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USE AND ABUSE OF THE CONGRESSIONAL FRANKING PRIVILEGE¹

In May of 1970 California Congressman George E. Brown, Jr., was nearing the end of a hotly contested campaign for the Democratic Party's nomination as its candidate for the United States Senate.² To further his candidacy Brown began mailing statewide 300,000 copies of a brochure paid for by the Congressman and prepared by the public relations firm which directed his senatorial campaign.³ The brochures were mailed under Brown's congressional franking privilege which exempts members of Congress from the requirement of paying postage for their correspondence conducted in the course of official business.⁴ Although the brochure purported to give the results of an earlier franked environmental problems questionnaire, it portrayed six photographs of Brown in various speaking poses and presented the Congressman's views on political topics unrelated to the subject of the questionnaire.⁵ Suit was brought to enjoin Brown from exercising his frank on the grounds that the distribution constituted a dissemination of campaign material and thus an abuse of the privilege.⁶ A preliminary injunction was granted, the court asserting that this use of the franking privilege by a member of Congress gave him a distinct and unfair advantage over others not possessing the privilege, that such use caused irrep-

1. The word "frank" is derived from the latin *francus* which means "free." BLACK'S LAW DICTIONARY 787 (4th ed. 1968). The franking privilege denotes the right of a governmental official to send matter through the public mails free of postage. *Id.* at 788; 39 U.S.C. §§ 3201(3)-(4) (1970). This Comment will only be concerned with the franking privilege granted to United States Congressmen by 39 U.S.C. §§ 3210-13, 3215-16 and 3218 (1970). The "penalty mail" privileges granted to other governmental officials are beyond the scope of this Comment. *See* 39 U.S.C. §§ 3202-09 (1970).

2. Congressman Brown and Congressman John V. Tunney were both vying for the Democratic nomination. The primary election was to be held June 2, 1970. *Rising v. Brown*, 313 F. Supp. 824, 825 (C.D. Cal. 1970). For a detailed discussion of this case see text accompanying notes 108-172 *infra*.

3. "It was agreed between the parties that 300,000 pieces of the questioned mailout were printed." *Id.*

4. 39 U.S.C. § 3210 (1970) provides for congressional franked mailing of correspondence on "official business" to any person. *See* text accompanying notes 45-63 *infra*.

5. *Rising v. Brown*, 313 F. Supp. 824, 826 (C.D. Cal. 1970).

6. *Id.* at 825.

arable harm to his opponents, and that the overriding public interest required protection from the misuse of the frank.⁷ Although the misapplication of the frank was restrained in this instance,⁸ the source of the problem remains embedded in the federal law and provides a means of campaign abuse.

Technological advances have favored the employment of the mass media in political campaigns.⁹ Nevertheless, direct mailing remains an important and effective means of voter contact which can be utilized to frame issues and to inform and persuade the electorate.¹⁰ It is therefore not surprising that the vast sums expended on campaigns and campaign literature soar each year.¹¹ In the context of rising campaign costs and the persuasive value of direct mailings the potential abuse of the franking privilege takes on significant proportions. An incumbent national legislator who is allowed to use his privilege for direct mailings of campaign literature to the prospective voting populace is given a competitive advantage over the non-incumbent. Although this advantage is gained at the taxpayer's expense,¹² the legally permissible limits of the privilege remain substantially undelineated and regulation of the practice remains virtually ineffective. Congress has recently reenacted the franking statutes in substantially the same form as had previously existed.¹³ Congress has stated that the same groups that enjoy the benefits of free mail will continue to enjoy these benefits until changed by law.¹⁴ Thus the potential for abuse of these benefits remains unchanged. The scope of this Comment will include the historical development of the frank, the statutory defects inherent in its definition, the permissible use of the privilege, present and proposed

7. *Id.* at 828.

8. *Id.*

9. In the last 40 years the use of radio and television facilities for "electronic campaigning" has increased many fold. See generally *Hearings on S. 2876 Before the Communications Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., 5 (1969).

10. See generally Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 3 (1966) for a discussion concerning the necessity of contacting the electorate while campaigning. The importance and effectiveness of direct mailing affects campaigning on the state as well as the federal level. See *L.A. Times*, Nov. 4, 1971, § 1, at 2, cols. 5-6 (home ed.).

11. See text accompanying notes 34-38 *infra*.

12. See note 33 *infra*.

13. See note 42 *infra*.

14. HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE, POSTAL REORGANIZATION ACT, H.R. REP. NO. 91-1104, 91st Cong., 2d Sess. 18 (1970).

regulatory supervision and proposed corrective measures which would curtail its abuse.

Maintenance of postal facilities has historically remained a function of the state.¹⁵ The British Post Office was established in the American colonies to deliver the mail as well as to raise revenues;¹⁶ the latter purpose occasioned the embitterment of the colonists.¹⁷ During the American Revolution, the establishment of postal service as a function of the central government was one of the initial problems resolved by the Continental Congress.¹⁸ Once the postal service was established, the members of the Continental Congress were determined to secure all the privileges enjoyed under the old legislative offices. Free mail privileges were granted to soldiers in the Continental Army,¹⁹ various officials²⁰ and Congress itself.²¹

Post-Colonial delegation of the postal power to the central government eventually was embodied in the Constitution.²² Thereafter frank-

15. Even the early Roman state had a postal system. A public postal service in England was not established until the sixteenth century but private communications had been carried by royal messengers for many years prior to this time. Official letters on state matters constituted such a large portion of this correspondence that a postal service supported directly by the state was the inevitable next step. L. ROGERS, *THE POSTAL POWER OF CONGRESS* 11 (1916) [hereinafter cited as ROGERS].

16. W. RICH, *HISTORY OF THE UNITED STATES POST OFFICE TO THE YEAR 1829*, at 12-14 (1924) [hereinafter cited as RICH]; C. KELLY, *UNITED STATES POSTAL POLICY* 1-6 (1931) [hereinafter cited as KELLY].

17. The Colonists were irritated by the Crown's manipulation of the post office to raise revenues and they viewed this use as an onerous tax without representation. They were further irritated by the Crown's use of the post office to maintain a surveillance of colonial activity by examining the contents of letters. KELLY, *supra* note 16, at 9-10; RICH, *supra* note 16, at 41-44.

18. Although at this time the Continental Congress did not legally possess sovereign powers, it was required to assume such powers by necessity. The Post Office was created on July 26, 1775. II *JOURNALS OF THE CONTINENTAL CONGRESS* 208-09 (Lib. Cong. ed. 1775) [hereinafter cited as *JOURNALS*]; KELLY, *supra* note 16, at 157; RICH, *supra* note 16, at 48; ROGERS, *supra* note 15, at 13-14.

19. III *JOURNALS*, *supra* note 18, at 342; IV *JOURNALS*, *supra* note 18, at 43.

20. III *JOURNALS*, *supra* note 18, at 342. It is typical of the man that Benjamin Franklin changed his frank with the coming of the new order from "Free, B. Franklin" to "Be Free, Franklin." KELLY, *supra* note 16, at 24-25; RICH, *supra* note 16, at 50.

21. III *JOURNALS*, *supra* note 18, at 267. The Articles of Confederation gave Congress the limited power of establishing and regulating post offices "from one state to another." IX *JOURNALS*, *supra* note 18, at 907. Even under this limited grant of power Congress enacted a comprehensive ordinance in 1782 for the regulation of the post office. 7 *JOURNALS OF CONGRESS* 383 (1800).

22. U.S. CONST., art. I, § 8 warrants Congress the power "[t]o establish post offices and post roads." The Federalist Papers include only one reference to the postal power:

ing legislation was promulgated to permit the transmission of congressional correspondence and publications through the mails without prepayment of postage.²³ The privilege, with but one exception,²⁴ has

The power of establishing post-roads must, in every view, be a harmless power and may, perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care.

