

2010

## Can the President Read Your Mail? A Legal Analysis

Anuj C. Desai

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Anuj C. Desai, *Can the President Read Your Mail? A Legal Analysis*, 59 Cath. U. L. Rev. 315 (2010).  
Available at: <https://scholarship.law.edu/lawreview/vol59/iss2/2>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

## ARTICLES

### CAN THE PRESIDENT READ YOUR MAIL? A LEGAL ANALYSIS

*Anuj C. Desai*<sup>+</sup>

I. BACKGROUND.....	319
II. THE SEALED-LETTER PROVISION .....	320
A. <i>Introductory Analysis of Statutory Language</i> .....	321
B. <i>The Sealed-Letter Provision’s Provenance and Legislative History</i> .....	323
1. <i>Prohibition on Mailing Obscene Matter (1865)</i> .....	324
2. <i>Prohibition on Mailing Lottery-Related Matter (1868 &amp; 1872)</i> .....	326
3. <i>Prohibition on Mailing Matter Designed to Further Counterfeit-Money Schemes (1889)</i> .....	328
4. <i>Addition of Letters to Prohibition on Mailing Obscene Matter (1888)</i> .....	329
5. <i>Espionage Act (1917)</i> .....	332
6. <i>Codification</i> .....	338
7. <i>The 1970 Postal Reorganization Act</i> .....	343
C. <i>Principles Underlying Communications Privacy</i> .....	344
D. <i>A Linguistic and Historical Analysis of the Concept of a Letter</i> .....	346
1. <i>The Dictionary Meaning of the Term “Letter”</i> .....	346
2. <i>The Term “Letter” Excludes Packages and Parcels</i> .....	347
3. <i>“Letter” Only Includes “Communications” or “Correspondence”</i> .....	349
4. <i>Evidence Suggesting a Broader Meaning of the Term “Letter”</i> .....	353
E. <i>Other Related Statutory Prohibitions</i> .....	357
III. THE FOURTH AMENDMENT .....	359

---

<sup>+</sup> University of Wisconsin Law School; Hopkins-Nanjing Center, Nanjing, China (2009–10). The author wishes to thank Jennifer Hartung for her research assistance and the law librarians at the University of Wisconsin Law Library, especially Bill Ebbott, Mike Morgalla, Cheryl O’Connor, and Jenny Zook, for helping find a variety of obscure resources. Additionally, the author thanks Mary Quandt and Elise Volkmann for their word processing help; Ann Althouse, Fabio Arcila, Tricia Bellia, Andy Coan, Thomas Healy, Orin Kerr, Michael Ravnitzky, Paul Schwartz, David Stover, Ian Volner, and Jason Yackee for their comments; and Nina Mendelson for alerting him to the initial news story. Finally, the author received financial support for this Article from a Doyle Summer Fellowship and a Charles F. Luce Summer Research Fellowship from the University of Wisconsin Law School.

IV. THE PRESIDENT'S SIGNING STATEMENT .....	365
V. CONCLUSION .....	370

The photo on the Internet showed George W. Bush peering over his reading glasses and grinning slyly at the camera. The caption screamed, "I've got mail! And it's yours!"<sup>1</sup> and the accompanying *New York Daily News* story involved the Postal Accountability and Enhancement Act (PAEA)—the first major change in postal law since 1970.<sup>2</sup> The story focused on a provision of the Act that addresses the legality of opening first-class mail and concluded that President Bush's signing statement to the law had "quietly claimed sweeping new powers to open Americans' mail without a judge's warrant."<sup>3</sup>

As one might imagine, the matter did not end there. The story ricocheted around the Internet, provoking the ritual Bush-hating<sup>4</sup> and Bush-defending outrage.<sup>5</sup> The story even made its way to the late-night comedy shows, with *Late Night* host Conan O'Brien joking, "President Bush is claiming that a new postal law gives him the authority to read anyone's letters without a warrant. . . . [I]f you're upset about the law, you can let Bush know by writing to your sister."<sup>6</sup> The *New York Times* and *Washington Post* also picked up the story.<sup>7</sup> Democratic Senator Russell Feingold of Wisconsin sent an open letter

---

1. Posting of John Hinderaker to Power Line Blog, <http://www.powerlineblog.com/archives/2007/01/016123.php> (Jan. 4, 2007, 12:28 EST) [hereinafter Hinderaker].

2. James Gordon Meek, *W Pushes Envelope on U.S. Spying*, N.Y. DAILY NEWS, Jan. 4, 2007, at 5; see also Peter Hettich, *Governance by Mutual Benchmarking in Postal Markets: How State-Owned Enterprises May Induce Private Competitors to Observe Policy Goals*, 32 U. DAYTON L. REV. 199, 199–200 (2007).

3. Meek, *supra* note 2, at 5.

4. See, e.g., Posting of Jeralyn E. Merritt to Talk Left, <http://www.talkleft.com/story/2007/1/4/121210/6287> (Jan. 4, 2007, 11:12 EST) (asserting that the signing statement reflected President Bush's belief that the executive branch "can trump the will of Congress and the judiciary").

5. See, e.g., Hinderaker, *supra* note 1 (claiming that the *New York Daily News* article has the story "backward").

6. Funnies: Complaint for Bush? Write Your Sister, <http://abcnews.go.com/ThisWeek/Funnies/story?id=2776169> (last visited Feb. 4, 2010); see also Posting by Jonathan Ide to Past Peak, [http://www.pastpeak.com/archives/2007/01/todays\\_bush\\_jok\\_861.htm](http://www.pastpeak.com/archives/2007/01/todays_bush_jok_861.htm) (Jan. 9, 2007, 9:04 EST) ("We have a new person in the mail room opening mail, President Bush. The president now says the government has the right to open anyone's mail at any time without a warrant. How crazy is that? President Bush finally decided he wants to read something and it's our mail. Hey, how about those memos on your desk? – [Tonight Show host] Jay Leno"); Don Davis, *Bush Defends Right to Open Mail: Claims Letter on 9/11 Plot Found Last Week*, THE SATIRICAL POLITICAL REPORT, Jan. 5, 2007, <http://satiricalpolitical.com/2007/01/05/bush-defends-right-to-open-mail-claims-letter-on-911-plot-found-just-this-week/>.

7. See Dan Eggen, *Bush Warned About Mail-Opening Authority*, WASH. POST, Jan. 5, 2007, at A3; Eric Lichtblau, *White House Denies Switch in Mail Policy*, N.Y. TIMES, Jan. 5, 2007, at A13.

to the president requesting clarification.<sup>8</sup> Republican Senator Susan Collins of Maine, one of the principal drafters of the postal reform bill, introduced a Senate Resolution “reaffirming the constitutional and statutory protections accorded sealed domestic mail,”<sup>9</sup> and the American Civil Liberties Union and the Center for National Security Studies made a Freedom of Information Act request to further investigate the president’s signing statement.<sup>10</sup> The United States Postal Service (Postal Service) subsequently issued a terse statement denying that the signing statement changed policy in any way.<sup>11</sup>

The *New York Daily News* story cited legal experts who concluded that the president’s “claim [was] contrary to existing law and contradicted the bill he had just signed.”<sup>12</sup> But was the president’s claim in fact contrary to existing law and, if so, in what ways? In this Article, I will analyze the regulatory, statutory, and constitutional issues related to the president’s signing statement and the statutory provision the statement purported to interpret. In particular, I will address the legal question of whether the government may open first-class mail without a warrant and, if so, under what circumstances. In the process, I will draw three fundamental distinctions that have been ignored by commentators thus far: (1) the distinction between a *letter*—which, roughly speaking, consists of a message, communication, or correspondence—and *other mail matter*; (2) the distinction between *opening* mail and *reading* it; and (3) the distinction between *detaining* a piece of mail—in particular, for the purpose of obtaining a warrant—and *opening* it.

Under the best reading of the statute, the relevant provision in the PAEA<sup>13</sup> only applies to letters sent via first-class mail, and it bars the opening of letters without a warrant subject to only one relevant exception: the “physical searches” provisions in the Foreign Intelligence Surveillance Act (FISA).<sup>14</sup> There is no exigent-circumstances exception for first-class letters, although the

---

8. Senator Russell D. Feingold, *An Open Letter to President Bush: So Now You Want to Snoop Through Our Mail*, COUNTERPUNCH, Jan. 9, 2007, available at <http://counterpunch.org/feingold01092007.html>.

9. S. Res. 22, 110th Cong. (2007).

10. See Letter from Ben Wizner, Staff Attorney, Am. Civil Liberties Union, & Brittany Benowitz, Staff Attorney, Ctr. for Nat’l Sec., to U.S. Postal Serv. (Jan. 22, 2007), available at [http://www.aclu.org/pdfs/safefree/mail\\_uspsltr\\_20070122.pdf](http://www.aclu.org/pdfs/safefree/mail_uspsltr_20070122.pdf); see also Press Release, Am. Civil Liberties Union, ACLU Seeks Answers and Congressional Oversight on President Bush’s Snooping Authority (Jan. 4, 2007), available at <http://www.aclu.org/safefree/nsaspying/27843prs20070104.html>; Press Release, Am. Civil Liberties Union, ACLU and CNSS Seek Records on Warrantless Mail Surveillance (Jan. 22, 2007), available at <http://www.aclu.org/safefree/spyfiles/28091prs20070122.html>.

11. See Press Release, Thomas Day, Senior Vice President, Gov’t Relations, U.S. Postal Serv., Comment on President’s Signing Statement Accompanying Postal Accountability and Enhancement Act (Jan. 4, 2007), available at [http://www.usps.com/communications/news/press/2007/pr07\\_day0104.htm](http://www.usps.com/communications/news/press/2007/pr07_day0104.htm).

12. Meek, *supra* note 2, at 5.

13. Postal Accountability & Enhancement Act, 39 U.S.C. § 404 (2006).

14. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1822 (2006).

government may *detain* a letter for the purpose of obtaining a warrant. Thus, if the government wishes to open a first-class letter in order to read its contents, it must either obtain a warrant or follow the procedures outlined in FISA's physical searches provisions.

On the other hand, the government *may* open other types of mail without a warrant subject only to the strictures of the Fourth Amendment. The Fourth Amendment does contain an exigent-circumstances exception to the ordinary rule that a warrant is required for all searches.<sup>15</sup> Thus, scenarios that might involve hazardous materials, such as anthrax or a ticking time bomb, would in many circumstances fall under this exception. Key, however, is that the *statutory* prohibition on opening first-class letters does not apply to mail that cannot be classified as a letter.

In Part I, I provide a brief background of the statutory provision barring the opening of letters, as well as the president's signing statement and the ensuing controversy. In Part II, I analyze the statutory provision, explaining in particular the meaning of the term "letter." Part II will also address two other statutes that might prohibit the government from opening mail. In Part III, I discuss the prohibition on the opening of first-class mail, which dates back to one of the United States Supreme Court's first Fourth Amendment decisions. Finally, in Part IV, I analyze the president's signing statement;<sup>16</sup> the statement indicated that President Bush was interpreting the statute as permitting the government to open mail (1) "in exigent circumstances, such as to protect human life and safety against hazardous materials"; and (2) "for physical searches specifically authorized by law for foreign intelligence collection." Under the best reading of the statute, I conclude that the first point made in the statement is either wrong, because it makes claims that the statute does not authorize, or irrelevant, because it addresses circumstances not covered by the statute. The second of the two points likely reflects an accurate description of the law. It is possible to interpret President Bush's second point as a claim of authority beyond that permitted by law and, in particular, as an implicit claim that the law permits the opening of first-class letters pursuant to the so-called Terrorist Surveillance Program—the National Security Agency (NSA) surveillance program first made public by the *New York Times* in December 2005.<sup>17</sup> But President Bush's decision not to reauthorize the

---

15. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

16. This particular signing statement falls into the category of what Professors Curtis A. Bradley and Eric A. Posner have called "interpretive (or legislative history) signing statements," through which "the president provides his understanding of what the bill means, without trying to appeal to his constitutional powers." Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 314 (2006); *see also* Statement on Signing the Postal Accountability & Enhancement Act, 42 WKLY. COMP. PRES. DOC. 2196 (Dec. 20, 2006) [hereinafter Signing Statement].

17. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

program,<sup>18</sup> coupled with the enactment of the Protect America Act of 2007<sup>19</sup> and the FISA Amendments Act of 2008,<sup>20</sup> may well render that possibility moot—at least for the immediate future.

### I. BACKGROUND

On December 20, 2006, President Bush signed into law the Postal Accountability and Enhancement Act, which was the first major postal statute since the Postal Reorganization Act of 1970.<sup>21</sup> Its principal purpose was to enable the Postal Service to respond better to changed market conditions, particularly in the competitive area of shipping.<sup>22</sup> But the statute included one section, § 1010(e), that had little to do with the Act's primary purpose, a provision that was billed as a "technical" amendment that merely recodified one section of 39 U.S.C.—the title dedicated to the Postal Service—moving it from 39 U.S.C. § 3623(d) to 39 U.S.C. § 404(c).<sup>23</sup> The recodification did not change a single word in the statutory provision.<sup>24</sup> The provision states:

The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.<sup>25</sup>

---

18. See Letter from Alberto Gonzalez, U.S. Attorney Gen., to Senators Patrick Leahy (D-VT) and Arlen Specter (R-PA) (Jan. 17, 2007), *reprinted in* 153 CONG. REC. S646 (2007).

19. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (codified in scattered sections of 50 U.S.C.). The Protect America Act of 2007 was a stopgap amendment to FISA that permitted the NSA to engage in certain foreign intelligence-gathering without any court approval; it had a sunset provision and expired on February 16, 2008. § 6(c), 121 Stat. at 557. During that period, the law thus strongly reduced any need to act outside of FISA. I bracket here the important question whether the Protect America Act might violate the Fourth Amendment in some circumstances. See *generally In re Directives* [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008) (upholding the Protect America Act against an as-applied Fourth Amendment challenge by a telecommunications provider).

20. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 50 U.S.C.). Section 107 of the FISA Amendments Act of 2008 amends § 304 of FISA to ease the requirements for the government when it seeks physical searches for foreign intelligence purposes. § 107, 120 Stat. at 2462.

21. Hettich, *supra* note 2, at 200.

22. *Id.* at 229.

23. 39 U.S.C. § 404(c) (2006).

24. Compare *id.*, with 39 U.S.C. § 3623(d) (2000).

25. 39 U.S.C. § 404(c).

Upon signing the law, the president appended a signing statement declaring the executive branch's view on several provisions, including the new 39 U.S.C. § 404(c).<sup>26</sup> The signing statement stated that

[t]he executive branch shall construe subsection 404(c) of title 39, as enacted by subsection 1010(e) of the Act, which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances, such as to protect human life and safety against hazardous materials, and the need for physical searches specifically authorized by law for foreign intelligence collection.<sup>27</sup>

As I noted in the Introduction, a major controversy then ensued. I will refer to this provision—former 39 U.S.C. § 3623(d) and current 39 U.S.C. § 404(c)—as the sealed-letter provision and will explain its meaning in the next section. In doing so, I will answer a seemingly simple question: Does the provision permit the president—or, more likely, an NSA or Justice Department official acting pursuant to a presidential directive—to open mail without a warrant?<sup>28</sup>

## II. THE SEALED-LETTER PROVISION

We can look at the sealed-letter provision using several of the tools of statutory interpretation. Starting with the text, the statute's prohibition on opening mail applies only to "letters," which can be defined roughly as "correspondence" or "communication."<sup>29</sup> The text of the statute thus strongly suggests that the statute does not protect parcels, packages, or other mail matter, even if sent via first-class mail. For a pure textualist,<sup>30</sup> therefore, since the interpretation of the statute ultimately requires one to interpret the word

---

26. See Signing Statement, *supra* note 16.

27. *Id.*

28. I will not address the related issue of mail covers, which involves the recording of information from the outside cover of sealed mail. 39 C.F.R. § 233.3 (2005). Mail covers can be requested by postal investigators or law enforcement authorities at all levels of government for the purposes of obtaining information for a number of reasons enumerated in the regulation. *Id.* Mail covers are approved by high-ranking postal inspectors but are executed without any judicial oversight; no warrant is necessary for government officials to obtain a mail cover order. *Id.* Little is known about the extent to which law enforcement and postal inspectors seek mail covers, but the process has occasionally been reported in the press. See, e.g., *All Things Considered: Mail Cover* (NPR radio broadcast Apr. 1, 2002), available at <http://www.npr.org/templates/story/story.php?storyId=1140959>; Mark Benjamin, *The Government is Reading Your Mail*, SALON, Jan. 5, 2007, available at [http://www.salon.com/news/feature/2007/01/05/mail\\_cover/print.html](http://www.salon.com/news/feature/2007/01/05/mail_cover/print.html).

29. See *infra* Parts II.A and II.D.

30. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (arguing that interpretation of legal texts should focus on the text itself); see also *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279–81 (1996) (Scalia, J., concurring) (explaining that "a law means what its text most appropriately conveys").

“letter,” that would end the matter. Focusing solely on legislative history,<sup>31</sup> things become a little more complicated because of the provision’s long and complicated history. Still, the best reading of the principal intentions of the numerous statutory drafters is that the provision was meant to protect the privacy of correspondence and, in particular, to prevent others from reading it.<sup>32</sup> Finally, from a broad purposivism perspective<sup>33</sup> incorporating pragmatic concerns, the statute can be thought to reflect the broader principles of communication privacy, principles that apply to correspondence but not to ordinary, non-communicative goods that are transmitted through the postal system.<sup>34</sup>

Ultimately, then, the best interpretation of the sealed-letter provision limits its protection to “letters”—mail matter that falls into the category of correspondence or communication. This interpretation makes particular sense in light of not only the text, but also the provision’s legislative history and its broader purposes and policies.

#### A. Introductory Analysis of Statutory Language

Virtually all theories of statutory interpretation begin with, or at least incorporate, the text of the statute.<sup>35</sup> The sealed-letter provision has four sentences. The first is a requirement that the Postal Service maintain “one or more classes of *mail* for the transmission of *letters* sealed against inspection.”<sup>36</sup> The statute thus makes a clear distinction between the word “mail” and the word “letter.”

The second and third sentences relate to the structure of rates that can be charged for the relevant class of mail and the speed at which that class of mail

---

31. See generally 3 LEARNED HAND, *How Far Is a Judge Free in Rendering a Decision?*, in THE SPIRIT OF LIBERTY 79, 82–83 (Irving Dillard ed., Vintage Books 1959) (1935). Starting with the view that legislation is analogous to a contract among members of Congress and (usually) the president, some scholars argue that the goal of determining statutory intent ought to be to determine the nature of the compromise made among the relevant political actors. These scholars argue that the preferences of veto players in the legislative compromise—the pivotal legislators necessary for passage—should guide judicial interpretation. See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 705–07 (1992). However, the various legislative histories I will discuss do not lend themselves to a determination of who, if anyone, was a relevant veto player.

32. See *infra* Part II.B.

33. See generally HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING & APPLICATION OF LAW 1377 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to HART & SACKS, supra*, at lxvii–lxviii, xc–xcii, cv–cvi, cxxviii–cxxxii (describing the importance of Hart and Sacks’s purposivist theory of statutory interpretation and the impact it has had on the law).

34. See *infra* Part II.C.

35. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987).

36. 39 U.S.C. § 404(c) (2006) (emphasis added).



must flow.<sup>37</sup> Because they are not relevant for understanding the statute's privacy protection, I will ignore them. This leaves the fourth sentence, which states that

[n]o letter of such a class of domestic origin shall be opened *except* under authority of a search warrant authorized by law, *or* by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, *or* pursuant to the authorization of the addressee.<sup>38</sup>

Notice the structure of the sentence. It effectively establishes a rule prohibiting the opening of a letter sent via the relevant class, but at the same time, provides three exceptions: (1) when there is a search warrant, (2) when the postal authorities need to determine where to send the letter, or (3) when the addressee consents.<sup>39</sup> It is clear, then, that the statute contemplates exceptions to the general rule that a letter sent via the relevant class of mail cannot be opened.<sup>40</sup>

On that basis, one might make an argument that because the statute includes some exceptions, no other exceptions are permitted based on the principle of *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of another").<sup>41</sup> One could go even further with the textual argument. The statute does not simply contain a list of exceptions thereby implying that there are no other exceptions; rather the language preceding the enumeration of the exceptions—"no letter . . . shall be opened"—strongly suggests a categorical prohibition on the opening of letters.<sup>42</sup> Thus, even without the language after the word "except"—that is, the list of exceptions that gives us the *expressio unius* argument—the categorical nature of the sentence's initial clause seems to admit no exceptions at all. A pure linguistic analysis of this sentence therefore seems to lead to a simple conclusion: letters may not be opened except under the three circumstances specified in the statute.

This argument would seem to undermine the president's claim in his signing statement that the statute contains an exception for "exigent circumstances" or a "need for physical searches."<sup>43</sup> As we will see, I do not believe this ends the debate, but at first glance, the provision does appear to be a categorical

---

37. *Id.*

38. *Id.* (emphasis added).

39. *Id.*

40. It is worth noting that the statute applies only to letters "of domestic origin." *Id.* Mail sent from abroad is not subject to the statute and, as discussed below, has far weaker protection. See *infra* Part II.D.3. As I argue below, the customs regulations dealing with mail from abroad also lend some support to the distinction between letters and other mail matter. See *infra* Part II.D.3.

41. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). This principle is also known as "*inclusio unius est exclusio alterius*." BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

42. 39 U.S.C. § 404(c).

43. Signing Statement, *supra* note 16.

prohibition on the opening of letters and does not appear to contemplate exceptions other than those specifically provided.

In sum, a simple textual analysis suggests two things: (1) the statute categorically prohibits the opening of letters except in three circumstances; and (2) its prohibition applies only to letters, as distinct from other mail matter. Thus, a textual approach would lead one to ask what constitutes a “letter,” as the statute defines it.

Before engaging in that linguistic analysis, however, I turn to the reasons why the prohibition on opening mail might be limited to “letters” as opposed to applying to all mail. In the next section, I address the statute’s legislative history, which speaks to the ways in which legislators through history have understood the provision. In the section immediately after that, I address the broad policy concerns that animate the distinction between “letters” and other mail matter. These two sections will give the necessary background to understand why the term “letters” in the statute is defined as it is.

#### *B. The Sealed-Letter Provision’s Provenance and Legislative History*

The sealed-letter provision’s legislative history suggests, albeit ambiguously, that its purpose was most likely intertwined with concerns about government officials opening and reading correspondence. Because the provision dates back to the nineteenth century and the operative language comes from four separate statutes, the legislative history is by no means clear.<sup>44</sup> Still, when seen in its broad outline, the full story lends further support to the notion that the concerns that motivated the enactment of the provision are intimately connected with concerns about privacy in communications—in other words, concerns about the privacy of sealed correspondence.

The history of the sealed-letter provision will help us understand why it is best interpreted to apply only to correspondence or communication. In doing so, we will see that the primary rationale underlying the original language is what we today refer to as communications privacy, or the privacy of correspondence, rather than a more generalized concept of privacy. The original concerns related to the sanctity of the seal, which was deeply intertwined with privacy of correspondence. Although there certainly were circumstances in which the seal was thought to embody broader privacy concerns, the language of the sealed-letter provision was derived from—and in multiple instances over its now 135-year history was restated in—legislative concerns about the privacy of correspondence.

The concern that the sealed-letter provision was originally meant to address was censorship. In particular, the language from which the sealed-letter provision derived involved attempts to ensure the privacy of mail at a time

---

44. See Act of June 15, 1917, ch. 30, title XII, § 1, 40 Stat. 230; Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 497; Act of June 3, 1872, ch. CCCXXV, §§ 148–49, 17 Stat. 302; Act of July 27, 1868, ch. CCXLVI, § 13, 15 Stat. 196; Act of Mar. 3, 1865, ch. LXXXIX, § 16, 13 Stat. 507.

when Congress was passing laws aimed at creating specific categories of nonmailable items.<sup>45</sup> These were categories that Congress was prohibiting from the mail due to their value as *information*, and the privacy provisions were introduced in conjunction with, and in part to alleviate, concerns that Congress was engaged in censorship.

### 1. *Prohibition on Mailing Obscene Matter (1865)*

During the first half of the nineteenth century, there were no statutory restrictions on content sent through the mail, either in newspapers or in letters.<sup>46</sup> The first time that Congress prohibited sending specific content through the mail was in 1865 when it barred use of the mails to send any “obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character.”<sup>47</sup> Notice that the statute was limited to “book[s],

---

45. See Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 497; Act of June 3, 1872, ch. CCCXXXV, §§ 148–49, 17 Stat. 302; Act of July 27, 1868, ch. CCXLVI, § 13, 15 Stat. 196; Act of Mar. 3, 1865, ch. LXXXIX, § 16, 13 Stat. 507.

46. RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 267 (1995). The most significant antebellum controversy about the content of materials sent through the mail was the Abolitionist Mail Controversy from 1835 to 1837, when President Andrew Jackson proposed and Congress debated, the propriety and constitutionality of prohibiting the mailing of so-called “incendiary” publications, the term used to refer to abolitionist tracts. Although Congress refused to pass any law restricting content, the debates provide one of the most fascinating windows into the role of the postal system in the constitutional scheme. See MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 155–75* (2000); DOROTHY GANFIELD FOWLER, *UNMAILABLE: CONGRESS AND THE POST OFFICE 26–34* (Univ. of Ga. Press 1977); JOHN, *supra*, at 257–73; W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830–1860*, at 61–81 (Negro Univs. Press 1968) (1938); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 570–72 (2007); Eberhard P. Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 717–23 (1938). For a discussion regarding the events that prompted the controversy, see Susan Wylly-Jones, *The 1835 Anti-Abolition Meetings in the South: A New Look at the Controversy over the Abolition Postal Campaign*, 47 CIV. WAR HIST. 289, 290–91 (2001). One scholar has argued that the abolitionists’ postal campaign was an important catalyst in raising awareness in the North—indeed, that it was intended to be an advertising campaign, not a conversion campaign—that was crucial in convincing many of the need for emancipation. See Bertram Wyatt-Brown, *The Abolitionists’ Postal Campaign of 1835*, 50 J. NEGRO HIST. 227, 227–29 (1965).

47. Act of Mar. 3, 1865, ch. LXXXIX, § 16, 13 Stat. 507. This is not to say that there had not been content restrictions in the mail prior to this time. There certainly had been. For example, during the Civil War, the Postmaster General barred newspapers that contained information he viewed as treasonable or that might otherwise aid the Confederacy. FOWLER, *supra* note 46, at 55. He also “excluded from the mails obscene and scandalous printed matter on exhibition of its criminal immorality” without any judicial determination of criminal immorality. *Id.* at 55–56. Abolitionist publications were also blocked in the antebellum period. While the Abolitionist Mail Controversy of 1835–37 yielded no law restricting abolitionist tracts, this did not mean that abolitionist mail always made its way to the South. During the Pierce Administration, Attorney General Caleb Cushing issued an opinion authorizing the confiscation of abolitionist mail. James C.N. Paul, *The Post Office & Non-Mailability of Obscenity: An*

pamphlet[s], picture[s], print[s], [and] other publication[s]” and did not explicitly list letters.<sup>48</sup> Thus, employing a simple linguistic analysis, one might read the prohibition as *not* applying to sealed letters. Although a picture might have been sent in a letter, “book[s], pamphlet[s], [and] print[s]” could not have been sent in a letter in 1865; therefore, the reference to “other publication[s]” could be read to imply that only pictures in publications would be covered. Still, on its face, it is certainly possible to interpret the provision as applying to letters in some circumstances.<sup>49</sup> Moreover, there was no explicit language prohibiting the opening of mail.<sup>50</sup>

However, the legislative history is clear that the prohibition on sending obscene matter did not authorize postal officials to open sealed mail.<sup>51</sup> Indeed, in response to concerns that the need to enforce the statute implicitly authorized the opening of sealed mail, Congress specifically changed the language of the proposed bill to address those concerns.<sup>52</sup> Therefore, we see

---

*Historical Note*, 8 UCLA L. REV. 44, 49 (1961). Thus, while Congress refused to promulgate a law barring abolitionist mail, postal officials certainly barred abolitionist tracts in the antebellum era. The important point, however, is that, prior to 1865, none of these restrictions was written into a federal statute.

48. Act of Mar. 3, 1865, ch. LXXXIX, § 16, 13 Stat. 507.

49. The United States Supreme Court eventually held that all of the words in the list referred only to published matter, in part because of the phrase “other publications” at the end of the sentence. *United States v. Chase*, 135 U.S. 255, 258–59 (1890). For further discussion on this point, see *infra* note 75 and accompanying text.

50. See Act of Mar. 3, 1865, ch. LXXXIX, § 16, 13 Stat. 507.

51. CONG. GLOBE, 38th Cong., 2d Sess. 661 (1865).

52. See Paul, *supra* note 47, at 47–50 (providing an overview of the history of the language). The original language of the bill permitted postmasters to take obscene matter out of the mail and imposed criminal penalties on anyone who mailed obscene matter. In its entirety, the original language read as follows:

And be it further enacted, *That no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States; but all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct.* And any person or persons who shall deposit or cause to be deposited in any post office or branch post office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor, and, being duly convicted thereof, shall, for every such offense, be fined not more than \$500, or imprisoned not more than one year, or both, according to the circumstances and aggravations of the offense.

CONG. GLOBE, 38th Cong., 2d Sess. 661 (1865) (emphasis added). During the debate on the provision, Senator Reverdy Johnson of Maryland asked, “If they are sent in envelopes, how does the postmaster know what they are?” *Id.* Senator Jacob Collamer of Vermont, who had introduced the bill at the request of the Postmaster General, replied, “Printed publications are always sent open at one end. It will not require the breaking of seals.” *Id.* Johnson inquired again, “You do not propose to let the postmaster break the seals?” *Id.* Collamer then replied, “There is not a word said about ‘seals’ in the section.” *Id.* Johnson then moved to strike the first sentence—the portion italicized above—from the provision:

the origin<sup>53</sup> of a concern about mail-opening, one that arises specifically in the context of enforcement of a restriction on the communicative content of what can be sent through the mail.<sup>54</sup>

## 2. *Prohibition on Mailing Lottery-Related Matter (1868 & 1872)*

Three years later, in 1868, Congress passed a second law barring content from the mails, this time prohibiting the mailing of lottery-related matter.<sup>55</sup> More specifically, the statute prohibited the sending of “letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever.”<sup>56</sup> In contrast to the restriction on obscenity three years earlier,<sup>57</sup> the language of the lottery statute

---

It seems to me . . . that it would be establishing a very bad precedent to give authority to postmasters to take anything out of the mail. It is true that most of the printed matter that is sent is sent without being covered or sealed up; but if there is any danger of this kind those who send this species of publications will no doubt soon begin to seal them, and then the postmaster, whenever he suspects that the envelope contains anything which is obnoxious to objection, will break the seal.

*Id.* Senator John Sherman of Ohio responded that he wanted to preserve the ability of the postmasters to exclude publications and that deleting the entire first sentence would prevent this:

I think the prohibition against publications of this character going into the mails ought to stand. We are well aware that many of these publications are sent all over the country from the city of New York with the names of the parties sending them on the backs, so that the postmasters *without opening the mail matter* may know that it is offensive matter, indecent and improper to be carried in the public mails.

*Id.* (emphasis added). Thus, rather than deleting the entire first sentence, he proposed deleting only the second half of that sentence, the words “but all such obscene publications deposited in or received at any post office, or discovered in any mail, shall be seized and destroyed or otherwise disposed of, as the Postmaster General shall direct.” *Id.* In making this proposal, however, Senator Sherman seemed to understand that the deletion of this language would eliminate a portion of the bill that might otherwise have permitted the opening of mail, as evidenced by his description that this was a “clause allowing [the Postmaster General] to open mail matter.” *Id.* Senator Johnson agreed to the modification of his amendment, clearly understanding that an implicit prohibition on opening mail had effectively been written into the statute; the change to the provision was then made. *Id.* The Senators were probably wrong in their understanding of the statutory language they were using, but still, their intentions were clear. In sum, although nothing in the provision mentions the opening of mail, the legislative history is clear that this first law regulating the content of mail was not to be enforced by opening sealed mail.

53. I do not mean to imply that there were no concerns about the opening of mail prior to this time. In fact, the concerns about letter-opening date back to before the Revolutionary period. *See* Desai, *supra* note 46, at 564. However, the specific language of the sealed-letter provision can be traced to the concern animated by content restrictions.

54. This was clearly the understanding of the statute in the two decades immediately after it was passed; the statute was amended in 1888 specifically to add the word “letter,” while a proviso was added with language similar to that in the sealed-letter provision. *See infra* note 76 and accompanying text.

55. Act of July 27, 1868, ch. CCXLVI, § 13, 15 Stat. 196.

56. *Id.*

57. *See* Act of Mar. 3, 1865, ch. LXXXIX, § 16, 13 Stat. 507.

explicitly included “letters” in its prohibition.<sup>58</sup> While the statute again contains no explicit prohibition on the opening of letters, the legislative history strongly suggests congressional intent that postmasters would not be permitted to open letters.<sup>59</sup>

Four years later, in 1872, Congress completely revised and consolidated all the postal laws. In this comprehensive revision, Congress re-enacted the prohibition on the sending of lottery letters and circulars.<sup>60</sup> The legislative history of the revision is clear: not only was the government forbidden from opening mail, but the reason for the prohibition was fear of government officials reading correspondence. During the revision process, the provision prohibiting lottery matter in the mail originally included the following language not found in the 1868 statute: “and any such letters or circulars shall be detained by the postmaster at the office of mailing or delivery, and disposed of under the instructions of the Postmaster General.”<sup>61</sup> One Congressman, Representative James Brooks, sought to remove this language from the provision.<sup>62</sup> In doing so, he explicitly stated that he wanted to remove it because it might be viewed as giving government officials the right to read personal correspondence. He noted that the language would give the Postmaster General

the power . . . to pry into the correspondence of any person whatever whom he may deem suspicious. He has authority indirectly, if not directly, to spy upon the correspondence of any person. I need not dwell, in a country like this, on the danger of investing such a power in the hands of any public officer.<sup>63</sup>

He went further, arguing that such a power would “expose the correspondence of the people to a scrutiny and espionage of a most dangerous character . . .”<sup>64</sup>

---

58. Act of July 27, 1868, ch. CCXLVI, § 13, 15 Stat. 196.

59. See CONG. GLOBE, 40th Cong., 2d Sess. 4412 (1868). The legislative intent is not quite as clear as with the 1865 obscenity prohibition, but instead comes from a negative implication from what Congress did in fact do. The original House bill included a provision that would have “authorize[d] postmasters if they suspect that any letters or circulars concern lotteries to take them from the mails and forward them to the dead letter office.” *Id.* According to the House manager at the conference committee, Representative John Farnsworth, the members “thought that was a dangerous power to confer upon postmasters . . . [and] thought it would not be wise to give postmasters this extraordinary power to be exercised upon a mere suspicion.” *Id.* Thus, Congress effectively rejected giving postmasters the power to enforce the statute. Cf. Paul, *supra* note 47, at 51 (describing this congressional action as “expressly reject[ing] and str[ic]king out a clause authorizing . . . censorship”). After passage of the statute, it became clear that Congress had created a prohibition without any enforcement mechanism and, more importantly, without any penalties.

60. See Act of June 3, 1872, ch. CCCXXV, § 149, 17 Stat. 302.

61. CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870).

62. *Id.*

63. *Id.* (emphasis added).

64. *Id.*

Immediately after this speech, the House agreed to remove the language.<sup>65</sup> The concern with prying into correspondence was in large part due to the fact that letters were associated with personal correspondence.

The same 1872 statute also included, for the first time, language that led to the sealed-letter provision. The statute contained new language granting postmasters the power to prohibit those engaged in conducting lotteries from receiving money orders or registered mail.<sup>66</sup> It was a sweeping law, giving postmasters the power to determine when someone or some entity was “engaged in conducting” lotteries.<sup>67</sup> It thus allowed a postmaster to target particular individuals or entities, rather than prohibiting specific acts of sending information connected to lotteries through the mail.<sup>68</sup> Included at the end of this provision was a proviso stating, “*Provided*, That nothing in this act contained shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.”<sup>69</sup> This was the first time that language similar to the sealed-letter provision appeared in a federal statute.

### 3. *Prohibition on Mailing Matter Designed to Further Counterfeit-Money Schemes (1889)*

Language similar to the sealed-letter provision appeared twice more in the late 1880s. Once was in an 1889 law prohibiting use of the mails for fraud schemes connected with counterfeit money.<sup>70</sup> The language of the proviso in the counterfeit-money-fraud statute was identical to the 1872 lottery law

---

65. *Id.*

66. Act of June 3, 1872, ch. CCCXXXV, § 300, 17 Stat. 322–23.

67. § 300, 17 Stat. at 322.

68. *Id.* For a description of how ambiguities about enforceability of the 1868 Act led to this provision, see FOWLER, *supra* note 46, at 58–60.

69. Act of June 3, 1872, ch. CCCXXXV, § 300, 17 Stat. 322. In 1874, Congress re-enacted and codified all federal law for the first time, creating what were known as the Revised Statutes of the United States or, simply, the Revised Statutes. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012 (1938). The revision separated the law of the post office into different titles, including one for registered letters and another for the money-order system. The provision on those conducting lotteries was thus split in two: Revised Statute § 3929 allowed the Postmaster General to prohibit those conducting lotteries from receiving registered mail and Revised Statute § 4041 allowed him to prohibit them from receiving postal money-orders. This revision resulted in slight changes to the relevant language: while the language of Revised Statute § 3929 closely tracked the original 1872 statute, the language of § 4041 was slightly different. *Compare* Rev. Stat. § 3929 (1875) (“But nothing contained in this Title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.”), *with* Rev. Stat. § 4041 (1875) (“But this shall not authorize any person to open any letter not addressed to himself.”). Interestingly, in 1890, Congress changed the language in Revised Statute § 3929 from “nothing contained in this Title” to “nothing contained in this section.” See Act of Sept. 19, 1890, ch. 908, § 2, 26 Stat. 466.

70. Act of Mar. 2, 1889, ch. 393, § 4, 25 Stat. 873, 874.

except that it added an exception to the prohibition on opening mail for “an employee of the dead-letter office, duly authorized thereto.”<sup>71</sup>

It seems clear from the language of the law that the term “letter” is most likely used in the sense that I am arguing—as “correspondence” or “communication.” The principal provision in the law prohibited use of the mails to further a scheme to distribute counterfeit money that was “effected by either opening or intending to open correspondence or communication . . . .”<sup>72</sup> Thus, the only reason that enforcement of the statute would even have been thought to need the opening of mail was for the purpose of reading correspondence or communication. Moreover, the law prohibited the use of the mails for “any letter, packet, writing, circular, pamphlet, or advertisement” in furtherance of the scheme.<sup>73</sup> Thus, we can again make a textual argument similar to the one I drew upon in Part II.A: that the use of the word “letter” in the mail-opening prohibition was a conscious choice to distinguish “letter[s]” from the other mail matter that the statute prohibited—“packet[s], writing[s], circular[s], pamphlet[s] or advertisement[s]” (matter that could be opened).<sup>74</sup>

#### 4. *Addition of Letters to Prohibition on Mailing Obscene Matter (1888)*

The other time language similar to the sealed-letter provision appeared in the 1880s was in 1888, when Congress revised the prohibition on obscene mail matter so that obscene *letters* were prohibited as well.<sup>75</sup> At the same time,

---

71. *Id.* (“That all matter the deposit of which in the mails is by this act made punishable is hereby declared non-mailable; but nothing in this act shall be so construed as to authorize any person other than an employee of the dead-letter office, duly authorized thereto, to open any letter not addressed to himself.” (emphasis added)). The bill that eventually became law was originally drafted by Anthony Comstock, who had by then been made an inspector employed by the post office. See S. REP. NO. 2566, at 1–2 (1888). An earlier draft of the law had raised concerns that postal inspectors would have the power to enforce the law by opening mail. *Id.* Comstock proposed a complete rewriting of the bill, largely to make it broader and more stringent, but in part to allay concerns about mail-opening. *Id.* at 3. In his letter to Senator George Edmunds of Vermont, the Chair of the Senate Judiciary Committee, Comstock proposed the prohibition on opening mail:

[I]n all my fifteen years as a post-office inspector I have never known an instance where the mail has been tampered with, where any attempt has been made to interfere with letters in transit, or where the sanctity of the seal has ever been broken. . . .

