitutional Posts, see Robert J. Stets, "U.S. Government-Authorized Private Mail Service 1787-1800," *Chronicle* 156 (Nov. 1992), 233ff; 157 (Feb. 1993), 9ff; and 158 (May 1993), 83ff.

³⁷*XI Commonwealth of Virginia Statutes at Large*, 395, 467 (1784) (Hening ed., 1823).

³⁸*Index to the Journals of the Senate and House of Delegates of the State of Maryland* (Annapolis 1856-1857).

³⁹*Letterbook "B" of the Postmaster General*, p. 21.

⁴⁰*American State Papers, Class VII [Post Office Department]*, "Tax on Mail Stages in New Jersey, Feb. 9, 1793," p. 15 (Theron Wierenga reprint ed., 1981).

⁴¹*LXI Papers of the Continental Congress*, foll. 181-185.

⁴²*Ibid.*

During the period following the passage of the Ordinance of 1782 (up to the passage of the Act of 1792 which reorganized the postal system), Congress took no important action concerning the Post Office. The records of the Constitutional Convention and of the ratification debates in the several states show that there was virtually no debate over the postal clause.⁴³ In the Convention, on June 15, 1787, William Paterson of New Jersey suggested that “in addition to the power vested in the United States by the existing articles [sic] of Confederation, *they be authorized to pass acts for raising a revenue . . . by a postage on all letters and packages passing through the general Post Office*, to be applied to such federal purposes as they shall deem proper and expedient.[Emphasis added]”⁴⁴ Paterson’s proposal obviously was not concerned with the management of the Post Office; he submitted his plan in the context of the debate over the proposed scope of Congress’ taxing power: whether Congress should be empowered to tax directly or whether Congress should be required, as it had been under the Articles of Confederation, to rely on indirect taxes and requisitions received from the states. Those delegates who opposed giving Congress the power to levy taxes directly, such as Paterson, could better support their position if they could propose other sources of revenue for the government. The Paterson proposal sought to do this, but the Committee of Detail, which issued its Report to the Convention on August 6, did not accept Paterson’s plan.⁴⁵ Indeed, the report ignored the revenue raising aspects of Paterson’s proposal; it simply provided in Article VII that “The Legislature of the United States shall have the power . . . to establish post-offices.”⁴⁶ Ten days later the Committee recommended that the phrase “and post roads” be added. Congress accepted this amendment.⁴⁷

This absence of controversy over the postal clause suggests that although the language of the Establishment Clause was vague, there probably was general agreement about what it meant and the scope of authority it gave to Congress. The Establishment Clause, I suspect, probably was intended to achieve no more than to validate in the Constitution the powers that the Continental Congress had exercised under the Articles of Confederation. If I am correct, this would explain why the *Federalist Papers* mentioned the Establishment Clause only once:

The power of establishing post roads must, in every view, be a harmless power and may perhaps, by judicious management become productive of great public conveniency.⁴⁸

It is not surprising that this was the only reference to the postal system in the *Federalist Papers* since the establishment of post offices and post roads was not then considered to be complex, nor was the creation of the post office then thought to offer political patronage benefits. However, the Delegates to the Convention did view the operation of a

⁴³*Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (W.W. Norton & Company, 1987), pp. 118-119; 389; 470; 620; 2 Elliot, *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution . . .*, 406 (1845).

⁴⁴*Notes of Debates . . . Madison*, pp. 118-119; Ferrand, *Records of the Federal Convention*, Vol. II, pp. 158-159.

⁴⁵*Ibid.* The Paterson proposal, while perhaps acquitting him of his responsibility to suggest an alternative to direct taxation, could not have been seriously considered by the Constitutional Convention. In 1787 the Post Office had returned profits of approximately \$5000; government domestic expenditures in that year were more than \$337,000. Postal revenues would not have compensated for the power to levy taxes. 34 *JCC* 463-464.

⁴⁶*Notes of Debates . . . Madison*, p. 389; Ferrand, *op. cit.*, Vol. I, p. 177.

⁴⁷*Notes of Debates . . . Madison*, p. 470.

⁴⁸*Federalist Papers*, No.42 (Modern Library ed.).

postal system as essential to the development of the new nation.⁴⁹ The First Congress' debates concerning the postal system reveal that the legislators' predominant concern was to promote the circulation of newspapers and periodicals.⁵⁰ The Delegates perceived the Post Office as assuring and protecting the exchange of information.

The fact that the postal system historically had always been conducted under the auspices of government also might explain why the very limited discussions about the federal post office, both in the *Federalist Papers* and in the debates at the Convention, were concerned with the implementation of the postal system rather than with its justification. It is my premise that because private enterprise was then in its infancy and could not have fulfilled the postal needs of the frontier nation, the Delegates took for granted that the central government would provide this service. I further propose that the colonial and Confederation experience of operating under multiple postal systems functioning in and among the colonies and states contended for a strong central postal authority. Since, I believe, the question of private enterprise supplying the needed postal service never entered the Constitutional debates, the specific question of the government's monopoly probably was never formally considered. If I am correct, then the issue of the constitutionality of the monopoly power must, in default of other evidence, be answered by history. If this is so, then the Framers must have had in mind that *for approximately one hundred-fifty years, both in England and in the colonies, the postal service had been a monopoly of the government.* The postal service also had remained a monopoly under the Articles of Confederation. This premise is supported by the first postal Act of Congress adopted after the effective date of the Constitution (March 4) in 1789, when it was said that

the regulations of the post-office shall be the same as they last were under the regulations and ordinances of *the late Congress.*⁵¹ [Emphasis added]

(to be continued)

⁴⁹George Washington, when he recommended the postal provisions to Congress which became part of the Act of 1792, pointed out the political importance of such a service as aiding the diffusion of the knowledge of the laws and proceedings of the Government. *Message to Congress*, October 25, 1791.

⁵⁰*II Annals of Congress*, 1580-82, 2236, 2357, 2409 (1st Cong., Gale & Seaton ed., 1834); *III Annals of Congress*, 214, 219, 237, 241, 254, 282-85, 298 (2d Cong., 1849 ed.).

⁵¹Act of Sept. 2, 1789, Ch. 16, *1 Stat. 70* (1789). This statute was continued in force by the Acts of Aug. 4, 1790, *1 Stat. 178* (1790) and Mar. 3, 1791, *1 Stat. 218* (1891).

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