THE FEDERALIST NO. 42, at 271 (C. Rossiter ed. 1961) (J. Madison). It is interesting to note that James Madison also described the necessary and proper clause as "harmless." *Id.*, No. 44, at 285-86. Apparently, the state conventions also lightly regarded the postal power, for at the conventions there was a dearth of discussion concerning its purpose or effect before ratification. ROGERS, *supra* note 15, at 25. However, this constitutional authority is considered today to warrant Congress total control and regulation over the entire postal system. *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913); *Public Clearing House v. Coyne*, 194 U.S. 497 (1904); *In re Rapier*, 143 U.S. 110 (1892); *Ex parte Jackson*, 96 U.S. (6 Otto.) 727 (1878). The postal power is now at least as plenary and encompassing as Congress' power over interstate commerce. *Crosby v. Weil*, 382 Ill. 538, 48 N.E.2d 386 (1943).

23. Act of September 22, 1789, ch. 16, § 1, 1 Stat. 70, Act of August 4, 1790, ch. 36, 1 Stat. 178, and Act of March 3, 1791, ch. 23, § 1, 1 Stat. 218 (these three acts continued the ordinance enacted by the Continental Congress on October 18, 1782 which permitted free mail to and from members during sessions); Act of February 20, 1792, ch. 7, § 19, 1 Stat. 237-38 (limited the congressional franking privilege to packets of two ounces or less); Act of April 9, 1816, ch. 43, § 3, 3 Stat. 265-66 (extended the time during which congressmen enjoy the franking privilege to thirty days before and after each session); Act of March 3, 1825, ch. 64, § 27, 4 Stat. 110 (extended the privilege to sixty days before and after each session); Act of March 3, 1845, ch. 43, §§ 1, 6-8, 5 Stat. 732-35 (repealed all former acts and tightened up the regulations concerning who could use the frank, but congressmen retained the privilege); Act of March 3, 1847, ch. 63, §§ 12-13, 9 Stat. 201-02 (provided that the Treasury pay the Post Office Department \$200,000 per year as reimbursement for franked mailings and designated what was to be considered as a "public document"); Act of March 3, 1851, ch. 20, § 9, 9 Stat. 591 (raised the annual payment to \$500,000 per year, payable quarterly); Act of March 3, 1863, ch. 71, § 42, 12 Stat. 708-09 (enumerated who was allowed the privilege, including members of Congress, and limited weight of franked packages to four ounces, except petitions to Congress and seeds, roots, etc. Only congressmen were allowed to send and receive mail free, all others were limited to sending only); Act of June 1, 1872, ch. 256, § 4, 17 Stat. 202 (repealed the provision of the Act of March 3, 1851 that provided for a specific appropriation. The Post Office was directed to thereafter cover the cost of franked mail from its yearly appropriation); Act of June 8, 1872, ch. 335, §§ 180-84, 17 Stat. 306 (again limited who could use the frank. Members of Congress retained the privilege); Act of June 30, 1939, ch. 254, § 2, 53 Stat. 989 (clarified existing laws concerning the franking privilege); Act of August 15, 1953, ch. 511, § 2, 67 Stat. 614 (provided that the Post Office Department be paid by lump-sum appropriation for postage of franked mail of the President, Vice-President and members and members-elect of Congress).

24. The privilege was abolished in full from 1873 to 1875. Act of January 31, 1873, ch. 82, 17 Stat. 421 (abolished the franking privilege altogether, including the congressional privilege); Act of March 3, 1873, ch. 231, § 3, 17 Stat. 559 (repealed all laws and parts of laws permitting any franked mail whatsoever). The congressional franking privilege was reinstated by various acts between 1875 and 1895. Act of

continually been in effect for nearly 200 years since its congressional inception.²⁵