There is an entirely erroneous idea that this system of legislation permits or sanctions interference with mail matter in transit. I desire to do away entirely with that false impression, and I respectfully insist that such is not the letter or spirit of this bill.

*Id.* at 5.

72. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873, 873.

73. *Id.*

74. See *id.* This textual argument runs into some trouble, however, if one thinks of a writing as distinct from a letter. See *infra* text accompanying notes 186–90 (discussing the definition of a letter).

75. Compare Rev. Stat. § 3893 (1875), with Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496. This change was made because of conflicting case law as to whether the word “writing”—a term that was added during an 1876 revision that was not intended to change the existing law—



Congress also added an express proviso prohibiting the opening of “any letter or sealed matter of the first-class.”<sup>76</sup> In contrast to the proviso prohibiting mail-opening in the 1872 lottery law, this proviso contains the words, “sealed matter of the first-class.”<sup>77</sup> Thus, by itself, this language seems to contemplate that first-class matter encompassed more than just letters. Moreover, there is a somewhat equivocal indication in the legislative history that some members of Congress recognized that the prohibition on mail-opening would apply to more than just letters.<sup>78</sup>

---

included obscene *letters*. See FOWLER, *supra* note 46, at 75 (noting that the word “letter” was inserted because the “courts had disagreed on whether the word ‘writing’ included private letters”); see also JAMES JACKSON KILPATRICK, *THE SMUT PEDDLERS* 40 (1960) (describing the conflicting ways courts approached the Comstock Act before the 1888 amendments). The issue did not reach the Supreme Court until after the 1888 amendments that added the term “letter” to the list of prohibitions; the Court held that the term “writing” in the 1876 statute did not include letters. See *United States v. Chase*, 135 U.S. 255, 258–59 (1890). Among the arguments the Court used to reach this conclusion was that the phrase “or other publication” at the end of the provision implied that the other words in the list, “book, pamphlet, picture, paper, writing, print,” were also types of publications. *Id.* at 258–59. Even after Congress added the word “letter” to the provision, two lower courts followed the Supreme Court’s reasoning and held that the word “letter”—because it too was among a list that ended with “or other publication”—had to refer to some type of “publication.” See *United States v. Warner*, 59 F. 355, 356 (D. Wash. 1894) (concluding that the letter at issue did not fall “within the intent and letter of the statute”); *United States v. Wilson*, 58 F. 768, 770, 772 (N.D. Cal. 1893) (finding that the private letter at issue did not contain any of the characteristics of a “publication”).

76. Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496, 497.

77. Compare *id.* (“Provided, That nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself.” (emphasis added)), with Act of June 3, 1872, ch. CCCXXXV, § 300, 17 Stat. 283, 323 (“Provided, That nothing in this act contained shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.”).

78. See 19 CONG. REC. 8189 (1888). During the debate over the bill on the House floor, Congressman John M. Farquhar implied that he opposed the bill because it granted postmasters too much discretion. *Id.* Congressman Alexander Dockery, who introduced the bill, replied, “I do not think there is any such power expressed in the bill, nor do I believe it can be so construed by implication.” *Id.* Farquhar responded by asking, “Then why is an exception made in regard to the first-class mail matter?” *Id.* Dockery then explained that this exception was added because the Postmaster General had interpreted the earlier bill as providing postmasters with implied authority to inspect first-class mail matter; however, such an interpretation did not comport with the intent of Congress. *Id.* A moment later, Congressman Richard Bland asked, “How is it proposed that the postmasters are to ascertain the character of the mail matter?” *Id.* Dockery answered this question by explaining that

[t]he bill wisely prohibits postmasters from opening letters to ascertain their contents, but if, for instance, an obscene letter is addressed to the gentleman from Missouri, he will have the authority under this bill which will enable him to punish the sender. The postmaster, however, has no authority to open the letter.

*Id.* Bland then asked how the postmaster could open any other mail matter, but Dockery replied that the postmaster could not. *Id.* Like Farquhar, Bland asked why an exception was made for first-class mail matter. *Id.* Dockery responded that the exception was made “out of abundant caution.” *Id.* Following this answer, Bland logically inquired as to why abundant caution should not apply to all mail matter, at which point the House agreed to refer the bill back to the

Most important, the context of the 1888 obscenity law makes clear that the inclusion of the words, “sealed matter of the first-class,” was likely the product of a conscious effort and was intended to include a broader range of mail matter.<sup>79</sup> The statute’s prohibition covered not only communications (such as publications), but also contraceptives, abortifacients, and “every article or thing intended or adapted for any indecent or immoral use or nature . . . whether sealed as first-class matter or not.”<sup>80</sup> The statute would thus have needed to prohibit the opening of all first-class mail or else it would have been assumed that authorities could enforce the statute’s prohibition on, for example, contraceptives by opening first-class mail, since a contraceptive—even if sent via first-class—was not a letter.<sup>81</sup>

Thus, as early as 1888, when Congress sought to protect the privacy of all sealed mail, it knew to use language that protected more than just letters.<sup>82</sup> This lends support to a definition of the category “letter” as narrower than that of first-class mail, a point I discuss in greater detail in Part II.D.

In sum, the sealed-letter provision derived from the provisos in three nineteenth-century statutes that prohibited the mailing of certain content through the mail. While the legislative history is by no means unambiguous, the principal concern of the drafters of that language seems likely to have been with the opening and reading of correspondence sent through the mails as sealed letters, because of a fear that enforcement of the statutes without limitations would have permitted the opening and reading of sealed letters.<sup>83</sup>

Committee on the Post-Offices and Post-Roads. *Id.* When the bill returned to the House floor, no change had been made to the relevant language. *See id.* at 8519, 8555.

79. Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496, 497.

80. *Id.* at 496.

81. *Id.* The prohibition on contraceptives, abortifacients, and other items used for immoral purposes was first added in 1873 at Anthony Comstock’s instigation. *See* Act of Mar. 3, 1873, ch. CCLVIII, § 1, 17 Stat. 598, 598–99; Paul, *supra* note 47, at 53–54. Thus, the Act soon came to be known as the Comstock Act. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 748 (1992). Given that certain abortifacients were sold as powders, it seems plausible to imagine such an abortifacient sent in a sealed envelope via first-class mail in a manner similar to the way in which anthrax was sent to government offices in 2001 and 2002. Indeed, the first case brought before a federal court following the passage of the Comstock Act involved accusations that the defendant had sent a powder abortifacient through the mail. *United States v. Bott*, 24 F. Cas. 1204, 1204 (C.C.S.D.N.Y. 1873) (No. 14,626); *see also* FOWLER, *supra* note 46, at 62; KILPATRICK, *supra* note 75, at 38. Unfortunately, the case report does not indicate whether the defendant sent the powder via first-class mail, and if so, how he was caught. *See Bott*, 24 F. Cas. at 1204–05.

82. *See* Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496, 497.

83. *See, e.g.*, 19 CONG. REC. 8199 (1888) (showing the concern of the drafters that the bill would grant the postmasters too much power). Despite this prohibition, postal agents found a way to open letters without violating the law. Because the law permitted the addressee to open a letter, postal agents would scan the newspaper advertisements for suspected peddlers of obscenity and then write them “decoy letters” using an assumed name; when the person responded by sending obscene materials in a sealed envelope, the postal agent, as addressee, was allowed to

In the one instance in which the statute prohibited more than expressive content, the drafters were careful to include not only the word “letter,” but also the phrase “sealed matter of the first-class.”<sup>84</sup>

### 5. *Espionage Act (1917)*

The next time Congress used similar language involved one of the most controversial statutes in the nation’s history—the Espionage Act of 1917.<sup>85</sup> As I explain in more detail below, this connection with a statute that is now viewed as one of the most famous violations of First Amendment rights in American history<sup>86</sup>—and the first of its ilk since the 1798 Alien and Sedition Acts—further supports the view that the rationale underlying the sealed-letter provision’s predecessors specifically related to privacy of correspondence or communications privacy.<sup>87</sup>

The Espionage Act included a series of provisions regulating the use of the mails.<sup>88</sup> As in the laws restricting lottery matter and counterfeit money in the mail, the Espionage Act’s prohibition on opening letters was also a proviso to a restriction on expressive content.<sup>89</sup> In the Espionage Act, it was a proviso to a section that forbade the use of the mails for sending anything that violated any other provision of the Act.<sup>90</sup> That section prohibited the mailing of “[e]very

---

open it. Blanchard, *supra* note 81, at 749. The Supreme Court rejected arguments that this constituted illegal entrapment. See *Andrews v. United States*, 162 U.S. 420, 423–24 (1896). The Court also rejected an argument that the prohibition on opening mail had been violated, concluding that, for purposes of the statute, the postal inspector was the person to whom the letter had been addressed despite the use of a fictitious name. *Id.* at 424.

84. Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496, 497.

85. Act of June 15, 1917, ch. 30, tit. XII, § 1, 40 Stat. 217, 230; see also GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 146–53 (2004).

86. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 960 (1919).

87. The Espionage Act of 1917 and the cases it spawned are largely viewed as the dawn of the modern First Amendment. David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 516 (1981); see also Michael T. Gibson, *The Supreme Court & Freedom of Expression from 1791–1917*, 55 FORDHAM L. REV. 263, 263–64 (1986). The trio of cases written by Justice Oliver Wendell Holmes, Jr. in March 1919 along with his famous dissent in *Abrams* later that same year all involved the Espionage Act of 1917. *Abrams v. United States*, 250 U.S. 616, 624–26 (1919) (Holmes, J., dissenting); *Debs v. United States*, 249 U.S. 211, 212 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205 (1919). Indeed, one of the counts brought against the defendant in *Schenck* involved the very section of the Espionage Act that contained the predecessor of the sealed-letter provision. *Schenck v. United States*, 249 U.S. 47, 49 (1919). Before this line of cases, Judge Learned Hand’s seminal decision in *Masses* was also based on the same section. *Masses Publ’g Co. v. Patten*, 244 F. 535, 538 (S.D.N.Y. 1917), *rev’d* 246 F. 24 (2d Cir. 1917). However, neither *Schenck* nor *Masses* involved the specific language that became the sealed-letter provision’s direct predecessor. It seems fair to say nonetheless that this provenance shows deep connections between the sealed-letter provision and broader free speech principles.

88. Act of June 15, 1917, ch. 30, tit. XII, §§ 1–3, 40 Stat. 217, 230–31.

89. *Id.* at 230.

90. *Id.*

letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter, or thing, of any kind, in violation of any of the provisions of this Act . . . .”<sup>91</sup> The provision continued, however, with the following language: “*Provided*, That nothing in this Act shall be so construed as to authorize any person other than an employe [*sic*] of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any *letter* not addressed to himself.”<sup>92</sup>

Here, we again have a variation on the argument I drew upon in Part II.A. While the provision prohibited the mailing of several different types of mail matter, including any “matter, or thing, of any kind,” the proviso protected only “letter[s]” from being opened.<sup>93</sup> The statute thus makes a clear distinction between letters, which were protected from being opened by the proviso, and the remainder of the items, which (to the extent that they are not letters) were not protected.<sup>94</sup> This does not resolve situations involving sealed first-class mail that is not correspondence, because the term “letter” could still mean all sealed mail, but it is somewhat suggestive.

The Espionage Act’s legislative history sheds some light on why the term “letter” was distinguished from the rest of the list. Although the legislative history is ambiguous, it does lend some support to the idea that the principal goal of the proviso was to prevent the opening of private correspondence because of a fear of government agents reading it.<sup>95</sup> When the original bills were before both houses of Congress, neither had a mail-opening prohibition; the language was added as an amendment on the floor of the Senate.<sup>96</sup> Much

---

91. *Id.*

92. *Id.* (emphasis added). The drafters of the Espionage Act created an entire title that specifically authorized search warrants. Act of June 15, 1917, ch. 30, tit. XI, §§ 1–23, 40 Stat. 217, 228–30. Thus, the inclusion of this search-warrant exception—for the first time—can be seen in part as an attempt to avoid conflict with other provisions of the Act. See 55 CONG. REC. 2068 (1917) (statements of Sens. Walsh and Sherman) (discussing search warrants and how warrants affect the provisions regulating the mail).

93. Act of June 15, 1917, ch. 30, tit. XII, §§ 1–3, 40 Stat. 217, 230–31.

94. *Id.* Interestingly, the Espionage Act also created a criminal prohibition on “us[ing] or attempt[ing] to use the mails . . . for the transmission” of the matter declared to be nonmailable. § 3, 40 Stat. at 230–31. Thus, the Espionage Act’s version of what became the sealed-letter provision was first codified—when the United States Code was created in the 1920s—in title 18 of the United States Code, the federal criminal code. It remained there until 1960. In the criminal code’s version of the provision, the provision thus appeared to be a criminal prohibition on mail-opening, even though the Espionage Act makes clear that Congress never intended to criminalize the opening of letters; the language prohibiting the opening of letters in the Espionage Act was merely a proviso to a prohibition on sending through the mail material that violated other provisions of the Espionage Act. Act of June 15, 1917, ch. 30, tit. XII, § 1, 40 Stat. 217, 230.

95. See 55 CONG. REC. 2057 (1917).

96. *Id.* at 2071. In the initial bill, the provision read as follows:

Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter, or thing, of any kind, in violation of any of the provisions of this act . . . or intended or calculated to induce,

of the lengthy discussion prior to the amendment focused on how the Postmaster General could enforce the mailing prohibition, particularly the language in the bill that declared that mail matter that violated the statute “shall not be conveyed in the mails or delivered from any post office or by any letter carrier . . . .”<sup>97</sup> When discussions regarding the bill first began, Senator William Borah of Idaho and Senator Thomas Hardwick of Georgia believed that the only reason for the provision was to give postal officials the power to examine the mail, and they were extremely concerned with granting government officials the power to examine *any* mail.<sup>98</sup> Later in the discussion, Senator Borah focused his concerns on sealed mail, including both letters and packages.<sup>99</sup>

In response to these concerns, Senator Thomas Sterling of South Dakota, a supporter of the bill, alluded to the other statutes restricting mail matter.<sup>100</sup> He noted that “the Postmaster General is not directed, is not commanded, and is not even authorized to open the mail of anybody in order to prevent a violation of any of those several statutes”<sup>101</sup> and that those statutes were regularly enforced without opening the mail, but rather “upon the testimony furnished by

promote, or further any of the acts or things by any provision of this act declared unlawful . . . is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

*Id.* The phrase, “or intended or calculated to induce, promote . . . or further any of the acts or things by any provision of this act declared unlawful,” was subsequently removed from the bill before passage. *Id.* at 3498.

97. See Act of June 15, 1917, ch. 30, tit. XII, § 1, 40 Stat. 230; see also 55 CONG. REC. 2057 (1917) (asking how the non-mailable matter could be identified without first opening the letter).

98. See 55 CONG. REC. 2057–58 (1917). Senator Hardwick expressed his concern by stating that “[t]here is not the slightest reason on earth to retain section 1 in this bill unless the purpose is through inspectors or in one way or another to stop certain mail from being transmitted before the question is decided by any court.” *Id.* at 2058. Concurring, Senator Borah remarked that “the Senator has stated the exact purport of this section. It can not have any reason for existence in reality unless it is proposed to examine the mail.” *Id.* Senator Hardwick further noted: “I want to say that if people violate this law, they shall not be tried and condemned by the Post Office Department, but they shall be tried in the courts of the Republic and before juries of their peers.” *Id.* at 2059.

99. See 55 CONG. REC. 2060 (1917). The relevant colloquy was as follows: Senator Paul Husting from Wisconsin asked Senator Borah whether his “objections to that section . . . only apply to sealed letters.” *Id.* Senator Borah replied, “Precisely.” *Id.* To make sure he understood, Senator Husting reiterated that “[t]hey would not apply to the other writings, circulars, postal cards, and so forth, the contents of which could be readily discovered before the time they were put into the mails.” *Id.* In response, Senator Borah said, “My argument at the present moment only applies to that which is sealed, *either a package or a letter*. Anything that is closed by seal would come under the purview of my present statement.” *Id.* (emphasis added).

100. *Id.* at 2063–64. By this time, there were additional content restrictions on the mail, including one for liquor advertisements. See Act of Mar. 3, 1917, ch. 162, § 5, 39 Stat. 1058, 1069 (1917). However, there was no proviso similar to the sealed-letter provision in this statute.

101. 55 CONG. REC. 2064 (1917).

some one who saw the letter mailed or by the party to whom the mail was sent and to whom it was delivered by the postmaster.”<sup>102</sup>

Some of the subsequent discussion involved a distinction between correspondence and goods, although none of it was unequivocal.<sup>103</sup> For example, Senator James Reed of Missouri made a distinction between authorities opening mail to look for opium, which he wanted to permit, and “a post-office inspector . . . [who] thinks I am sending through the mail some *criminal message*,” which he did not want to permit.<sup>104</sup> There is at least some indication, then, of a distinction between correspondence and goods and of a concern for privacy in communications rather than privacy in general. Still, even this is hardly conclusive—not only is it unclear whether Senator Reed is affirmatively concerned with the reading of mail or the broad concept of communications privacy, but he also assumes that the postal official who searches for opium would have a search warrant, whereas the one who opens his mail to search for a message would not.<sup>105</sup> He also assumes that the postal official who searches for the criminal message would be acting under a pretext.<sup>106</sup>

At the end of this extensive discussion, Senator Thomas Walsh of Montana proposed an amendment containing language similar to the prohibitions on opening mail found in the obscenity and lottery statutes.<sup>107</sup> The Senate agreed to the amendment, and the language was added.<sup>108</sup>

Thus, as of 1917, there were four separate statutes with the predecessor language of the sealed-letter provision.<sup>109</sup> In all four, the language comes as a

102. *Id.*; *cf. id.* at 2070 (“There is not the authorization of opening the envelope or examining it. The proof must be secured in some other way than by opening the letter.”).

103. *See id.* at 2070–71.

104. *Id.* at 2071 (emphasis added).

105. *See id.* at 2070–71.

106. *Id.* at 2071.

107. *Id.*; *see also* Act of Sept. 26, 1888, ch. 1039, § 2, 25 Stat. 496, 497; Act of June 3, 1872, ch. CCCXXXV, § 300, 17 Stat. 283, 323. The addition to the provision read as follows: “But nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, to open any letter not addressed to himself.” 55 CONG. REC. 2071 (1917). Interestingly, when Senator Walsh proposed the amendment, he used the phrase, “[n]othing in this *section* shall be so construed,” whereas the amendment agreed to contained the phrase, “[n]othing in this *act* shall be so construed . . .” *Id.* The use of the word “act” gave the prohibition on opening mail a potentially broader applicability.

108. *Id.* at 2072.