The reason underlying the franking policy is fundamentally sound. Free transmission of letters on governmental business is directly connected to the well-being of the people because of the nature of the legislative function. There is no doubt but that in a democracy the postal service must serve the constituent's need for enlightenment concerning governmental activities.²⁶ The freedom of choice presented to an electorate at the polls requires knowledge if that choice is to be validly exercised. The franking privilege serves as an aid and auxiliary in informing the populace since many members of Congress would be unable to afford correspondence with their constituency in the absence of the privilege.²⁷ The use of franked mail for official business also provides an efficient means of posting since the Postal Service is not required to stamp and cancel franked mail.²⁸

However, the franking privilege can often be the subject of abuse when those who are less than scrupulous attempt to subordinate its intended purpose to their own ends. As early as the mid-nineteenth century abuse of the privilege reached ludicrous proportions when a senator solemnly declared his horse "a public document" and proceeded to affix his frank to its bridle in order to transport it to his Philadelphia residence free of charge.²⁹ The substantial increase in the utilization of the frank today provides even greater potential for its abuse.

Use of the franking privilege by members of Congress is extensive. In 1959 the Postal Service carried 86,129,000 pieces of franked mail.³⁰

March 3, 1875, ch. 128, § 5, 18 Stat. 343 (permitted congressmen to send speeches and reports through the mails free); Act of December 15, 1877, ch. 3, 20 Stat. 10 (permitted all elected officials of the federal government to send or receive free public documents printed by order of Congress); Act of March 3, 1891, ch. 547, § 3, 26 Stat. 1081 (allowed members of Congress to send official mail under their frank to any officer of the government); Act of January 12, 1895, ch. 23, §§ 65, 73, 28 Stat. 611, 617 (restored to congressmen the right to send franked letters to private persons as well as to governmental officers).

25. See notes 21 and 23 *supra*.

26. KELLY, *supra* note 16, at 158.

27. Project, 41 S. CAL. L. REV. 643, 658 & n.118 (1968).

28. A. SUMMERFIELD, U.S. MAIL, THE STORY OF THE UNITED STATES POSTAL SERVICE 58 (1960).

29. G. CULLINAN, THE POST OFFICE DEPARTMENT 59 (1968).

30. U.S. POST OFFICE DEP'T., 1968 COST ASCERTAINMENT REPORT 61. Franked mail data is received from the Washington, D.C. Post Office, which accounts for 95% of the franked mail volume. A continuous daily record of this mail volume is maintained at the Post Office. *Id.* at 60.

In 1968 the total carried by the Service was 178,239,000 pieces.³¹ This represents more than a 100 percent increase in the volume of franked mail in only ten years. In the same period of time the costs to the Postal Service in handling franked mail have increased by more than 200 percent, from \$3,009,000 in 1959³² to \$9,060,000 in 1968.³³

It is significant to note that until the 1956 election campaign costs of presidential candidates ran about 19 to 20 cents per vote cast.³⁴ But in the twelve-year period from 1956 to 1968 costs increased by over 200 percent to a top value of 67 cents per vote cast for George Wallace.³⁵ The total cost of all campaigns in 1968 was estimated at approximately \$300 million, an increase of 50 percent since 1964 and 100 percent since 1956.³⁶ The cost of congressional campaigns has been estimated to run at least \$100,000 for many House races³⁷ and nearly \$2,000,000 was spent on television campaigning during recent senatorial contests in California and New York.³⁸ In this context, the likelihood that some

31. *Id.*

32. *Id.* at 61.

33. *Id.* at 62. The Postal Service is reimbursed by Congress on a yearly basis for the costs of handling franked mail. 39 U.S.C. § 3216(a) (1970) provides:

The postage on mail matter sent and received through the mails under the franking privilege by . . . Members and Members-elect of Congress . . . including registry fees if registration is required, and postage on correspondence sent by the surviving spouse of a Member under section 3218 of this title, shall be paid by a lump-sum appropriation to the legislative branch for the purpose, and then paid to the Postal Service as postal revenue.

The official mail costs allocated for the 1970-71 fiscal year totaled \$11,244,000. 1971 LEGISLATIVE APPROPRIATIONS ACT, PUB. L. No. 91-382, 84 Stat. 807 (Aug. 18, 1970).

34. *Hearings on S. 2876 Before the Communications Subcomm. of the Senate Comm. on Commerce, 91st Cong., 1st Sess., 5 (1969).*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 6;

AMOUNT SPENT ON LAST [1968] CAMPAIGN
[In percent]

Senate	\$100,000 or less	\$100,001 to \$200,000	More than \$200,000
Democrats (16) _____	31.3	31.3	37.5
Republicans (7) _____	28.6	28.6	42.9
Senior ¹ (12) _____	33.3	33.3	33.3
Junior (11) _____	27.3	27.3	45.5
State population over 5,000,000 (4) _____	25.0	_____	75.0
Under 5,000,000 (19) _____	31.6	36.8	31.6
West (9) _____	33.3	22.2	44.4
Midwest (5) _____	_____	40.0	60.0
South (6) _____	33.3	16.7	50.0
East (3) _____	66.7	_____	33.3
Total (23) _____	(30.4)	(30.4)	(39.1)

congressmen will yield to temptation and use their franking privilege in order to minimize exorbitant overall campaign costs appears great.

The major effect of money in a political campaign is to enable the candidate to present his case to the electorate. Although the candidate with the greatest amount of campaign funds will not necessarily win an election, the candidate without these funds will be less likely to present his position to the populace.³⁹ The advantage of having a large source of funds on which to draw is that it enhances one's ability to contact and persuade the populace. The franking privilege, when directed toward this objective, eliminates the need for a substantial portion of these funds and thus allows the incumbent candidate to sub-

¹ Senators whose present service commenced prior to April 1957 are classified as senior.

TABLE 4.2—AMOUNT SPENT ON LAST [1968] CAMPAIGN
[In percent]

House	\$30,000 or less	\$30,001 to \$60,000	More than \$60,000
Democrats (50)	50.0	34.0	16.0
Republicans (41)	48.8	36.6	14.6
Senior ¹ (49)	69.4	22.4	8.2
Junior (42)	26.2	50.0	23.8
Urban (16)	50.0	25.0	25.0
Metropolitan (29)	44.8	41.4	13.8
Rural (46)	52.2	34.8	13.0
West (14)	35.7	42.9	21.4
Midwest (25)	64.0	32.0	4.0
South (24)	33.3	41.7	25.0
East (28)	57.1	28.6	14.3
Total (91)	(49.4)	(35.2)	(15.4)

¹ Representatives elected to 5 or more terms (including the 90th Cong.) are classified as senior.

Id. at 57.

The recent Federal Election Campaign Act, Pub. L. No. 92-225 (Feb. 7, 1972), now limits campaign expenditures for use of the communications media by candidates for a federal elective office to a sum no greater than either \$50,000.00 or 10 cents per capita of the voting age population of the particular geographical district. *Id.* § 104. This much needed reform will have its greatest effect over senatorial contests in the large urban states such as New York and California. It is significant to note that this new act limits the definition of "communications media" to broadcasting stations, newspapers, magazines, outdoor advertising facilities and telephones (*Id.* § 102), and omits any mention of direct mailing as a form of campaign communications. Thus it appears that direct mailing under a congressional frank will remain a constant source of campaign abuse and, in light of the new limitations on expenditures for other campaign media, may, for the unscrupulous, become a major vehicle for campaign communication.

39. Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 3 (1966). See generally McKesson & Dickey, *Financing of Political Campaigns: Abuses and Suggested Controls*, 34 S. CAL. L. REV. 165 (1961).

sidize his campaign by virtue of his office. The temptation for abuse of the franking privilege, coupled with the ease with which it may be misused, places the congressman who lacks sufficient campaign funds in an uneasy position.