109. *Compare* 39 U.S.C. § 404(c) (2006) (codifying the sealed-letter provision), *with* Act of June 15, 1917, ch. 30, tit. XII, § 1, 40 Stat. 217, 230 (including a proviso restricting unauthorized persons from opening mail), Act of Mar. 2, 1889, ch. 393, § 4, 25 Stat. 873, 874 (stating that no person other than an employee of the dead-letter office is allowed to open “any letter not addressed to himself”), Act of Sept. 26, 1888, ch. 1039, sec. 2, § 3893, 25 Stat. 496, 497 (prohibiting any person from opening any letter or first-class sealed matter that is not addressed to him), *and* Act of June 3, 1872, ch. CCCXXXV, § 300, 17 Stat. 283, 323 (prohibiting any postmaster or other person to open a letter not addressed to him).

proviso to the prohibition on the mailing of certain matter—“nothing in this act shall be so construed”<sup>110</sup>—rather than as an affirmative prohibition—“[n]o letter . . . shall be opened.”<sup>111</sup> In the only one of the four statutes that forbids the mailing of matter other than communication, the mail-opening prohibition covers both “letter[s]” and “sealed matter of the first-class”;<sup>112</sup> whereas, in the other three statutes, the prohibition on opening mail covers only letters.<sup>113</sup>

How should this ambiguous legacy be interpreted? To start, remember that the language in all of these statutes comes as a proviso and not a prohibition.<sup>114</sup> The language, “nothing in this act shall be so construed as to authorize any person . . . to open any letter,”<sup>115</sup> does not preclude the possibility of some other authority for opening mail. The 1889 counterfeit-money-scheme law,<sup>116</sup> on the other hand, might be interpreted somewhat differently. Although it too contains language directing that “nothing in this act shall be so construed,” it also includes what appears to be an exception, allowing “an employee of the dead-letter office, duly authorized thereto” to open mail,<sup>117</sup> but an exception that has no bearing on the Act at issue. Nothing in the counterfeit-money-scheme law dealt with the dead-letter office at all; if the proviso was simply a proviso to that law, the exception would have been unnecessary. Therefore, one could impliedly read this as a broader prohibition; in fact, it is most likely the existence of the exceptions that led to these provisos eventually being treated as a blanket prohibition on opening mail during the codification process years later.<sup>118</sup> Of course, it seems unlikely that Congress gave much thought to any of this in 1889, because the entire 1889 Act was drafted by postal officials who were likely just being overly cautious.<sup>119</sup>

Putting that point aside for a moment and focusing on the fact that three of the four provisos prohibit the opening of letters only, the fact that they are provisos might be seen in a slightly different way. Because they are only

110. § 1, 40 Stat. at 230; § 4, 25 Stat. at 874; § 2, 25 Stat. at 497; § 300, 17 Stat. at 323.

111. 39 U.S.C. § 404(c).

112. § 2, 25 Stat. at 497.

113. § 1, 40 Stat. at 230; § 4, 25 Stat. at 874; § 300, 17 Stat. at 323.

114. See *supra* notes 110–11 and accompanying text.

115. Act of June 15, 1917, ch. 30, tit. XII, § 1, 40 Stat. 217, 230; Act of Mar. 2, 1889, ch. 393, § 4, 25 Stat. 873, 874; Act of Sept. 26, 1888, ch. 1039, sec. 2, § 3893, 25 Stat. 496, 497; see also Act of June 23, 1872, ch. CCCXXXV, § 300, 17 Stat. 283, 323 (extending the prohibition to postmasters).

116. Act of Mar. 2, 1889, ch. 393, 25 Stat. 873.

117. *Id.* at 874.

118. See *infra* Part II.B.6.

119. The Espionage Act of 1917 likewise picks up language similar to that in the Act of March 2, 1889, and adds the exception for any “other person upon a search warrant authorized by law.” § 1, 40 Stat. 217, 230. This addition was prompted by the fact that the Espionage Act itself authorizes search warrants—warrants that could easily apply to mail matter. *Id.* at 228 (providing for a warrant to seize certain illegally possessed papers). Thus, at least with respect to the search-warrant exception, this argument would not apply.

provisos to particular statutes, nothing in them precludes the possibility of some other prohibition on the opening of *other* mail matter—that is, the proviso precludes anything in the particular Acts from authorizing the opening of *letters*, but this does not mean that anything in the Acts should be construed as authorizing the opening of *anything else*, whether sealed mail matter or otherwise. That is, however, a little bit of angels dancing on the head of a pin.

Perhaps a more persuasive interpretation of the fact that only three of the four provisos prohibit the opening of letters can be made by reading the four statutes together as a broad statement showing that Congress has long understood that the category of “letters” is distinct from the category of first-class mail and that Congress has further understood how to draw that distinction in statutory language.

Of course, putting aside the Espionage Act for a moment, the exact opposite argument could be made. Congress used the word “letter” in the provisos in both the lottery<sup>120</sup> and counterfeit-money-fraud<sup>121</sup> statutes because the only concern was that government officials might enforce those statutes by opening letters.<sup>122</sup> The only thing prohibited by those statutes was communication and so the only reason mail matter would be opened during the enforcement of those statutes would have been to read the item’s contents. The addition of the phrase “or sealed matter of the first-class” in the 1888 obscene-matter statute was necessary because the statute prohibited both “articles, [and] things”,<sup>123</sup> thus, enforcing officials might want to open mail matter for reasons other than to read the contents. For this reason, the difference between letters and “letters and sealed matter of the first-class” could be read as a reflection of the specific concerns of the particular statute to which the prohibition on opening mail was appended.

Once the Espionage Act is taken into consideration, however, this argument becomes more difficult to sustain. The obscene-matter statute was available to Congress at the time of the drafting of the Espionage Act;<sup>124</sup> indeed, it was among the statutes referenced by Senator Thomas Walsh when he introduced the proviso language on the floor of the Senate.<sup>125</sup> Moreover, Senator Walsh introduced his floor amendment primarily in response to Senator Borah, who had raised the question of sealed matter beyond letters earlier in the same discussion.<sup>126</sup> And yet, the Espionage Act proviso applies only to letters. Congress thus chose to prohibit the opening of only letters, rather than all first-class sealed matter, and did so (1) in a statute that prohibited the mailing of not

---

120. Act of June 3, 1872, ch. CCCXXXV, § 300, 17 Stat 283, 323.

121. Act of Mar. 2, 1889, ch. 393, § 4, 25 Stat. 873, 874.

122. CONG. GLOBE, 41st Cong., 3d Sess. 36 (1871).

123. Act of Sept. 26, 1888, ch. 1039, sec. 2, § 3893, 25 Stat. 496–97.

124. See 55 CONG. REC. 2058, 2071 (1917).

125. *Id.* at 2071.

126. *Id.* at 2060.



only communication, but also “matter” and “thing[s], of any kind”<sup>127</sup> and (2) at a time when it had at its fingertips language that would have extended the prohibition to all sealed mail.

Perhaps more important than the details of the specific language in the various provisions is the broader context of non-mailability. From at least as far back as 1879, postal regulations prohibited the mailing of a variety of matter that had no communicative impact, including items such as “[l]iquids, poisons, [and] explosive and inflammable articles . . . .”<sup>128</sup> Congress was fully aware of these prohibitions and incorporated them into statutory law as early as 1909 when it codified and revised all federal criminal law.<sup>129</sup> Yet Congress never raised any concerns about the opening of mail in the context of enforcing any of these restrictions. The only times that Congress raised concerns with mail-opening were in the specific context of restrictions on the communicative nature of mail.

Against that background, it seems best to conclude that the term “letter” must be understood as not being synonymous with all first-class sealed matter and that the Espionage Act might well have permitted the opening of first-class matter that was not a letter. This history sheds light on the language of the statute today largely because (a) the language of the Espionage Act is the basis of the sealed-letter provision; and (b) as we will see, many of the subsequent changes in the statute—including, most importantly, the change from a proviso to an affirmative prohibition—were almost definitely unintentional. Thus, to the extent that the specific legislative purpose of the statute matters, the Espionage Act is the last time that anyone in Congress thought consciously about whether the prohibition on opening mail should be limited to letters or should also extend to all first-class mail.

#### 6. Codification

Much of the rest of the sealed-letter provision’s history is found in the process by which federal law became codified—the story of the original United States Code and subsequent re-codifications of 18 U.S.C. and 39 U.S.C. The purpose of the codification process is to restate and organize the pre-

---

127. Act of June 15, 1917, ch. 30, tit. XII, § 1, 40 Stat. 217, 230.

128. See THE POSTAL LAWS AND REGULATIONS OF THE UNITED STATES OF AMERICA, PUBLISHED IN ACCORDANCE WITH THE ACT OF CONGRESS APPROVED MARCH 3, 1879 § 222 (Arthur H. Bissell & Thomas B. Kirby eds., 1879). The full regulation read as follows:

Liquids, poisons, explosive and inflammable articles, fatty substances easily liquefiable, live or dead animals (not stuffed), live insects, and reptiles, fruits or vegetable matter liable to decomposition, comb honey, pastes or confections, guano, and other substances exhaling a bad odor, are regarded as in themselves, either from their form or nature, within the inhibitions of the preceding section [on fourth-class matter], and under no circumstances must they be admitted to the mails.

*Id.*

129. See Act of Mar. 4, 1909, ch. 321, § 217, 35 Stat. 1088, 1131.

existing law, not to change it.<sup>130</sup> However, the process of codification in this instance appears to have unintentionally changed the substance of at least one of these provisos.<sup>131</sup>

When the federal government created the first United States Code in 1925, the four provisions discussed above were codified into various sections of 18 U.S.C. (Crimes and Criminal Procedure) and 39 U.S.C. (Postal Service).<sup>132</sup> The prohibition on mailing obscene matter was codified at 18 U.S.C. § 334. The authorization to return registered letters to those conducting lotteries was codified at 39 U.S.C. § 259, and the authorization to refuse money orders to those conducting lotteries was codified at 39 U.S.C. § 732. The prohibition on using the mails to further a scheme of distributing counterfeit money was codified at 18 U.S.C. § 338 and 39 U.S.C. § 256. Finally, the prohibition on using the mails to send matter that violated the Espionage Act was codified at 18 U.S.C. § 343. Through the codification process, however, the provisions changed form even though the changes were most likely unintentional.

In short, the provisions in 39 U.S.C. effectively retained their language and meaning as provisos,<sup>133</sup> but the provisions in 18 U.S.C. did not.<sup>134</sup> The codification in 18 U.S.C. introduced various changes to the language of the prohibition on opening mail. Other than the Espionage Act provision, now codified at 18 U.S.C. § 343, none of the other provisions codified in 18 U.S.C. included any prohibition on opening mail.<sup>135</sup> For example, recall that the prohibition on obscene matter in the 1888 statute included the following proviso: “*Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself.”<sup>136</sup> In the codification process, this language simply disappeared.<sup>137</sup> Similarly, the codification of the 1889 prohibition on matter furthering a scheme of distributing counterfeit money lacked the language found in the original Act.<sup>138</sup>

130. *Doyle v. Huntress, Inc.*, 419 F.3d 3, 8 (1st Cir. 2005); *see also infra* note 162.

131. *See infra* text accompanying notes 139–42.

132. 18 U.S.C. §§ 334, 338, 343 (1925) (obscenity, counterfeit money, and espionage, respectively); 39 U.S.C. § 259 (1925) (lotteries).

133. *See* 39 U.S.C. § 256 (1925) (“[B]ut nothing herein contained shall be so construed as to authorize any person other than an employee of the dead-letter office, duly authorized thereto, to open any letter not addressed to himself.”); *id.* § 259 (“Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.”); *id.* § 732 (“This shall not authorize any person to open any letter not addressed to himself.”).

134. *See* 18 U.S.C. §§ 334, 338, 343 (1925).

135. *Compare* 18 U.S.C. § 343 (1925) (containing a prohibition on the opening of mail), *with id.* §§ 334, 338 (failing to explicitly prohibit the opening of mail).

136. Act of Sept. 26, 1888, ch. 1039, sec. 2, § 3893, 25 Stat. 496, 497.

137. *See* 18 U.S.C. § 334 (1925).

138. *See id.* § 338 (deleting the proviso found in the Act of March 2, 1889). This may well be more understandable. In the 1889 statute, the prohibition on opening mail, although a proviso, is in a different section of the statute than the section that describes the criminal punishment. *See* Act of Mar. 2, 1889, ch. 393, § 4, 25 Stat. 873, 874 (mail-opening prohibition); *id.* sec. 1, § 5480,

The codification of the Espionage Act provision, however, was completely different. Recall that the proviso in the Espionage Act originally read: “*Provided*, That nothing in this Act shall be so construed as to authorize any person other than an employe [*sic*] of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.”<sup>139</sup> The last portion of the original version of 18 U.S.C. § 343, in contrast, read: “[B]ut no person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, shall be authorized to open any letter not addressed to himself.”<sup>140</sup> Notice the subtle change: what was originally a proviso in the Espionage Act itself (“[N]othing in this Act shall be so construed as to authorize . . . .”) has become what appears to be a prohibition (“[N]o person . . . shall be authorized . . . .”).<sup>141</sup> Part of the reason for this change might have been the length of the Espionage Act.<sup>142</sup> The codification process made it extremely difficult to apply the “[N]othing in this Act” language to specific circumstances, because the Espionage Act was no longer a coherent whole but was instead littered throughout the newly created United States Code. Nevertheless, the codification process changed the language of the Act.

In sum, the 1925 codification process deleted the language prohibiting the opening of mail from the obscene-matter statute—the only language prohibiting the opening of “sealed matter of the first-class” and not simply letters<sup>143</sup>—and changed the Espionage Act’s proviso into what appears to be an affirmative prohibition on opening letters.<sup>144</sup> The other two provisos related to opening mail were largely left intact, although the codification process separated the provisions regarding lotteries into two separate sections.<sup>145</sup> Consequently, after the 1925 codification, there were a total of four separate prohibitions on opening mail—one appearing to be an affirmative prohibition and the other three appearing to be provisos.<sup>146</sup> Importantly, all four prohibited only the opening of letters.

In 1948, Congress recodified the entire Criminal Code and, in doing so, consolidated several of the provisions that were originally in the Espionage Act

25 Stat. at 873 (criminal punishment). The codification process simply incorporated the language from the section describing the criminal prohibition, but ignored the separate section prohibiting the opening of mail. See 18 U.S.C. § 338 (1925).

139. Act of June 15, 1917, ch. 30, tit. XII, § 1, 40 Stat. 217, 230.

140. 18 U.S.C. § 343 (1925).

141. Compare § 1, 40 Stat. at 230, with 18 U.S.C. § 343 (1925).

142. The original Espionage Act contained twelve titles and covered fourteen pages. See § 1, 40 Stat. at 217–31.

143. Compare Act of Sept. 26, 1888, ch. 1039, sec. 2, § 3893, 25 Stat. 496, 497 (referencing “sealed matter of the first-class”), with 18 U.S.C. § 334 (1925) (making no such designation).

144. 18 U.S.C. § 343 (1925).

145. *Id.* § 338; 39 U.S.C. §§ 256, 259, 732 (1925).

146. 18 U.S.C. § 343 (1925); 39 U.S.C. §§ 256, 259, 732 (1925).

into one section, 18 U.S.C. § 1717.<sup>147</sup> 18 U.S.C. § 343, which contained the prohibition on opening mail, became a full-fledged subsection of the newly enacted 18 U.S.C. § 1717: “[n]o person other than a duly authorized employee of the Dead Letter Office, or other person upon a search warrant authorized by law, shall open any letter not addressed to himself.”<sup>148</sup> There were a few changes from the pre-1948 provision, but none of these are material.<sup>149</sup>

In 1960, Congress rewrote and recodified the entire Postal Code. In doing so, Congress moved the language from the Criminal Code, 18 U.S.C. § 1717(c), and inserted it into the Postal Code, in 39 U.S.C. § 4057, thereby integrating it with the language from the three prohibitions on opening mail that were already in that title, 39 U.S.C.—the two that regulated lottery operations and the one prohibiting matter furthering a scheme of distributing counterfeit money.<sup>150</sup> The new section was entitled “Opening first class mail” and read, “Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department.”<sup>151</sup>

In integrating the prohibition on opening mail into the Postal Code, Congress eliminated from the earlier versions of 39 U.S.C. all language suggesting the prohibition on opening mail was a proviso (“Nothing contained in this section [or Act] . . .”), and made it more similar to the absolute prohibition found in the previous version of 18 U.S.C. § 1717(c).<sup>152</sup> The historical and revision notes in the United States Code specifically rely on the fact that “[t]he provisions of section 1717(c), title 18, [were] not restricted to opening mail to discover violations of subsections (a) and (b) of section 1717, title 18.”<sup>153</sup> It then goes on to say that “the provisions of the said subsection [§

147. Act of June 25, 1948, ch. 645, § 1717, 62 Stat. 683, 782 (formerly codified at 18 U.S.C. § 1717 (1952)).

148. *Id.*; 18 U.S.C. § 1717(c) (1952).

149. According to the reviser’s note, “[m]inor changes were made in arrangement, translation, and phraseology.” 18 U.S.C. § 1717 (1952) (Reviser’s Note). The new provision replaced the phrase “an employee of the Dead Letter Office, duly authorized thereto” with the phrase “a duly authorized employee of the Dead Letter Office,” and replaced the phrase “shall be authorized to open any letter” with the phrase “shall open any letter.” *Compare* 18 U.S.C. § 343 (1946), *with* 18 U.S.C. § 1717(c) (1952). Given that the provision was now a separate subsection in the Criminal Code, one might wonder whether the 1948 codification process created a new crime, albeit one without any stated penalties. My research, however, has uncovered no cases interpreting the provision, let alone a prosecution based on it.

150. Act of Sept. 2, 1960, Pub. L. No. 86-682, § 4057, 74 Stat. 578, 657 (codified at 39 U.S.C. § 4057 (1964)).

151. 39 U.S.C. § 4057 (1964).

152. *Compare* 39 U.S.C. § 4057 (1964) (prohibiting anyone who is not an employee authorized by the Postmaster General or a person with a warrant from opening a first-class letter or parcel), *with* 18 U.S.C. § 1717(c) (1952) (prohibiting anyone other than an authorized employee of the Dead Letter Office or a person with a search warrant from opening letters not addressed to himself).

153. 39 U.S.C. § 4057 (1964) (Historical and Revision Notes).

1717(c)] are consolidated in this section with somewhat similar provisions of sections 256, 259, [and] 732 of title 39.”<sup>154</sup> It is of course true that the pre-1960 version of 18 U.S.C. § 1717(c) was “not restricted to opening mail to discover violations of subsections (a) and (b) of section 1717, title 18”;<sup>155</sup> however, the provision from which 18 U.S.C. § 1717(c) derived *was* most definitely “restricted to opening mail to discover violations of” the Espionage Act,<sup>156</sup> since it was a proviso to the Espionage Act provisions, not an absolute prohibition on mail-opening.<sup>157</sup>

Still, from a broader perspective, this complete elimination of the proviso aspect of the prohibition on opening mail probably did not change anything. Congress has consistently believed that letters cannot be opened—even when it did not include language to that effect; the proviso language in each of the original statutes was simply a reflection of this fact, not an attempt to limit the language prohibiting the opening of mail to the particular statutes being passed.<sup>158</sup>

Beyond this change, however, there was another important change to the language of former 18 U.S.C. § 1717(c): the protection for letters was supplemented with the phrase “parcel of the first-class.”<sup>159</sup> In 1960, the new provision read as follows: “Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department.”<sup>160</sup> Given this rather explicit addition of first-class parcels, one might ordinarily understand such a change to be a conscious attempt on the part of the 86th Congress in 1960 to have the prohibition on opening mail cover all first-class mail. The problem, however, is that the 1960 statute was simply a recodification.<sup>161</sup> According to the House Judiciary Committee Report,

[t]he object of the new title is to restate existing law, not to make new law. Consistently with the general plan of the United States Code, the pertinent provisions of law have been reworded and rearranged, subject to every precaution against making changes in substance . . . .

. . . In a codification statute . . . the law is intended to remain substantively unchanged.<sup>162</sup>

---

154. *Id.*

155. *Id.*

156. *Id.*

157. *See supra* Part II.B.5.

158. *See supra* text accompanying note 45.

159. 39 U.S.C. § 4057 (1964).

160. Act. of Sept. 2, 1960, Pub. L. No. 86-682, § 4057, 74 Stat. 578, 657 (codified at 39 U.S.C. § 4057 (1964)).

161. 39 U.S.C. § 4057 (1964).