In 1970 Congress enacted the comprehensive Postal Reorganization Act in an effort to improve and modernize the Postal Service.⁴⁰ The Post Office Department was converted into an independent establishment under the Executive Branch.⁴¹ The statutes covering the franking privilege were encompassed within the scope of the Act. However, reenactment without reform was the result⁴² and the problems remain essentially the same. The primary source of abuse is now embodied in Title 39 of the *United States Code* at sections 3210 and 3212. Section 3210 grants the franking privilege to members of Congress and permits the dispatch of certain correspondence or other matter by mail free under their frank to *any person* if it is being sent upon "official business."⁴³

40. Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified in scattered sections of 39 U.S.C.).

41. 39 U.S.C. § 201 (1970).

42. Compare 39 U.S.C. §§ 4161-64, 4166-67 (1964) with 39 U.S.C. §§ 3210-13, 3215-16 (1970). There are only minor changes in statutory language: The Clerk and Sergeant at Arms of the House of Representatives are included as persons entitled to use the franking privilege in §§ 3210, 3211, and 3216(a); the surviving spouse of a member of Congress is entitled to a limited use of the privilege in § 3218 (*see note 64 infra*); and the surviving spouse is recognized as a user of the privilege in § 3216 (a).

43. 39 U.S.C. § 3210 (1970) reads as follows:

The Vice President, Members, and Members-elect of Congress, Secretary of the Senate, Sergeant at Arms of the Senate, Clerk of the House of Representatives, and Sergeant at Arms of the House of Representatives, until the thirtieth day of June following the expiration of their respective terms of office, may send as franked mail—

(1) matter, not exceeding 4 pounds in weight, upon official or departmental business, to a Government official; and

(2) correspondence, not exceeding 4 ounces in weight, upon official business to any person.

In the event of a vacancy in the office of the Secretary of the Senate, Sergeant at Arms of the Senate, Clerk of the House of Representatives, or Sergeant at Arms of the House of Representatives, any authorized person may exercise this privilege in the officer's name during the period of the vacancy.

Members-elect of either house of Congress may exercise their franking privilege from the commencement of their term, although no session has actually been called and they have not been able to take the oath of office. 16 OP. ATT'Y GEN. 271 (1879); 5 OP. ATT'Y GEN. 358 (1851). An unseated member thereafter loses the franking right. 19 OP. ATT'Y GEN. 592 (1890). The franking privilege exists only in favor of those who are within the terms of the statutes. 11 OP. ATT'Y GEN. 35 (1864). The privilege extends to those officials wherever they are located. 23 OP. ATT'Y GEN. 316 (1900). Under the earlier statutes the privilege was restricted to officials located at the seat of government. 15 OP. ATT'Y GEN. 262 (1877).

Material inserted in the *Congressional Record* may be directly mailed under a congressional frank pursuant to section 3212.⁴⁴

I. SECTION 3210—"OFFICIAL BUSINESS"

The Postal Service, as the establishment responsible for the supervision of the use of free mailing for all governmental officials, has the power to regulate the use of the congressional franking privilege as authorized by section 3210. The Postmaster General, as the chief executive officer of the Postal Service,⁴⁵ is required generally to superintend the business of the Service and to execute all laws relative to that agency.⁴⁶ To accomplish this task, Congress has delegated the Postal Service the power to promulgate rules and regulations which it deems necessary to effectuate the objectives of the Act.⁴⁷

The Postal Service, however, has been lax in enacting and augmenting any definitive set of regulations that will confine the use of the congressional franking privilege within the letter and spirit of the statute. While the Service has enacted a set of rules ostensibly to regulate the use of the privilege,⁴⁸ the rules have no prophylactic effect on the poten-

44. 39 U.S.C. § 3212 (1970) provides: "Members of Congress may send as franked mail the Congressional Record, or any part thereof, or speeches or reports therein contained." 44 U.S.C. § 907 (1970) provides in part:

The Public Printer may print and deliver, upon the order of a Member of Congress and payment of the cost, extracts from the Congressional Record. The Public Printer may furnish without cost to Members . . . envelopes, ready for mailing the Congressional Record or any part of it, or speeches, or reports in it. . . .

45. 39 U.S.C. § 203 (1970).