162. S. REP. NO. 86-1763, at 5 (1960); H. REP. NO. 86-36, at 3 (1959).

Using a plain meaning approach to statutory interpretation,<sup>163</sup> the addition of “or parcel of the first-class” created a clear break with all four of the statutes then in effect. The previous statutes were limited to letters, while the new statute covered all first-class mail, including both letters and parcels. At the same time, however, it is clear that there was no intention to change the meaning of the statute.<sup>164</sup> This leads to the conclusion that either the 86th Congress believed that the various prohibitions on opening mail already applied to first-class parcels or that Congress simply made a mistake, and we should ignore the prohibition with respect to mail matter other than letters. If we start with the presumption that the prohibition on opening mail originally applied only to letters, one can argue that the 1960 postal revision left the law as it had been.

### 7. The 1970 Postal Reorganization Act

Finally, in 1970, Congress promulgated the precise language of the sealed-letter provision. The provision comprised a tiny part of the Postal Reorganization Act,<sup>165</sup> which was the largest reorganization of the postal system in the nation’s history.<sup>166</sup>

The principal change the 1970 law brought to the sealed-letter provision was to delete the reference to “parcel of the first class” that had been introduced during the 1960 codification process.<sup>167</sup> Again relying on *expressio unius*, this suggests that the sealed-letter provision does not protect parcels (except to the extent that a parcel might be a letter).<sup>168</sup> Thus, one could argue that this change of language was a conscious attempt to exclude first-class “parcels” from the statute’s protection. The problem with this argument, however, is that there is no evidence that anyone in Congress either consciously thought about the difference in language or indicated a desire to exclude first-class parcels. As I explained above, it is not clear that the words “or parcel of the first class” in the pre-1970 law were ever meant to protect anything beyond letters in any event.<sup>169</sup> Thus, even the premise of such an argument, that the pre-1970 law included protection for first-class parcels, may be incorrect. So, however the pre-1970 language is interpreted—as either protecting first-class parcels or

---

163. *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (discussing the plain-meaning approach).

164. S. REP. NO. 86-1763, at 5 (1960); H.R. REP. NO. 86-36, at 3 (1959).

165. Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C.).

166. Hettich, *supra* note 2, at 200. Although the bulk of the law came from a House bill, the sealed-letter provision itself came from the Senate bill. See H.R. REP. NO. 91-1363, at 3721 (1970).

167. Compare Postal Reorganization Act § 3623, with 39 U.S.C. § 4057 (1964).

168. *But cf.* S. REP. NO. 91-912, at 4 (1970) (proposing that the law include “a new statement of postal policy” that would include a provision “[t]hat *letter mail* be sealed against inspection” (emphasis added)).

169. See 39 U.S.C. § 4057; see also S. REP. NO. 86-1763, at 5; H.R. REP. NO. 86-36, at 3.

not—the language of the 1970 sealed-letter provision suggests that, from that point forward, the prohibition on opening mail applied only to letters and not to parcels. Beyond this linguistic point, moreover, there are other reasons to think that the 1970 statute should be interpreted to exclude parcels.<sup>170</sup>

By itself, this historical background does not explicitly indicate how to interpret the statutory language from 1970, but it creates a presumption that Congress has long understood the difference between letters and all other sealed mail and that this understanding was incorporated into the specific language from which the sealed-letter provision arose.

### C. Principles Underlying Communications Privacy

Taking an intentionalist approach to statutory interpretation, the previous section was aimed at discerning—as best as one can—the specific intent of the drafters of the language that resulted in the sealed-letter provision.

Using a broader, more purposive approach to the interpretive task, we might ask why this distinction between privacy of correspondence and privacy of goods-transportation might make sense, and why it might reflect a principle that embodies the underlying purpose of the statute.

In brief, the answer is that privacy of correspondence furthers values that privacy for the transportation of goods does not, particularly freedom of thought and mind.<sup>171</sup> While this Article is not the place for fully exploring the importance of privacy of correspondence, a brief explanation of its animating value and historical pedigree might be of some use.

As a historical matter, the broader principle of communications privacy—which today regulates communications media from telephone to the Internet—derived from the protection for the privacy of correspondence embodied in postal statutes dating from the Continental Congress.<sup>172</sup> These postal statutes have in turn been deeply intertwined with the Fourth Amendment for over a century. As legal historian David Seipp has explained, the introduction of postal privacy into constitutional jurisprudence in 1878 was connected textually to the word “papers” in the Fourth Amendment and was intertwined with fears of government officials learning secrets contained in epistolary communication.<sup>173</sup> As I have shown elsewhere, though there was indeed a textual hook, the Fourth Amendment principle was not actually derived from a historical understanding of the word “papers” in the Fourth Amendment, but was instead the constitutionalization of long-standing postal policy—a policy

---

170. See *infra* Part II.C.

171. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–99 (1890); see generally Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 387 (2008) (explaining that intellectual privacy—“the protection of records of our intellectual activities”—is necessary to protect “the First Amendment values of free thought and expression”).

172. See Desai, *supra* note 46, at 565–66.

173. DAVID J. SEIPP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY* 34–35, 54 (1981).

that was likewise motivated by fears of government officials prying into the thoughts of those sending letters through the post office.<sup>174</sup>

Later in the nineteenth century, what most scholars see as the dawn of the modern concept of privacy in the United States began with the publication of Samuel D. Warren and Louis D. Brandeis's seminal 1890 article, *The Right to Privacy*.<sup>175</sup> Warren and Brandeis are famously viewed as articulating privacy as the "right 'to be let alone,'"<sup>176</sup>—a phrase that today practically defines the popular conception of privacy.<sup>177</sup> Long forgotten, however, is that one of the principal examples on which Warren and Brandeis built their argument that the common law contained a right to privacy was the common law of copyright.<sup>178</sup>

When Warren and Brandeis wrote, copyright in the United States fell into two broad categories: federal copyright for published works and common-law copyright for unpublished works.<sup>179</sup> Warren and Brandeis argued that common-law copyright was often used as the means of protecting the privacy of epistolary communication, because courts had ruled that common-law copyright prevented not only the copying of letters, but also descriptions of their contents and disclosure of the facts contained in them.<sup>180</sup> This use of

174. See Desai, *supra* note 46, at 575–76; see also SEIPP, *supra* note 173, at 33 (describing "the sacred privacy of individual correspondence"); Note, *The Right to Privacy in the Nineteenth Century America*, 94 HARV. L. REV. 1892, 1899–1901 (1981).

175. Warren & Brandeis, *supra* note 171.

176. *Id.* at 195 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARE INDEPENDENT OF CONTRACTS 29 (2d ed. 1888)).

177. This is not to imply that this is the proper definition of a concept as elusive as privacy. See ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 7 (1988) (noting that under Warren and Brandeis's "right to be let alone" definition, "[a] punch in the nose would be a privacy invasion as much as a peep in the bedroom"); see also DANIEL SOLOVE, UNDERSTANDING PRIVACY 18 (2008); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980) (describing an "interest in privacy" as "related to our concern over our accessibility to others"); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001) ("Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all.").

178. Warren & Brandeis, *supra* note 171, at 201–02.

179. For works created since the effective date of the 1976 Copyright Act, common-law copyright has been abolished, and all copyright is now federal and statutory. However, even today, some of the residual rules related to duration of copyright depend on the pre-1976 Act's distinction between common-law copyright and federal copyright. Compare 17 U.S.C. § 303 (copyright term for works created but not published before the 1976 Act's effective date), with *id.* § 304 (copyright term for works copyrighted—and therefore, published—before the Act's effective date).

180. Warren & Brandeis, *supra* note 171, at 200–05. It is not clear, however, that Warren and Brandeis were entirely forthright in their characterization of the then-extant case law. See Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 655 (1991) (describing the argument as "rest[ing] upon a strained and historically sterile reading of a single decision"). Still, the basic principle that privacy concerns affect copyright cases involving unpublished works in general, and correspondence in particular, remains even in the post-1976 Copyright Act era. See, e.g., *Salinger v. Random House*, 811 F.2d



common-law copyright was, as Warren and Brandeis noted, a form of privacy, one built on “the principle of . . . an inviolate personality.”<sup>181</sup>

It is this conception of privacy—one built on an individual’s common-law “right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others”<sup>182</sup>—that is embedded in the sealed-letter provision, and it is this conception of privacy that allows for a distinction between correspondence and other first-class mail matter, such as parcels and packages.

#### D. *A Linguistic and Historical Analysis of the Concept of a Letter*

Having reviewed the historical provenance of and values embedded in the sealed-letter provision, let me return to the specifics of the statutory language. Recall that the relevant language of the sealed-letter provision states that “[n]o letter of such a class of domestic origin shall be opened except” under three exceptions.<sup>183</sup> Returning to a pure textual approach to interpretation, one would focus on the meaning of the word “letter.” What, then, is a letter for purposes of the sealed-letter provision?

In short, a letter is a message or a communication of information or intelligence.<sup>184</sup> While a letter necessarily includes the medium used for the communication (e.g., paper) as well as the materials used to enclose it (typically an envelope), the key to the meaning of the word is that it *excludes* parcels, packages, and other goods that do not convey a message to an addressee.<sup>185</sup> Consequently, a ticking time bomb or anthrax is not covered by the sealed-letter provision as a matter of statutory interpretation, but a message sent from an al-Qaeda member instructing a confederate as to where to put the bomb or anthrax would be covered by the provision.

##### 1. *The Dictionary Meaning of the Term “Letter”*

To define the word “letter,” let us begin with the dictionary. As I explain below, postal statutes and regulations help elucidate the meaning of the word “letter,” and so I will not limit my analysis to the dictionary.<sup>186</sup> Still, the

---

90 (2d Cir. 1987) (denying fair-use claim by a publisher to print private letters written by noted author and recluse, J.D. Salinger).

181. Warren & Brandeis, *supra* note 171, at 205.

182. *Id.* at 198.

183. 39 U.S.C. § 404(c) (2006).

184. *See infra* Part II.D.1.

185. *See infra* Part II.D.2.

186. *See Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.) (“But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”).

dictionary provides an important starting point for analyzing the statutory definition.<sup>187</sup>

*Black's Law Dictionary* defines a "letter" as a "written *communication* that is usually enclosed in an envelope, sealed, stamped, and delivered,"<sup>188</sup> while the *Concise Oxford English Dictionary* defines it as "a written, typed, or printed *communication*, sent by post or messenger."<sup>189</sup> One can quibble on the margins as to whether, say, a videotape or a computer disk would be a communication, but, understood literally, a ticking time bomb or any ordinary good, including something small enough to fit into a regular-sized envelope, such as anthrax, would not satisfy this definition.<sup>190</sup>

Evidence of statutory meaning also supports these dictionary definitions. It is crystal clear that the term "letter" does not include packages or parcels, and other evidence suggests that the term "letter" is limited to messages or communications, as the dictionary suggests.

## 2. The Term "Letter" Excludes Packages and Parcels

Two pieces of evidence suggest that the term "letter" excludes packages: (1) a comparison of the sealed-letter provision with its immediate predecessor and (2) postal regulations that set forth the postal rate classification system.

First, as I described in detail at the end of Part II.B, the pre-1970 language prohibiting the opening of mail included the phrase "or parcel of the first class,"<sup>191</sup> while the current version does not.<sup>192</sup> By itself, this fact lends some

---

187. See HART & SACKS, *supra* note 33, at 1375–76 ("[Dictionaries] are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible."); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 280–81 (1998) (noting that dictionaries are used in both textualist and intentionalist approaches to statutory interpretation and analyzing the use of dictionaries in Supreme Court opinions); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993) ("[J]udges often turn to the dictionary to find support for their decisions."); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 228 (1999) ("For nearly 170 years, the United States Supreme Court has referred to a variety of different dictionaries for a variety of different reasons."); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994) (noting that "the Supreme Court has referred to dictionaries in more than six hundred cases over a period of two centuries"); cf. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 357 (1994) (noting an increase in the use of dictionaries over the 1980s and early 1990s); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, *supra*, at 1438–40 (same).

188. BLACK'S LAW DICTIONARY 986 (9th ed. 2009) (emphasis added).

189. CONCISE OXFORD ENGLISH DICTIONARY 818 (11th ed. 2008) (emphasis added).

190. I will discuss the practical implications of this definition in more detail below. See *infra* note 244 and accompanying text. If this argument is correct, however, a potential problem arises: one cannot verify whether a piece of mail is a letter, as so defined, until after the envelope is opened.

191. 39 U.S.C. § 4057 (1964).

192. 39 U.S.C. § 404(c) (2006).

support to the view that parcels are excluded from the category of “letter.”

Second, a brief look at the regulatory structure of the postal rate classification system buttresses this conclusion. In particular, the structure of postal rate classification demonstrates that the word “letter” is distinct from the broader concept of a “class of mail,” as described in the sealed-letter provision, and that the term “letter” is a subset of, rather than coterminous with, the relevant class of mail.<sup>193</sup>

To understand why the structure of the postal rate classification system is important for interpreting the sealed-letter provision requires some background about the place of the sealed-letter provision in the broader statutory scheme. As I noted above, the sealed-letter provision comes from the 1970 Postal Reorganization Act. That Act codified the provision as a subsection of § 3623, entitled “Mail Classification,” which was in turn part of Chapter 36 of the Postal Code, a Chapter of the Code entitled “Postal Rates, Classes, and Services.”<sup>194</sup> In the 1970 Postal Reorganization Act, Congress created the Postal Rate Commission, now known as the Postal Regulatory Commission,<sup>195</sup> to establish a classification system that would allow different types of mail to be sent at different rates.<sup>196</sup> The establishment of the Postal Rate Commission was codified in the opening section of the “Postal Rates, Classes, and Services” chapter of the Code,<sup>197</sup> while Congress’s instructions to the Commission to establish a rate system were found in 39 U.S.C. § 3623(a), which also contains the sealed-letter provision.<sup>198</sup> Thus, it makes sense to understand the sealed-letter provision in the context of rate classification.

Soon after the 1970 Postal Reorganization Act, the Postal Rate Commission followed Congress’s instructions and established a rate classification system,

---

193. 39 C.F.R. pt. 3001, subpt. C, app. A, § 100.020 (1986).

194. Postal Reorganization Act, Pub. L. No. 91-375, § 3623(d), 84 Stat. 719, 761 (1970). The codification of the 1970 Postal Reorganization Act can be found in the pre-PAEA editions of the United States Code. *See, e.g.*, Former 39 U.S.C. § 3623 (2000). Here, I am referencing the 2000 edition of the United States Code, but the structure I am describing can be found in any edition from 1970 through 2000. The sealed-letter provision was found in § 3623(d), which was entitled “Mail Classification.” Section 3623 was in Subchapter II, which was entitled “Permanent Rates and Classes of Mail,” of Chapter 36, which was—and remains—entitled “Postal Rates, Classes, and Services.” *See* Former 39 U.S.C. § 3623 (2000).

195. Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 604, 120 Stat. 3198, 3241 (2006) (codified in scattered sections of 39 U.S.C.).

196. Postal Reorganization Act § 3603.

197. 39 U.S.C. § 3601 (2000).

198. *Id.* § 3623(a). Strictly speaking, the Postal Rate Commission recommended rates to the governors of the Postal Service. *See id.* § 3621 (“[T]he Governors are authorized to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of this chapter.”); *id.* § 3623(a) (“[T]he Postal Service shall request the Postal Rate Commission to make a recommended decision on establishing a mail classification schedule in accordance with the provisions of this section.”). The various roles of the Commission and the Postal Service are not of any importance here.

which was described in detail in title 39 of the Code of Federal Regulations.<sup>199</sup> Originally known as the Domestic Mail Classification Schedule,<sup>200</sup> it is now referred to as the Mail Classification Schedule.<sup>201</sup> The original Classification Schedule was lifted, virtually in its entirety, from previous statutes and can thus reasonably be seen as an expression not only of the views of the Commission, but also of the Congress that passed the 1970 Postal Reorganization Act.

The Classification Schedule contains four broad categories of mail: (1) Expedited Mail (also known as Express Mail), (2) First-Class Mail, (3) Standard Mail, and (4) Periodicals Mail.<sup>202</sup> Within the First-Class Mail classification were subclasses entitled “Letters and Sealed Parcels,” “Cards,” and “Priority Mail.”<sup>203</sup> While the details of their definitions are not important, notice that First-Class Mail includes subclasses other than “letters” and that a sealed parcel was implicitly treated as distinct from a letter.<sup>204</sup> Since sealed parcels are not letters, the sealed-letter provision likely does not apply to sealed parcels at all.

### 3. “Letter” Only Includes “Communications” or “Correspondence”

If the term “letter” does not include packages and parcels, then what exactly does the term include? Neither the relevant chapter of the statute nor the Classification Schedule contains an explicit definition of the word “letter,” but it is clear that the term “letter” is not synonymous with mail matter, first-class mail, or sealed mail.<sup>205</sup>

---

199. 39 C.F.R. pt. 3001, subpt. C, app. A (1986).

200. See 39 C.F.R. § 3001.68.

201. POSTAL REGULATORY COMM’N, DOMESTIC MAIL CLASSIFICATION SCHEDULE [hereinafter CLASSIFICATION SCHEDULE], available at [http://www.prc.gov/PRC-DOCS/library/mcs/June\\_1\\_DMCS\\_Web.pdf](http://www.prc.gov/PRC-DOCS/library/mcs/June_1_DMCS_Web.pdf). The Commission first established the Classification Schedule in the 1970s; however, it was not published in the Federal Register until 1985. See *infra* note 229.

202. CLASSIFICATION SCHEDULE, *supra* note 201, at i. Strictly speaking, the Commission, not Congress, established this rate classification system, but the broad outlines of the system date as far back as the 1879 Classification Act. The general notion of this rate structure, and in particular the notion of first-class mail, was well-known to Congress in 1970 when it passed former § 3623(d). Thus, this basic structure can be understood to have been contemplated at the time Congress passed the statute.

203. CLASSIFICATION SCHEDULE, *supra* note 201, §§ 221–222.45.

204. In 2007, the Commission gave the term “letter” a technical meaning in the context of the Classification Schedule that was distinct from communications. *Id.* § 221.221; Opinion and Recommended Decision of the United States Postal Regulatory Commission on Postal Rate and Fee Changes, No. R2006-1 (Feb. 26, 2007), app. 2, available at <http://www.prc.gov/Docs/55/55901/Vol1R2006-1Op.pdf>. Under this technical definition, the meaning of the term “letter” is based entirely on the size and weight of the piece of mail matter. *Id.* The principal rationale for this technical definition was to determine rates: the Postal Service processes different-sized mail matter on different machines, and letter carriers handle them differently; thus, their costs vary widely. I am indebted to David Stover for this point.

205. 39 U.S.C. § 404(c) (2006); CLASSIFICATION SCHEDULE, *supra* note 201, § 221.211. The sealed-letter provision was formerly in chapter 36 of title 39, entitled “Postal Rates, Classes,

In addition to the legislative history and broader purposivist arguments discussed above, two additional pieces of evidence lead to the conclusion that the specific term “letter” is properly interpreted as limited to communications or correspondence: (1) the use of the term “letter” in the context of the postal monopoly provisions has always been limited to communications, messages, or correspondence; and (2) in the highly related context of postal privacy during mail importation, the law distinguishes between correspondence and other types of mail matter.

First, although there is no explicit definition of the word “letter” in the sealed-letter provision, the concept of a letter is specifically defined elsewhere in the postal laws.<sup>206</sup> As with the sealed-letter provision, the term “letter” as used in the postal monopoly statutes has a long historical pedigree. At least as far back as the early nineteenth century, courts have played a role in interpreting the term “letter” in the context of the postal monopoly statutes.<sup>207</sup> For example, in 1822, the Supreme Judicial Court of Massachusetts held that a set of bank notes did not constitute a “letter” within the meaning of the postal statutes,<sup>208</sup> rather, the court held that a “letter is a message in writing . . . . *The merely covering a parcel of . . . merchandise[] with paper*, and directing it to the person to whom it is sent, *would not make such parcel a letter . . . .*”<sup>209</sup> The basic contours of this definition have persisted throughout American history<sup>210</sup> and remain the law today.<sup>211</sup>

---

and Services.” 39 U.S.C. § 3623 (2000). However, since the passage of the PAEA in 2006, it is in chapter 4 of title 39, entitled “General Authority.” 39 U.S.C. § 404 (2006). The term “letter” is not defined in either place.