46. "[T]he Postmaster General is the chief executive officer of the Postal Service and . . . is authorized to exercise the powers vested in the Postal Service. . . ." Bylaws of the Board of Governors of the U.S. Postal Service § 5.3, 36 Fed. Reg. 690 (1971) [hereinafter cited as Bylaws]. He is given wide discretion concerning the management of the Postal Service. See *Northern Pac. Ry. Co. v. United States*, 251 U.S. 326, 330 (1920).

47. 39 U.S.C. § 401 (1970) reads in part as follows:

The Postal Service shall have the following general powers: . . . (2) to adopt, amend and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title.

"The exercise of the power of the Postal Service shall be directed by a Board of Governors. . . ." 39 U.S.C. § 202(a) (1970). "[T]he Board may delegate the authority vested in it to the Postmaster General. . . ." *Id.* § 402. "Pursuant to 39 U.S.C. section 402, the Postmaster General is hereby delegated the authority to exercise the powers of the Postal Service." Bylaws, *supra* note 46, § 3.9. Through this delegation, the Postmaster General possesses the power to promulgate the rules and regulations necessary to superintend the business of the Postal Service.

48. 39 C.F.R. § 137.1 (1971) reads as follows:

(a) *Collection of postage.* Postage on mail sent under the franking privilege by the Vice President, Members and Members-elect of Congress, the Resident Commissioner from Puerto Rico, the Secretary of the Senate, Sergeant at Arms

tial for abuse. They fail to regulate where the need for regulation exists. When the regulations are juxtaposed with their statutory coun-

of the Senate, and the Clerk of the House of Representatives is paid annually by a lump sum to the Post Office Department.

(b) *Description.* Official mail of Members of Congress is sent without prepayment of postage bearing written signature or a printed facsimile signature instead of a postage stamp. Mail accepted under frank, and the officials authorized to use franked mail, are shown in paragraph (c) of this section.

[Paragraph (c) provides a table which reads in part:]

Persons authorized to use the frank	Matter that may be franked
Vice President of the United States, Members of Congress, Resident Commissioners, Secretary of the Senate, Sergeant at Arms of the Senate, and Clerk of the House.	Public documents printed by order of Congress.
Members of Congress and Resident Commissioners.	Congressional Record or any part of it, or speeches or reports contained in it.
Members of Congress	Seeds and agricultural reports from the Department of Agriculture.
Vice President of the United States, Members and Members-elect of Congress, Resident Commissioners, Secretary of the Senate, and Sergeant at Arms of the Senate.	Official correspondence not exceeding 4 ounces in weight. Official correspondence when addressed to a Government official by title may exceed 4 ounces in weight, but must not exceed 4 pounds.

(d) *Restrictions.* The following restrictions apply to franked mail:

(1) Official correspondence transmitted under frank of the Vice President, Members and Members-elect of Congress, Secretary of the Senate, Sergeant at Arms of the Senate, and Resident Commissioners must be on official or departmental business.

(2) No franked mail will be admitted to the mail unless admissible as ordinary mail.

(3) A person entitled to use franked mail may not loan his frank or permit its use by any committee, organization, or association; or permit its use by any person for the benefit or use of any committee, organization, or association. This restriction does not apply to any committee composed of Members of Congress.

(4) Franked mail is forwarded like any other mail, but when once delivered to the addressee it may not be remailed. A package of franked pieces may be sent by a person entitled to the franking privilege to one addressee, who, on receiving and opening the package, may on behalf of such person place addresses on the franked articles and mail them.

terparts, one fails to find any regulation at all!⁴⁰ The only indication of restriction upon the contents of franked correspondence is that "[o]fficial correspondence transmitted under frank of . . . Members . . . of Congress . . . must be on official or departmental business."⁵⁰ The rules do not attempt to indicate exactly what "official business" entails. They merely recite the dictates of the statutes without providing a sufficient aid in their interpretation. The lack of definition of "official business" thus leaves the regulations as ambiguous as the statute. Moreover, with the exception of this brief set of rules, there have been no other regulations promulgated by the Postal Service either as guides to interpretation or as means of implementing the statutes.