206. See, e.g., 39 C.F.R. 310.1 (1983).

207. *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 56 (1822).

208. *Id.* at 55–56.

209. *Id.* at 56 (emphasis added).

210. See *United States v. Bromley*, 53 U.S. 88, 93–94, 97 (1851) (“A letter is a written communication from one person to another; neither external direction, nor sealing, nor envelope, are essential to a letter.”); *United States v. Britton*, 17 F. 731, 732 (S.D. Ohio 1883) (“[L]etter’ is defined as a ‘written or printed message . . . .’”); *United States v. Gaylord*, 17 F. 438, 441 (C.C.S.D. Ill. 1883) (“A letter is certainly a writing.”); see also *Deweese’s Case*, 7 F. Cas. 571, 572 (C.C.D.N.C. 1869) (No. 3,848) (holding that the term “letter” in the postal statutes excludes “printed circulars”); *Chouteau v. Steamboat St. Anthony*, 11 Mo. 226, 230 (Mo. 1847) (explaining that bank notes are not “letters” within meaning of postal monopoly statute); cf. *United States v. Thompson*, 28 F. Cas. 97, 98 (D. Mass. 1846) (No. 16,489) (noting that the “word ‘letter’ had no technical meaning, but must be understood in the sense in which it was generally understood among business men”); *Buchwald v. Buchwald*, 199 A. 795, 799 (Md. 1938) (noting, in a case not involving the post office, that “the strict etymological meaning of a ‘letter’ would be an epistle, a written message”).

211. See *Nat’l Ass’n of Letter Carriers, AFL-CIO v. Ind. Postal Sys. of Am., Inc.*, 336 F. Supp. 804, 809 (W.D. Okla. 1971), *aff’d*, 470 F.2d 265 (10th Cir. 1972).

Indeed, in 1974, the Postal Service further refined the definition of letter for purposes of the postal monopoly.<sup>212</sup> Under these regulations, a letter is defined as “a *message* directed to a specific person or address and recorded in or on a tangible object . . . .”<sup>213</sup> In turn, a “[m]essage” means any information or intelligence that can be recorded,<sup>214</sup> and a “tangible object” *excludes* “objects the material or shape and design of which make them valuable or useful for purposes other than as media for long-distance communications, unless they are actually used as media for personal and business correspondence.”<sup>215</sup>

While the regulatory definition is far more extensive, the basic notion is that to be a letter, *mail matter must constitute a communication to a recipient.*<sup>216</sup> Although it is clear that the precise contours of the term “letter” in the sealed-letter provision are not identical to those found in the monopoly statutes,<sup>217</sup> the monopoly statutes provide further corroborating evidence that the term “letter” does not include anything beyond communications.

Second, the regulatory structure of postal law makes a similar distinction between correspondence and other mail matter in the context of postal privacy during mail importation.<sup>218</sup> Although this distinction does not speak directly to the linguistic definition of letter, it corroborates the intuition about the distinction between correspondence and other mail matter in the domestic mail context.

As a general matter, customs law affords customs officials more latitude to open and examine first-class mail sent from abroad than that given to postal officials working with domestic first-class mail.<sup>219</sup> Yet, the customs

---

212. 39 Fed. Reg. 33,209, 33,211 (Sept. 16, 1974) (promulgating 39 C.F.R. § 310.1(a) (1983)). The regulations were subsequently upheld. *See Associated Third Class Mail Users v. USPS*, 440 F. Supp. 1211, 1215 (D.D.C. 1977), *aff'd*, 600 F.2d 824 (D.C. Cir. 1979).

213. 39 C.F.R. § 310.1(a) (emphasis added).

214. *Id.* § 310.1(a)(2).

215. *Id.* § 310.1(a)(1).

216. *See id.* § 310.1(a)(1)–(3).

217. *See* JOHN A. GRONOUSKI & U.S. POST OFFICE DEP'T, RESTRICTIONS ON TRANSPORTATION OF LETTERS: THE PRIVATE EXPRESS STATUTES AND INTERPRETATIONS § 27, at 24–25 (5th ed. July 1967), *reprinted in* U.S. POSTAL SERV., BD. OF GOVERNORS, THE PRIVATE EXPRESS STATUTES AND THEIR ADMINISTRATION (1973); *see also* Private Express Statutes: Implementing Regulations, 41 Fed. Reg. 34,128, 34,131–32 (Aug. 6, 1976). In one case, a court relied on this distinction to distinguish between “letter” in the monopoly statutes and for purposes of privacy of the mail. *See Associated Third Class Mail Users*, 440 F. Supp. at 1215. The key point, however, is that the court implicitly accepted the basic notion of a letter, in both contexts, as being limited to written correspondence.

218. *See* 19 C.F.R. § 145.3 (2009).

219. *See id.* §§ 145.2, 145.3. *Compare* 19 U.S.C. § 482(a) (2006) (explaining that customs officials may “search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law”), *with* 39 U.S.C. § 404(c) (2006) (allowing the Postal Service to open a domestic letter only under the authority of a warrant, for the purpose determining the delivery address, or with the authorization of the

regulations make a distinction between mail that contains “[o]nly correspondence” and mail that contains “[m]atter in addition to correspondence.”<sup>220</sup> When first-class mail “appears to contain matter in addition to, or other than, correspondence,” customs officials are permitted to open and examine sealed letters without a warrant as long as they have a “reasonable cause to suspect the presence of merchandise or contraband.”<sup>221</sup> This standard is lower and easier to satisfy than the probable-cause standard necessary to obtain a warrant.<sup>222</sup>

In contrast, where first-class mail “appears to contain only correspondence,” customs officials may *not* open it unless they have the written consent of the sender or addressee or a warrant.<sup>223</sup> Similarly, without proper consent or a warrant, customs officials may not *read* any correspondence in first-class mail, regardless of the existence of other contents contained in the envelope or package.<sup>224</sup> Indeed, it was arguably this exclusion of correspondence from the reach of the lower “reasonable cause to suspect” standard that saved these regulations from invalidation under the First and Fourth Amendments in a 1977 Supreme Court case, *United States v. Ramsey*.<sup>225</sup>

While the customs regulations do not purport to define the term “letter,” they provide a key example of the law recognizing the common-sense distinction between correspondence and other mail matter for purposes of privacy principles.<sup>226</sup> The use of the term “letter” in the sealed-letter provision embodies a similar distinction—even if the term “correspondence” does not precisely match the definition of “letter,” it does lend support to the basic notion that anthrax or a ticking time bomb would not constitute a letter.

In short, then, the word “letter” in the sealed-letter provision is limited to the category of communications. The sealed-letter provision regulates the opening

addressee). The Court has upheld this power against constitutional challenge. *United States v. Ramsey*, 431 U.S. 606, 611–16, 619–20 (1977).

220. 19 C.F.R. § 145.3(a)–(b).

221. *Id.* § 145.3(a).

222. *Ramsey*, 431 U.S. at 612–13 (referring to the “reasonable cause to suspect” test in 19 U.S.C. § 482).

223. 19 C.F.R. § 145.3(b).

224. *Id.* § 145.3(c) (emphasis added). This rule is not duplicative of the prohibition against opening correspondence, because correspondence might be found after a customs official opens a piece of first-class mail that is suspected of containing something other than correspondence or when a package contains both correspondence and something else. Moreover, the prohibition on reading first-class mail also applies to postcards, which could otherwise be read without being opened. See *id.* § 145.1(b) (defining “letter class mail” to include “post cards”); § 145.3(c) (applying the prohibition to all “[l]etter class mail, whether or not sealed”). However, as a practical matter, customs protocol effectively eviscerates the prohibition on reading cross-border correspondence. See *United States v. Seljan*, 547 F.3d 993, 1008 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1368 (2009).

225. 431 U.S. 606, 621, 623–25 (1977).

226. 19 C.F.R. §§ 145.1, 145.3(a) (2009).

of mail that can be read, but simply does not apply to anthrax, bombs, or other types of mail matter.

#### 4. Evidence Suggesting a Broader Meaning of the Term “Letter”

There is some evidence that the sealed-letter provision applies more broadly than its literal terms. Perhaps the strongest piece of evidence comes from the regulations that address the issue of postal privacy.<sup>227</sup> As I noted above, the Postal Rate Commission has promulgated mail classification regulations known as the Mail Classification Schedule. Although the Classification Schedule makes a clear distinction between letters and other mail matter, it arguably interprets the sealed-letter provision to apply beyond mere letters.

Under § 5010 of the Classification Schedule, “[m]atter mailed as First-Class Mail or Express Mail shall be treated as mail which is sealed against postal inspection and shall not be opened except as authorized by law.”<sup>228</sup> This portion of the Classification Schedule seems likely to be the Commission’s implementation of the sealed-letter provision;<sup>229</sup> the Commission thus seems to

---

227. See CLASSIFICATION SCHEDULE, *supra* note 201, § 5010.

228. *Id.* Per section 5020, matter mailed under the other two categories of mail constitutes “consent by the sender to the postal inspection of the contents.” *Id.* § 5020.

229. The Commission issued its original decision establishing the Classification Schedule in April 1976. POSTAL RATE COMM’N, OPINION & RECOMMENDED DECISION, MAIL CLASSIFICATION SCHEDULE, 1973, Docket No. MC73-1 Phase 1 (Apr. 15, 1976), available at <http://weblink.prc.gov/weblink7/docview.aspx?id=508240233>. This recommended decision included a provision to protect the privacy of certain mail matter sent through the mail; however, the provision was not mentioned even once in the Commission’s opinion explaining its decision. The provision closely mirrored the language in the sealed-letter provision, except that the word “letter” was replaced with “[m]atter mailed at first-class or airmail rates.” U.S. POSTAL SERV., DOMESTIC MAIL CLASSIFICATION SCHEDULE § 006.2, in POSTAL RATE COMM’N, OPINION & RECOMMENDED DECISION, MAIL CLASSIFICATION SCHEDULE, 1973, *supra* (“Matter mailed at first-class or airmail rates shall not be opened except under authority of a search warrant authorized by law or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the matter can be delivered, or pursuant to the authorization of the addressee.”). A few years later, in 1978, the Commission addressed some broader issues related to classification and issued an updated and slightly reorganized Classification Schedule. POSTAL RATE COMM’N, OPINION & RECOMMENDED DECISION, BASIC MAIL CLASSIFICATION REFORM SCHEDULE—PROPER SCOPE & EXTENT OF SCHEDULE, Docket No. MC76-5 (Nov. 29, 1978), available at <http://weblink.prc.gov/weblink7/docview.aspx?id=508262575>. This decision changed the language to that found in section 5010 of the current regulations. See *id.* Despite the changes from the earlier language, the Commission provided no reason for changing the language. The reasons for some of the changes, however, are not difficult to fathom. The reference to airmail rates was changed to Express Mail because of broader changes in the Classification Schedule, and the “except as authorized by law” language seems likely to be a shorthand way of articulating the three exceptions in the statute. In 1985, the Commission published the entire Classification Schedule, unaltered, in the Federal Register. 39 C.F.R. pt. 3001.68 (1985). Because the 2006 PAEA has necessitated major changes to the Classification Schedule, it is in flux as of the writing of this Article, and a complete and fully updated Schedule does not exist; however, until May 2009, the Schedule was published in the Code of Federal Regulations. 39 C.F.R. pt. 3001, subpt. C, app. A (1985).



have interpreted the sealed-letter provision as prohibiting the opening of *any* sealed mail matter sent via first-class or express mail, not just letters. Under ordinary principles of deference to an administrative agency interpreting a statute within its own sphere of competence,<sup>230</sup> we might treat the Classification Schedule's privacy provision as an authoritative interpretation of the sealed-letter provision.

Putting all the evidence together, however, I conclude that the Classification Schedule's privacy provision cannot overcome the plain meaning of the statutory language that the sealed-letter provision is limited solely to letters. The question is close, but there are several reasons why the Classification Schedule's privacy provision's broader applicability does not change a proper interpretation of the sealed-letter provision as limited to letters.<sup>231</sup>

First, the language of the Classification Schedule's privacy provision can be read as limiting itself to postal authorities. Before stating that first-class or express mail "shall not be opened except as authorized by law," the Classification Schedule's privacy provision states that the mail matter "shall be treated as mail which is sealed *against postal inspection*."<sup>232</sup> In contrast, the sealed-letter provision simply states that "[n]o letter of such a class . . . shall be opened" and includes no reference to postal authorities.<sup>233</sup> Thus, one could interpret the Classification Schedule's privacy provision to apply only to postal

---

230. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

231. In administrative law terms, one could characterize this conclusion as saying that the statutory language is clear under the first step of the *Chevron* analysis. See *id.* at 842–43. The argument would be that regardless of the range of possible meanings the word "letter" might have, there is no question that the word does not mean all first-class mail. See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.6, at 169–71 (4th ed. 2002) (noting that the Court has generally found cases applying *Chevron* step one to preclude agency interpretations that fall outside the range of dictionary definitions or prior court interpretations of a term). However, it is probably more accurate to say that while the statute may be ambiguous, Congress did not delegate the authority to interpret the statute to the Postal Rate Commission, and the Commission was thus not actually interpreting the statute when it promulgated its privacy provision; rather, it was simply promulgating a rule that was not precluded by the statute. This could be analogized to the situation in *Martin v. Occupational Safety and Health Review Commission* in which the Court refused to give the Occupational Safety and Health Review Commission *Chevron*-style deference because it concluded that Congress did not delegate to the Commission the power to promulgate an authoritative interpretation of the relevant statute. 499 U.S. 144, 152–53 (1991). A similar argument could be made here: although Congress clearly delegated the authority to set rates to the Postal Rate Commission, it did not grant to the Commission the authority to interpret the sealed-letter provision. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990) (noting that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority" and that where "[n]o such delegation . . . is evident in the statute," *Chevron* deference is inappropriate). Indeed, it might well have been that the Postal Rate Commission did not even conceive of itself as engaging in the task of interpreting the statute when it promulgated its regulations.

232. CLASSIFICATION SCHEDULE, *supra* note 201, § 5010 (emphasis added).

233. 39 U.S.C. § 404(c) (2006).

authorities, whereas the sealed-letter provision applies to everyone, including government officials who do not work for the Postal Service, such as law enforcement and NSA officials.<sup>234</sup> Indeed, it is not clear that the Commission would even have the authority to bind officials who are not postal employees in such circumstances.

It certainly might be possible to interpret the reference to “postal inspection” simply to mean “occurring during the time the mail is in transit through the postal system.” Under this interpretation, the Classification Schedule’s privacy provision would apply to *anyone* who might open mail matter prior to delivery to the addressee. Still, given the explicit difference in language as compared to the original sealed-letter provision and the fact that the Commission’s authority to promulgate rules probably could not bind government officials outside of the post office, it seems most likely that the Classification Schedule’s privacy provision applies only to *postal officials*.

Limiting the reach of the Classification Schedule’s privacy provision to postal employees seems even more appropriate given that the Classification Schedule was not even published in the Federal Register until nine years after the Postal Rate Commission promulgated it. While the provisions of the Classification Schedule were known and generally relied upon by mailers—in other words, private parties who used the post office<sup>235</sup>—the privacy provision can be seen as limited to postal authorities,<sup>236</sup> in contrast to the statute, which is a comprehensive ban on letter-opening in general.

Moreover, in the context of the broader regulatory scheme, which consisted of establishing an entirely new set of classes and subclasses for mail matter, the sealed-letter provision was a relatively trivial part. My research for this Article has uncovered no explanation by the Commission indicating why the language in the Classification Schedule differs from that found in the actual statute. Although dozens of groups commented on the Commission’s classification proposals, I have not found any comments on the Commission’s

---

234. The exceptions to the sealed-letter provision’s prohibition on opening letters support the view that the statute applies to everyone, not just postal employees. The first exception permits the opening of a letter “under authority of a search warrant authorized by law,” and the second exception states that a letter can be opened “*by an officer or employee of the Postal Service* for the sole purpose of determining an address at which the letter can be delivered . . . .” 39 U.S.C. § 404(c) (emphasis added). It is clear that the first exception permits *anyone* acting under the authority of a search warrant to open a letter, while the second exception permits only *postal employees* to open a letter (and only to determine where to send it). The statute thus clearly contemplates situations in which people other than postal employees might open letters, and its categorical “[n]o letter of such a class . . . shall be opened” language thus clearly applies more broadly than just to postal employees.

235. I am indebted to Ian Volner for this point and for broader assistance in understanding the relationship between mailers and the Classification Schedule.

236. The Postal Service has long maintained a Postal Inspection Service that investigates a wide variety of federal crimes related to the U.S. mail, the postal system, and postal employees. See 18 U.S.C. § 3061 (2009); 39 C.F.R. § 233.1 (2008).

privacy provision. Even if this last point is incorrect, one thing is clear: the privacy provision was simply not a significant concern of the Postal Rate Commission as it went about the important task of establishing classes and subclasses of mail, designations that were primarily about—as the Commission’s name at the time suggests—the rates at which mail could be sent. This lack of analysis provides another reason to question whether to apply the ordinary rules of deference, even assuming the Classification Schedule’s privacy provision was intended to be the Commission’s authoritative interpretation of the sealed-letter provision.<sup>237</sup>

Finally, it is worth noting that postal regulations do provide an exception to the general prohibition on opening first-class mail. If authorities “reasonably suspect[]” that mail matter, whether “sealed or unsealed,” poses “an immediate danger to life or limb or an immediate and substantial danger to property,” they may “detain[], open[] [or] remove[] [the mail] from postal custody . . . to the extent necessary to determine and eliminate the danger . . . .”<sup>238</sup>

On first blush, this simply confirms the broader applicability of the Commission’s privacy regulations. The Postal Service would not have felt the need to promulgate regulations permitting it to open mail matter that poses an immediate danger unless there were reasons to think that postal authorities would otherwise be forbidden from doing so. Thus, the existence of this exception, at least implicitly, seems to confirm a view that there is some prohibition on the opening of *all* first-class mail, not just letters.<sup>239</sup>

This does not necessarily show, however, that the Postal Service understood the term “letter” *in the statute* to include all first-class mail; rather, it simply shows that the Postal Service knew that its own privacy regulations covered all first-class mail. The exception thus neither supports nor undermines any particular interpretation of the statute.

There is more to the exception for mail matter that poses an immediate danger, however, and it suggests that postal authorities understood the basic

---

237. See *United States v. Mead*, 533 U.S. 218, 228 (2001) (explaining that *Skidmore* deference is dependent on “the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position” (citations omitted)); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that when an agency is interpreting a statute without congressionally delegated power to conduct such an interpretation, deference to the agency depends in part “upon the thoroughness evident in [the agency’s] consideration, [and] the validity of its reasoning”); cf. *PIERCE*, *supra* note 231, § 3.6, at 172–73 (noting that under *Chevron* step two, courts ask whether the agency’s decision was the product of a process of reasonable decisionmaking).

238. 39 C.F.R. § 233.11(b) (2008). Interestingly, this particular regulation does not specify *who* may act pursuant to this authority, so presumably it could apply not only to postal authorities but to others as well. The only requirement is that the person acting must provide the Chief Postal Inspector with “a complete written and sworn statement” explaining “the circumstances that prompted” the actions taken with respect to the mail matter. *Id.*

239. I am indebted to Professor Thomas Healy for this point.

distinction between a letter and other first-class mail for the purposes of privacy.

First, the “*immediate danger*” exception is narrow: if there is no urgency, the authorities may not open the mail matter.<sup>240</sup> In order for the exception to apply, authorities must first screen the mail “by any means capable of identifying explosives, nonmailable firearms, or other dangerous contents in the mails.”<sup>241</sup> Only if they determine that the danger is immediate may they open the mail without first obtaining a search warrant.

Second, and more importantly, this screening must be done “without opening mail that is sealed against inspection or *revealing the contents of correspondence* within mail that is sealed against inspection.”<sup>242</sup> We thus have another highly relevant example of the law recognizing the distinction between the privacy of correspondence or communication and the privacy of the mere contents of one’s mail. While the regulations do provide privacy protection for all first-class and express mail, they seem to provide additional privacy protection for the “contents of correspondence.”<sup>243</sup> Thus, even the postal regulations—perhaps the best evidence that the sealed-letter provision applies to mail matter other than letters—recognize the distinction between correspondence and other mail matter. The regulations do not directly support my point as a matter of statutory interpretation, but they do support the common-sense notion that appears to be embedded in the statutory definition of “letter.”

In short, the sealed-letter provision applies only to letters, defined generally as consisting of messages or communications of information.<sup>244</sup> It does not prohibit the government from opening first-class mail that contains mail matter other than a letter.

#### E. Other Related Statutory Prohibitions

The sealed-letter provision is not the only law that relates to the detention and opening of mail. There are federal criminal prohibitions on the opening of mail, both for postal employees<sup>245</sup> and for anyone who acts with “design to

---

240. 39 C.F.R. § 233.11(b).

241. *Id.* § 233.11(a).

242. *Id.* (emphasis added).

243. *Id.*

244. See *supra* Part II.D.3. As a practical matter, the definition of “letter” will ultimately turn on the reasons a government official seeks to open the mail matter. In many cases, it is impossible to determine whether an envelope contains only correspondence solely by looking at the outside of the envelope. Anthrax in an envelope would be a paradigmatic example. In such cases, the application of the statute would turn on the reasons the officials seek to open the mail: if they suspect it contains a letter from an al-Qaeda member to a confederate, the statute applies, whereas if they suspect the mail matter contains anthrax, the statute would not apply. This would be the case regardless of what the mail matter actually contains, as long as they do not read correspondence they may find after opening the mail.

245. 18 U.S.C. § 1703(a) (2006). The full text of this provision reads as follows:

obstruct the correspondence, or to pry into the business or secrets of another . . . .”<sup>246</sup> These laws, which date back to the Continental Congress,<sup>247</sup> apply to letters *and* other mail matter; however, neither has ever been used to prosecute officially sanctioned government opening of mail, even though the literal terms of the latter statute could be interpreted to apply, like the sealed-letter provision, to a government official who opens a letter without a warrant.<sup>248</sup> The problem with such an interpretation is that, read literally, this statute could apply with equal force to a government official who opens a letter *with* a warrant.<sup>249</sup> It thus seems very unlikely that these criminal prohibitions could apply to the opening of mail that has been officially sanctioned. Although the application of these statutes to official letter-opening raises some interesting and non-trivial issues, I will not address the criminal prohibitions further.

In short, the sealed-letter provision is likely the only relevant statute that would prevent a government official from opening mail without a warrant, and it applies only to a letter, defined as a communication or message. If we understand the statute as being limited to letters as so defined, it is apparent that the sealed-letter provision is simply about communications privacy, not about privacy in general. It is not about privacy of all first-class mail or all sealed mail. In particular, it has no bearing on ticking time bombs or anthrax.

---

Whoever, being a Postal Service officer or employee, unlawfully secretes, destroys, detains, delays, or opens any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or the Postal Service, shall be fined under this title or imprisoned not more than five years, or both.

*Id.*

246. *Id.* § 1702. The full text of this provision reads as follows:

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both.

*Id.*

247. *See An Ordinance for Regulating the Post Office of the United States of America*, in 23 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 670, 671 (1782); *see also* Desai, *supra* note 46, at 562–68.

248. *See, e.g., Birnbaum v. United States*, 436 F. Supp. 967, 972 (E.D.N.Y. 1977) (suggesting that Federal Bureau of Investigation (FBI) and Central Intelligence Agency (CIA) agents who opened, read, and copied mail pursuant to a secret program from the 1950s to 1973 likely violated 18 U.S.C. § 1702), *aff'd in part, rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

249. In contrast, the criminal prohibition on postal employees opening mail only prohibits opening that is done “unlawfully.” As I have argued elsewhere, the word “unlawfully” in the statute dates back to the 1792 Post Office Act and was most likely intended specifically to permit the opening of mail pursuant to a warrant. *See* Desai, *supra* note 46, at 567–68.

## III. THE FOURTH AMENDMENT

Until now, I have avoided mention of the United States Constitution, but government officials are of course constrained not just by statutes, but also by the Constitution. Beyond the sealed-letter provision, the Fourth Amendment to the United States Constitution also regulates the detention and opening of mail.<sup>250</sup> In this section, I argue that the Fourth Amendment generally prevents the opening of *any* mail matter sent via first-class mail without a warrant, but that the exigent-circumstances exception applies to this general rule.<sup>251</sup> However, because the exigent-circumstances exception applies only to the Fourth Amendment, it does not bear on the sealed-letter provision.

In the seminal nineteenth-century case, *Ex parte Jackson*, the Supreme Court stated that when the government seeks to inspect materials sent through the post office, “a distinction is to be made between . . . what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.”<sup>252</sup> According to the Court, the government had no power to open sealed letters and packages without a warrant: “The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.”<sup>253</sup>

Although the Court connected its decision textually to the Fourth Amendment’s reference to “papers,” *Ex parte Jackson* has long since been interpreted to require a warrant for the opening of *any* sealed mail matter sent via first-class mail.<sup>254</sup> As the Supreme Court stated in the 1970 case, *United States v. Van Leeuwen*, “[i]t has long been held that first-class mail such as letters and sealed packages subject to letter postage—as distinguished from newspapers, magazines, pamphlets, and other printed matter—is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment.”<sup>255</sup> In other words, letters and sealed packages sent pursuant to first-class rates are treated the same from the perspective of the Fourth Amendment. Indeed, with respect to the question whether the president may read one’s mail, the government conceded, and a lower court explicitly held that a secret program to open, read, and copy vast amounts of sealed first-class

---

250. See U.S. CONST. amend. IV. The relevant portion of the Fourth Amendment addresses “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” *Id.*

251. 3 WAYNE R. LAFAYE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.5(c), at 229 (4th ed. 2004).

252. 96 U.S. 727, 733 (1878).

253. *Id.*

254. See *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970); *Oliver v. United States*, 239 F.2d 818, 820–21 (8th Cir. 1957).

255. *Van Leeuwen*, 397 U.S. at 251 (emphasis added).

mail (known under the code-names HT/LINGUAL and SR/POINTER) conducted by the FBI and CIA from the 1950s until 1973 violated the Fourth Amendment.<sup>256</sup>

In fact, it is the classification of mail as first-class that effectively gives the mail matter its Fourth Amendment protection.<sup>257</sup> Sending a package via what is now known as “Parcel Post” is generally viewed as consent to inspection of the contents for purposes of the Fourth Amendment.<sup>258</sup> Fourth Amendment protections are thus deeply intertwined with those postal statutes and regulations that determine the senders’ and recipients’ expectations of

---

256. *Birnbaum v. United States*, 436 F. Supp. 967, 972 (E.D.N.Y. 1977), *aff’d in part, rev’d in part*, 588 F.2d 319 (2d Cir. 1978). Over the life of the program, government officials opened, copied, and read approximately 215,000 pieces of mail. *Id.* In discussing a related issue, the Second Circuit did admit that a program approved by the president pursuant to his foreign affairs power might be constitutional. See 588 F.2d at 332 n.26. On the separate issue of civil liability, the Second Circuit later overturned its decision in *Birnbaum*, holding that a person whose mail was read pursuant to the program had no civil action under New York common law and thus dismissing the plaintiff’s Federal Tort Claims Act claim. *Hurwitz v. United States*, 884 F.2d 684, 687–88 (2d Cir. 1989).

257. See *Oliver v. United States*, 239 F.2d 818, 823 (8th Cir. 1957) (“The question of unreasonable search and seizure in postal inspection is entitled to be resolved, where legislative measures or administrative regulations exist, by such valid limits as have been fixed and held out thereunder as constituting the extent of mail opening and examination in which the Post Office Department will engage.”).

258. See *United States v. Riley*, 554 F.2d 1282, 1283 (4th Cir. 1977) (rejecting an argument that fourth-class mail is protected by the Fourth Amendment by relying on the theory that sending a package via fourth-class mail constitutes consent to inspection); *United States v. Phillips*, 478 F.2d 743, 746 (5th Cir. 1973) (noting that “fourth class matter is subject to opening for postal inspection”); *Santana v. United States*, 329 F.2d 854, 856 (1st Cir. 1964) (“Since the appellant might have protected the privacy of his package by [sending it via] first class, . . . we see no constitutional question under the unreasonable search and seizure provision of the Fourth Amendment.”); *People v. Garcia*, 309 N.Y.S.2d 721, 725 (Co. Ct. 1970) (citing postal regulations that mail other than first-class mail “may be opened for postal inspection” in holding that a warrant is not required to open a parcel sent via fourth-class); *cf. Webster v. United States*, 92 F.2d 462, 462 (6th Cir. 1937) (*per curiam*) (“[I]nspection by the Post Office Department of an unsealed package not having upon it stamps sufficient to qualify it as first class mail was not an invasion of appellant’s immunity from unreasonable search and seizure.”). *But cf. Commonwealth v. Dembo*, 301 A.2d 689, 693 (Pa. 1973) (holding that a package sent via fourth-class mail was protected by the Fourth Amendment when the postal authorities acted as a tool of police officials to further a police investigation); see also LAFAVE, *supra* note 251, § 10.3(b), at 122 (suggesting that one reading of *Dembo* is that the Fourth Amendment standard should be “reasonable suspicion (less than the traditional probable cause requirement) that the postal laws were being violated” in order to obtain a warrant for purposes of opening first-class mail). These cases are based on postal regulations that provide that sending mail matter not marked as first-class mail constitutes “consent by the sender to the postal inspection of the contents.” 39 C.F.R. pt. 3001, subpt. C, app. A § 5020 (2008). Today, those regulations are codified in section 5020 of the Classification Schedule and exclude both first-class and express mail. *Id.* As I noted above, the Classification Schedule is currently in flux, and the relevant provisions are not found in the Code of Federal Regulations after May 2009. See *supra* note 229.

privacy.<sup>259</sup> In contrast to the sealed-letter provision, however, the courts' interpretation of the Fourth Amendment has not made any distinction between letters and other matter sent via first-class mail.<sup>260</sup>

Therefore, the opening of *any* piece of first-class mail would constitute a search within the meaning of the Fourth Amendment.<sup>261</sup> Under ordinary circumstances, the government would thus be required to obtain a warrant to open a piece of first-class mail. There are exceptions to the warrant requirement, however, since the ultimate touchstone of the Fourth Amendment is whether the search is reasonable; a warrant issued by a neutral and detached magistrate is just the simplest method of satisfying this reasonableness standard.<sup>262</sup> The primary exception of relevance here is the exigent-circumstances exception.<sup>263</sup> The Fourth Amendment—as opposed to the

---

259. See generally Desai, *supra* note 46, at 553–54, 590–94 (arguing that the Fourth Amendment principle of communications privacy derived from postal statutes protecting privacy).

260. In fact, the courts' consistent application of the Fourth Amendment principles to all first-class mail arguably provides an interpretive gloss on the sealed-letter provision and undermines my earlier conclusion that the sealed-letter provision applies only to letters.

261. *Oliver v. United States*, 239 F.2d 818, 823 (8th Cir. 1957).

262. See *Johnson v. United States*, 333 U.S. 10, 14 n.3 (1948). The language in the Fourth Amendment referencing warrants is distinct from the clause that provides for the right against unreasonable searches and seizures, but “[t]he Supreme Court has long expressed a strong preference for searches made pursuant to a search warrant.” LAFAVE, *supra* note 251, § 4.1(b), at 446; see also *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (“[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . .”). But see Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 236 (1993) (“The cumulative weight of [recent] decisions has led the [Supreme] Court to a startling rejection of the rule-based model that dominated fourth amendment theory for a generation. The warrant rule no longer is the central conceptual tool for determining whether government conduct is reasonable for fourth amendment purposes.”).

263. See *supra* note 251 and accompanying text. There is arguably also a national-security exception to the Fourth Amendment's warrant requirement. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980) (finding a “foreign intelligence exception to the Fourth Amendment warrant requirement,” but limiting it to situations “when the object of the search or the surveillance is a foreign power, its agent or collaborators” and “when the surveillance is conducted ‘primarily’ for foreign intelligence reasons”). Whether the Fourth Amendment permits warrantless physical searches, as opposed to electronic searches, for the purpose of gathering intelligence is an important question, but one well beyond the scope of this Article. Compare *id.*, with *United States v. Ehrlichman*, 376 F. Supp. 29, 32–34 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976) (concluding that the only possible warrant exception for intelligence purposes would have to be limited to wiretapping). Cf. *United States v. Bin Laden*, 126 F. Supp. 2d 264, 271–77 (S.D.N.Y. 2000) (finding there to be such an exception with respect to foreign government agents when the searches are conducted abroad). I discuss the Foreign Intelligence Surveillance Act's physical-searches provisions in detail below. For now, however, I will assume that searches conducted in compliance with FISA's provisions would be constitutional under the Fourth Amendment, even though no court has directly addressed the constitutionality of such a search. See *In re Sealed Case*, 310 F.3d 717, 742, 746 (FISA Ct. Rev. 2002) (suggesting, but not definitively holding, that FISA, as amended by the USA Patriot Act, is constitutional under the Fourth Amendment); *id.* at 722 n.7 (*per curiam*) (noting that although the



sealed-letter provision—would permit the opening of first-class mail without a warrant in exigent circumstances.<sup>264</sup> The exigent-circumstances exception is a notoriously fuzzy balancing test in which courts consider factors such as “the degree of urgency involved, whether a warrant could have been obtained, the seriousness of the crime investigated, the possibility of danger, the likelihood evidence may be destroyed, and the availability of alternative means of obtaining or securing evidence or protecting public safety.”<sup>265</sup> One can easily imagine that a government official who suspects that a first-class package contains a ticking time bomb would satisfy this balancing test.<sup>266</sup>

There is, moreover, one other key constitutional distinction that applies to first-class mail: the distinction between the detaining of first-class mail and the opening of it—what in Fourth Amendment terms is the distinction between a seizure of a piece of mail and a search of it. The Supreme Court has held that a temporary delay in the delivery of first-class mail, in order to obtain a warrant, is permissible under the Fourth Amendment.<sup>267</sup> In *Van Leeuwen*, the Court held that government authorities could hold a first-class package long enough to investigate suspicions and obtain a warrant to open it.<sup>268</sup>

---

case involved FISA’s electronic-surveillance provisions, “much of our statutory analysis applies to FISA’s provisions regarding physical searches, which mirror to a great extent those regarding electronic surveillance” (citation omitted). The question remains whether a search conducted outside of FISA would be constitutional.

264. *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (noting that in order to open luggage or parcels, a warrant is required “when no exigency is shown to support the need for an immediate search . . .”). As discussed previously, the sealed-letter provision makes no mention of an exigent-circumstances exception. While one might graft such an exception onto the statute, it would not be necessary given the statute’s limited applicability to letters. In the hypothetical circumstance that authorities needed to open a letter immediately, rather than detain it long enough to get a warrant, perhaps the absurdity canon of statutory interpretation might be implicated, and the statute could be read to include an exigent-circumstances exception.

265. ORIN S. KERR, *COMPUTER CRIME LAW* 321–22 (2006) (“The Supreme Court has never articulated a clear test for exigent circumstances, and instead has applied a general balancing of interests to determine when and how broadly it applies.”).

266. *Cf. State v. Galpin*, 80 P.3d 1207, 1218 (Mont. 2003) (interpreting Montana’s “exigent circumstances” exception to permit warrantless search of a duffle bag where officers suspected the bag contained chemicals that were “highly toxic and potentially explosive [if] mishandled . . .”); 39 C.F.R. § 233.11(b) (2005) (permitting the warrantless opening of any mail “reasonably suspected of posing an immediate danger to life or limb or an immediate and substantial danger to property . . .”).

267. *United States v. Van Leeuwen*, 397 U.S. 249, 252–53 (1970).

268. In *Van Leeuwen*, the package was delayed by twenty-nine hours. As one might expect, the courts have had to address the question of how long is too long. *See United States v. Mayomi*, 873 F.2d 1049, 1053–54 (7th Cir. 1989) (holding that the detention of mail for forty-eight hours to confirm whether the mail contained heroin did not violate the defendant’s Fourth Amendment rights); *United States v. Dass*, 849 F.2d 414, 414–15 (9th Cir. 1988) (finding that the detention of mail for periods ranging from seven days to three weeks far exceeded the twenty-nine hour period found to be reasonable in *Van Leeuwen* and thus violated the Fourth Amendment); *cf. State v. Kelly*, 708 P.2d 820, 823–24 (Haw. 1985) (finding that the seizure of an album for ten days for the purpose of installing a beeper in the back cover without obtaining a

This distinction between detaining mail and opening it is crucial for interpreting the exigent-circumstances exception, because the appropriateness of that exception depends in part upon “the degree of urgency involved [and] whether a warrant could have been obtained.”<sup>269</sup> If a piece of first-class mail can be held while authorities obtain a warrant, then in many circumstances, opening the mail without a warrant would not be necessary.

For example, in one case, *State v. Hubka*, the defendant sent a letter requesting that the addressee kill her husband for a fee.<sup>270</sup> The letter was sent to a fire station where the addressee worked, but before the addressee received the letter, “[a]n inquisitive member of the department held the letter up to a light” and read part of the message through the envelope.<sup>271</sup> Becoming suspicious, he contacted a friend who was a police officer; the officer subsequently opened the letter without a search warrant.<sup>272</sup> The Arizona Court of Appeals held that the opening of the letter violated the Fourth Amendment and, in particular, rejected an argument that the exigent-circumstances exception applied:

The portion of the letter read through the envelope showed at most a solicitation or offer to the addressee to murder someone. The addressee was unaware apparently of even the existence of the letter at the time it was opened. No life was in immediate danger and sufficient time existed to secure a search warrant from the proper authorities.<sup>273</sup>

Although I have not found any other case that addresses the issues as directly as *Hubka*, other cases strongly suggest that the government’s ability to seize a piece of mail affects the determination of whether exigent circumstances exist for purposes of opening the mail.<sup>274</sup>

---

warrant was an unreasonable seizure under the state’s Fourth Amendment equivalent). While the details of this debate are not crucial for my purposes, the important point is that authorities may detain mail long enough to obtain a warrant under ordinary circumstances.

For those inclined to wonder about the continuing validity of a forty-year-old case, it is also worth emphasizing one important fact about *Van Leeuwen*: the opinion was written by Justice Douglas for a unanimous Court in 1970, at a time when the Warren Court was at the apex of its criminal procedure revolution. The fact that the 1970 Court unanimously upheld the detention makes arguments to the contrary virtually impossible to make today.

269. KERR, *supra* note 265, at 321.

270. 461 P.2d 103, 104 (Ariz. Ct. App. 1969).

271. *Id.*

272. *Id.*

273. *Id.* at 106.

274. See *State v. Eiseman*, 461 A.2d 369, 378–79 (R.I. 1983) (holding that if the government has seized a package, it cannot argue the exigent-circumstances exception based on “the possibility of flight or the inherent mobility of a parcel in the mail . . .”); see also *United States v. Chadwick*, 433 U.S. 1, 4 (1977) (noting that a search of a piece of luggage without a warrant did not constitute exigent circumstances when the federal agents had seized the luggage and could have obtained a warrant prior to opening it); LAFAVE, *supra* note 251, § 5.5(c), at 234 (arguing that *Chadwick* and its progeny, combined with *Van Leeuwen*, would render a warrantless search

Obviously, there might not be enough time if the mail contained a ticking time bomb, but the ability to detain should be a factor in determining whether the circumstances surrounding the opening of a piece of mail are exigent. As I noted above, this same distinction is reflected in postal regulations as well.<sup>275</sup>

Beyond the ticking time bomb example, one other factor that affects the court's analysis of whether there were exigent circumstances necessitating a warrantless opening of mail is the addressee's expectation of a timely delivery. For example, it might be permissible to open a package being sent for overnight delivery via express mail—which, according to postal regulations, is treated as one of the two classes of mail protected from being opened<sup>276</sup>—without a warrant rather than be required to detain it, if the delay caused by the time it would take to obtain a warrant would result in warning the suspects of government monitoring.<sup>277</sup> Still, *Van Leeuwen* strongly suggests that, absent exceptionally time-sensitive concerns, the *opening* of first-class mail would rarely satisfy the exigent-circumstances exception to the Fourth Amendment, and a warrant would thus be necessary.<sup>278</sup>

---

of a container sent via a common carrier unconstitutional unless there were specific reasons why there was insufficient time to obtain a warrant). *But see* *California v. Acevedo*, 500 U.S. 565, 575 (1991) (holding, in a case involving the automobile exception to the warrant requirement, that if government authorities can seize a container without a warrant, privacy interests in the contents of that container are “minimal” because “a warrant will be routinely forthcoming in the overwhelming majority of cases” (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting))).