A policy statement from an administrative agency, however, often serves as an additional method of rulemaking. Opinions concerning general governable principles often emanate from the delegated body.⁵¹ The Postal Service has published such an opinion entitled "The Congressional Franking Privilege."⁵² The statement, unfortunately, was neither promulgated as a regulation of the Service nor published in the

(5) Franked mail is handled as ordinary mail. Fees for special services must be paid at the time of the mailing.

(6) Franked mail must be addressed to the recipient by name, except as provided in § 123.4(d)(2) [see note 88 *infra*].

(e) *Weight and size limits*—(1) *Weight*. Official correspondence is limited to 4 ounces, except that when addressed to a Government official by title the limit is 4 pounds. . . .

49. *E.g., compare* 39 U.S.C. § 3216(a) (1970):

The postage on mail matter sent and received through the mails under the franking privilege by . . . Members . . . of Congress . . . shall be paid by a lump sum appropriation to the legislative branch for the purpose, and then paid to the Postal Service as postal revenue. . . .

with 39 C.F.R. § 137.1(a) (1971) which reads in part as follows: "Postage on mail sent under the franking privilege by . . . Members . . . of Congress . . . is paid annually by a lump sum to the Post Office Department . . . ;" *compare* 39 U.S.C. § 3210 (1970): ". . . Members . . . of Congress . . . may send as franked mail . . . (1) matter . . . upon official business, to a Government official; and (2) correspondence . . . upon official business to any person. . . ." with 39 C.F.R. § 137.1(d)(1) (1971): "Official correspondence transmitted under the frank of . . . Members . . . of Congress . . . must be on official or departmental business," and *compare* 39 U.S.C. § 3215 (1970):

A person entitled to use a frank may not lend it or permit its use by any committee, organization, or association, or permit its use by any person for the benefit or use of any committee, organization or association. This section does not apply to any committee composed of Members of Congress.

with 39 C.F.R. § 137.1(d)(3) (1971), *supra* note 47, which has substantially the same language.

50. 39 C.F.R. § 137.1(d)(1) (1971).

51. *Cf. Frozen Food v. United States*, 351 U.S. 40 (1956); *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942).

52. POST OFFICE DEPARTMENT PUBLICATION # 126 (April, 1968) [hereinafter cited as PODP # 126].

Federal Register. Its publication must therefore be considered as something less than a regulation and without the force and effect of law.⁵³ The opinion thus serves as an informal guideline void of the legal potency embodied in a statute or regulation. The informal criteria contained in this administrative opinion comprise the only substantial attempt undertaken by the Postal Service to define what is "official business" under section 3210. The opinion constitutes the sole departmental attempt to place sensible limits upon the use of the franking privilege. The publication reads in part:

Correspondence on "Official Business" is that in which the member deals with the addressee as a citizen of the United States or constituent as opposed to the relationship of personal friend, the *relationship of candidate or prospective candidate and voter or when the member writes in the capacity of a member of a political party or faction*.⁵⁴

This language specifically indicates that "official business" only encompasses correspondence directed to a constituent which neither contains campaign material nor is otherwise related to partisan politics. The opinion continues on to re-emphasize the concept that political campaigning is not official business:

Appeals for political support, references to what a member expects to do in the next Congress sent out before an election, discussion of a prior campaign, discussion of a coming political campaign and reference to campaign opponents as such are all matters beyond the official business concept.⁵⁵

The publication further specifies that:

[P]ictures which are of such size as to lead to the conclusion that their purpose is to advertise the member rather than to illustrate the text are not "official business." As an example, a picture of a member of Congress either alone or with another individual would be presumed to be for the purpose of personal advertising when it is larger than one-fourth of the page on which it appears.⁵⁶

Reference to forthcoming election and to the next Congress in letter mailed before election are nonfrankable. . . .