275. *See supra* Part II.D.4.

276. 39 C.F.R. pt. 3001, subpt. C, app. A, § 5010 (2008).

277. *See, e.g.*, *United States v. Ford*, 525 F.2d 1308, 1313 (10th Cir. 1975) (noting that the time delay of obtaining a warrant “might very well have warned the parties to the crime of the government’s presence and prevented their apprehension” and concluding that a quick search of a package sent via air freight delivery was reasonable). Although *Ford* involved a private freight delivery rather than delivery via the United States Postal Service, there is no reason to distinguish the post office from a private delivery service for purposes of determining the need for a warrantless search to avoid raising the suspicions of the addressee.

The 2006 PAEA requires the Postal Service to establish “a set of service standards” for what are known as “market-dominant products,” which includes first-class mail. 39 U.S.C. § 3691(a) (2006). These standards are intended to “reasonably assure Postal Service customers delivery reliability, speed and frequency consistent with reasonable rates and best business practices.” § 3691(b)(1)(C). These service standards, combined with longstanding policies related to the speed with which first-class mail gets delivered, will most likely lead to even more formal time standards for ordinary first-class mail. In November 2007, the Postal Service proposed formal delivery time standards ranging from one to three days for all first-class mail within the continental United States. *Modern Service Standards for Market-Dominated Products*, 72 Fed. Reg. 58,946, 58,953–54 (proposed Oct. 17, 2007). Those rules are now codified at 39 C.F.R. pt. 121, app. A (2009). If over time the public were to internalize these formal time standards, expectations of receipt of first-class mail within a particular time period might thus render the *Ford* principle applicable even to first-class mail. I am indebted to David Stover for this point.

278. *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970).

In sum, the Fourth Amendment prevents the opening of first-class mail, of any type, without either a warrant or exigent circumstances, but it permits a temporary detention of such mail for the purposes of obtaining a warrant.

#### IV. THE PRESIDENT'S SIGNING STATEMENT

This brings us back to the sealed-letter provision and the president's signing statement. As I explain in more detail below, part of the signing statement is either incorrect or irrelevant, but part of it represents an accurate reflection of changes in the law since the passage of the sealed-letter provision in 1970.<sup>279</sup>

Returning to the sealed-letter provision, recall that the relevant portion of the 2006 Postal Accountability and Enhancement Act simply moved former 39 U.S.C. § 3623(d) to a new section, 39 U.S.C. § 404(c). It did not change a single word of the law.<sup>280</sup> In such circumstances, one can argue that Congress has effectively not passed any new law and that the president who signs the recodification law should thus have no part in interpreting it.<sup>281</sup> I have no need, however, to address the general question of the extent to which a "technical amendment" that simply recodifies a pre-existing section of law can be re-interpreted by the president signing the recodifying bill. Surprisingly enough, this is not that situation.

As I describe in more detail below, the law passed in 2006 is *not* the same as the law passed in 1970, even though its language is identical, because the 1970 law had impliedly been amended by the passage of the Foreign Intelligence Surveillance Act.

The relevant portion of the president's signing statement reads as follows:

---

279. I do not mean to enter any debate about the role a presidential signing statement ought to play in statutory interpretation, or in particular, whether a court ought to defer to a signing statement. Those questions are significant and have been the subject of serious debate. *See, e.g.,* Bradley & Posner, *supra* note 16; Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515 (2005); Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209 (1988); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987). *See generally* Symposium: *The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1 (2007); Christopher S. Kelley, *The Law: Contextualizing the Signing Statement*, 37 PRESIDENTIAL STUD. Q. 737 (2007). Moreover, President George W. Bush's use of signing statements in particular has raised the heckles of his opponents in ways that far exceed the concerns raised in previous administrations. *See* Bradley & Posner, *supra* note 16, at 321–22; John P. Elwood, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Statement on Presidential Signing Statements Before the H. Comm. on the Judiciary (Jan. 31, 2007), *available at* <http://www.justice.gov/olc/2007/presidential-signing-stmt.pdf>. I am simply analyzing the signing statement to determine if it accurately interprets the statute. I am thus simply reviewing the signing statement *de novo*, so to speak.

280. Compare 39 U.S.C. § 404(c) (2006), with 39 U.S.C. § 3623(d) (2000).

281. *See* Posting of Thomas Healy to Dorf on Law, <http://michaeldorf.org/2007/01/where-is-richard-nixon-when-you-need.html> (Jan. 6, 2007, 13:13 EST).

The executive branch shall construe subsection 404(c) of title 39, as enacted by subsection 1010(e) of the Act, which provides for opening of an item of a class of mail otherwise sealed against inspection, in a manner consistent, to the maximum extent permissible, with the need to conduct searches in exigent circumstances, such as to protect human life and safety against hazardous materials, and the need for physical searches specifically authorized by law for foreign intelligence collection.<sup>282</sup>

Notice, first, the brief description of the law, set off by commas immediately after the reference to the statutory provision. The signing statement refers to the law as “*provid[ing] for opening of an item of a class of mail otherwise sealed against inspection.*”<sup>283</sup> While the sealed-letter provision does *permit* the opening of mail in the three limited circumstances described above, it is obviously a stretch to refer to the sealed-letter provision as “*provid[ing] for*” the opening of mail: the statute actually *prohibits* the opening of mail.<sup>284</sup> It may well be this kind of sleight of hand that raised the ire of President Bush’s opponents.<sup>285</sup> Still, this description is meaningless for the purposes of interpreting the statute or even the signing statement itself.

Looking more closely at the substance of the statement, President Bush states that the executive branch will treat the sealed-letter provision as permitting searches in two different types of circumstances: “searches in exigent circumstances” and “physical searches specifically authorized by law for foreign intelligence collection.”<sup>286</sup>

The reference to “exigent circumstances” seems intended to invoke the Fourth Amendment and thus appears to be based on an understanding of the statute as somehow consonant with the Fourth Amendment. Other commentators have made this same point.<sup>287</sup> As I noted above, there are some good reasons to treat the statute as equivalent to, or at least deeply intertwined with, the Fourth Amendment. Notwithstanding those reasons, however, I conclude that the sealed-letter provision is not the same as the Fourth Amendment. If the sealed-letter provision applies only to letters, and thus only to messages or communications, the assumption underlying this part of the signing statement seems either extraneous or flat-out wrong; the specific example given in the signing statement—“to protect human life and safety

---

282. Signing Statement, *supra* note 16, at 2196.

283. *Id.* (emphasis added).

284. 39 U.S.C. § 404(c) (2006).

285. In the same phrase, the signing statement interprets the statute as applying to “item[s] of a class of mail.” Signing Statement, *supra* note 16, at 2196. To the extent that the word “item” might be interpreted to refer to more than letters, as I have defined them, the signing statement likewise errs.

286. Signing Statement, *supra* note 16, at 2196.

287. See, e.g., Posting of Orin Kerr to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2007\\_01\\_07-2007\\_01\\_13.shtml#1168059372](http://volokh.com/archives/archive_2007_01_07-2007_01_13.shtml#1168059372) (Jan. 8, 2007, 13:32 EST).

against hazardous materials”<sup>288</sup>—is simply irrelevant, because the content of the letter itself cannot be a “hazardous material.”

While it is possible that a creative lawyer might be able to imagine a hazardous-materials scenario involving a letter as the statute defines it, limiting the sealed-letter provision to letters leaves such scenarios few and far between. The mail is, after all, unlike a telephone or an instant-messaging system; the mere fact that the mail is slow makes it all the less likely that a warrantless opening of a letter would be necessary for purposes of discovering the *communication*. In sum, even if the sealed-letter provision could be interpreted to include an exigent-circumstances exception, the sort of scenarios that could be contemplated by the president’s signing statement are irrelevant because the provision is limited to letters. To the extent that the reference to exigent circumstances might be viewed as an attempt to expand the president’s authority to open letters for the purpose of reading them, the signing statement errs.<sup>289</sup>

The second exception is more interesting. The most plausible interpretation of this exception is that it refers to FISA.<sup>290</sup> The language—“*physical searches* specifically authorized by law for *foreign intelligence collection*”<sup>291</sup>—seems clearly intended to track FISA’s “physical searches” provisions, which empower the president, acting through the attorney general, to seek an order from the Foreign Intelligence Surveillance Court (FISC) to conduct “*physical search[es]*” for the purpose of “*collecting foreign intelligence information*.”<sup>292</sup>

If this language is a reference *solely* to FISA’s physical-searches provisions,<sup>293</sup> then the president was most likely correct in wanting to make

---

288. Signing Statement, *supra* note 16, at 2196.

289. If there were a circumstance in which the government had an immediate need to open a letter to protect human life and safety against hazardous materials, I cannot think of it; however, if there were such a circumstance, perhaps the absurdity canon would be implicated, and the president’s interpretation would be correct.

290. 50 U.S.C. §§ 1801–1863 (2006).

291. Signing Statement, *supra* note 16, at 2196 (emphasis added).

292. 50 U.S.C. § 1822(b) (emphasis added). The literature on FISA is voluminous. *See, e.g.*, DONALD J. MUSCH, CIVIL LIBERTIES & THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (James Walsh ed., 2003) (discussing the history and practical applications of FISA); William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209 (2007); Patricia J. Bellia, *The “Lone Wolf” Amendment & the Future of Foreign Intelligence Surveillance Law*, 50 VILL. L. REV. 425 (2005). The commentary specifically on the “physical searches” provisions is more limited. *See* Daniel J. Malooly, Note, *Physical Searches Under FISA: A Constitutional Analysis*, 35 AM. CRIM. L. REV. 411 (1998). *See generally* William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U. L. REV. 97 (1985) (addressing the issue of foreign intelligence physical searches prior to the passage of FISA’s “physical searches” provisions).

293. 50 U.S.C. §§ 1821–1829 (2006). It is possible that this second exception *also* includes the so-called “Terrorist Surveillance Program”—the NSA surveillance program first made public by the *New York Times* in December 2005. *See generally* ERIC LICHTBLAU, BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICE 223–24 (2008). As Professor Orin Kerr has pointed out,

this point in a signing statement.<sup>294</sup> As I explain in more detail, FISA's physical-searches provisions *do* provide an exception to the sealed-letter provision's prohibition on letter-opening. If one focuses on FISA at the time of the passage of the 2006 Postal Accountability and Enhancement Act, FISA's physical-searches provisions closely paralleled the provisions in FISA that cover electronic surveillance.<sup>295</sup> The president may grant the attorney general the power to petition the FISC for authorization to conduct physical searches aimed at gathering foreign intelligence information.<sup>296</sup> There are a number of requirements that regulate the contents of an application—for

---

President Bush's theory of the September 14, 2001, Authorization for the Use of Military Force (AUMF) Joint Resolution permits him to conduct warrantless electronic surveillance. See U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 25–26 (2006) [hereinafter DOJ REPORT], available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>. It is possible, as Kerr has noted, that this reference could include searches conducted pursuant to authority provided by the AUMF. The relevant portion of FISA's physical-searches provisions contains the same language as that found in the electronic-surveillance provisions referenced in the administration's argument that the AUMF authorizes warrantless searches. See DOJ REPORT, *supra*, at 292. Compare 50 U.S.C. § 1827(a) (2006) (containing the language "authorized by statute"), with 50 U.S.C. § 1809(a) (2006) (containing the same language). Therefore, this seems entirely plausible. Still, I will set the question of the interpretation of the AUMF and its statutory and constitutional issues to the side. President Bush decided not to reauthorize the program in early 2007. See Letter from Alberto Gonzalez, U.S. Attorney Gen., to Senators Patrick Leahy and Arlen Specter (Jan. 17, 2007), reprinted in 153 CONG. REC. S646 (daily ed. Jan. 17, 2007) (statement of Sen. Leahy). For this reason, the Bush Administration's argument has been rendered moot (in lay, if not legal, terms). Nonetheless, if a program of electronic surveillance is lawful under the administration's theory, then it seems likely that so too would be a program that included surveillance of letters.

294. Again, it is worth emphasizing that I am not addressing the question of whether a court ought to defer to the president's interpretation. I am simply saying that the signing statement is accurately describing the law and making a point that is not obvious on the face of the statute.

295. The history of the physical-searches provisions began soon after passage of FISA in 1978. When Congress initially promulgated FISA, the statute only covered electronic surveillance. The Carter Administration instituted a short-lived policy of going to the Foreign Intelligence Surveillance Court (FISC) whenever it sought to engage in warrantless physical searches. See *Amending the Foreign Intelligence Surveillance Act: Hearing Before the Permanent Select Comm. on Intelligence of the H.R.*, 103d Cong. 11–12 (1994) (Statement of Kenneth C. Bass, III) [hereinafter *Amending FISA*]; JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 1072–73 (2d ed. 2005). The Reagan Administration later abandoned that policy. See *Amending FISA*, *supra*, at 13–14. Interestingly, the Reagan Administration sought a physical search order from the FISC and urged the FISC to deny it on the grounds that the court lacked jurisdiction; the court agreed, and the Reagan Administration henceforth conducted physical searches without seeking FISC orders. See Patricia L. Bellia, *supra* note 292, at 443. When Aldrich Ames was investigated for espionage in the early 1990s, the government searched his office without a warrant, and his attorney, famed criminal defense lawyer Plato Cacheris, wanted to challenge the constitutionality of the warrantless search. MOORE & TURNER, *supra*, at 1073. Ames pleaded guilty, but the fear that a court might invalidate such a warrantless search led the Clinton Administration to seek amendments to FISA that would explicitly cover physical searches as well. *Id.*

296. 50 U.S.C. § 1822(b) (2006).

example, the application must include information indicating that the target of the physical search is a “foreign power” or an “agent of a foreign power,” and a designated official involved in national security or defense (one outside of the Department of Justice) must certify that the information is in fact sought for foreign intelligence purposes.<sup>297</sup>

Two facts about FISA’s physical-searches provisions are relevant to understanding its intersection with the sealed-letter provision. First, there remains an open question as to whether a FISC order is technically a search warrant.<sup>298</sup> Second, in narrow circumstances, FISA empowers “the President, acting through the Attorney General, [to] authorize physical searches without a court order to acquire foreign intelligence information . . . .”<sup>299</sup> Thus, whether the president seeks a FISC order or acts pursuant to FISA’s authorization for physical searches without a court order, there is a potential for conflict between FISA and the sealed-letter provision, because it is arguable that neither situation involves the obtaining of a search warrant.

Viewing FISA and the sealed-letter provision together, there is a very strong argument that foreign intelligence searches conducted pursuant to FISA’s physical-searches provisions are lawful notwithstanding the sealed-letter provision. Although nothing in FISA explicitly mentions letters or, more particularly, letters in transit through the postal system, FISA’s physical-searches provisions clearly contemplate intelligence-gathering and would thus seem to permit the reading of communication. By itself, however, this may not be enough.

What probably does establish that FISA implicitly amends the sealed-letter provision to the extent that they would otherwise conflict is the fact that FISA empowers the FISC to issue orders “[n]otwithstanding any other provision of law . . . .”<sup>300</sup> Similarly, when FISA’s physical-searches provisions empower the president to authorize physical searches without a court order, he may also do so “[n]otwithstanding any other provision of law . . . .”<sup>301</sup> Congress passed FISA’s provisions relating to physical searches in 1994. Although one can never truly presume that lawmakers have knowledge of all existing law when they act, the best interpretation of these statutes is either (1) that FISA amounts

---

297. 50 U.S.C. § 1823(a)(3)(A), (a)(6)(A) (2006); *see also* Exec. Order No. 12,949, 60 Fed. Reg. 8169 (Feb. 13, 1995) (designating those able to make certifications regarding foreign intelligence). Moreover, every application must set forth—and every FISC order must include specific directions about—the government’s “minimization procedures,” which are to be used “to minimize the acquisition and retention, and [to] prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons . . . .” 50 U.S.C. § 1821(4)(A) (2006).

298. *See In re Sealed Case*, 310 F.3d 717, 741–42 (FISA Ct. Rev. 2002); *see also* *United States v. Falvey*, 540 F. Supp. 1306, 1311–14 (E.D.N.Y. 1982) (treating a FISA order as the equivalent of a warrant for purposes of Fourth Amendment analysis).

299. 50 U.S.C. § 1822(a)(1) (2006).

300. *Id.* § 1822(b).

301. *Id.* § 1822(a)(1).



to another exception to the sealed-letter provision beyond the three explicit ones in the statute itself; or (2) that Congress implicitly understood a FISC order to be a “search warrant authorized by law” as that phrase is used in the sealed-letter provision. In either case, FISA’s physical-searches provisions thus change the meaning of the sealed-letter provision: to the extent that a physical search conducted in compliance with FISA could involve letters sent via first-class mail, the sealed-letter provision meant something different in 2006 than it did when Congress promulgated it in 1970.

For this reason, it makes sense for President Bush to have added an interpretive gloss to the sealed-letter provision upon its reenactment. The meaning of the 1970 statute changed following the passage of FISA’s physical-searches provisions in 1994, and President Bush’s signing statement simply alerted us to that change.<sup>302</sup>

## V. CONCLUSION

If the president wants to open first-class mail without a warrant, there are two different types of first-class mail to consider. If the reason for seeking to open mail is connected to mail matter other than communication, one set of concerns comes into play. Those concerns are solely constitutional, and the sealed-letter provision does not apply. The Fourth Amendment regulates such activity and provides for an exigent-circumstances exception to the ordinary rule that a warrant is required. A ticking time bomb would likely satisfy that exception, although given the Court’s holding in *Van Leeuwen*, if the bomb was not actually ticking, there might be arguments as to whether the package needs to be held until a warrant could be obtained.

On the other hand, if the president wants to open a letter or a message based on the contents of that communication, the sealed-letter provision categorically bars him from doing so unless one of its three exceptions is satisfied or the president is acting pursuant to FISA’s physical-searches provisions. Assuming that the addressee does not consent to the opening of the letter and that the purpose of the opening is not to determine where to send the letter, the president must have probable cause and must obtain a warrant, or else he must act pursuant to FISA, which specifically provides for “physical search[es] . . . for the purpose of collecting foreign intelligence information.”<sup>303</sup> To be clear,

---

302. Because Congress re-enacted the sealed-letter provision in 2006, one further complication arises in trying to understand the interplay between FISA and the sealed-letter provision. If the 1994 FISA provisions can be said to amend the 1970 sealed-letter provision by implication, why then could the 2006 reenactment of the sealed-letter provision not be thought to return the law of opening letters to its pre-FISA state? Theoretically, this is possible, but only if the rationale for treating FISA as an amendment to the sealed-letter provision is based on the fact that FISA is later in time. As I noted above, however, the principal reason I view FISA as impliedly amending the sealed-letter provision is the “notwithstanding any other provision of law” language. 50 U.S.C. § 1822(a)(1), (b). Because that language remains in FISA, the re-enactment of the sealed-letter provision would not affect the impact of FISA on the provision.

303. 50 U.S.C. § 1822(b).

obtaining a warrant would not be too onerous either. Since the sealed-letter provision says nothing about *delaying* the mail, detaining the mail until a warrant can be obtained would be constitutional. The *Van Leeuwen* case would likely apply, and the mail could be detained long enough for government authorities to make their case for a warrant.

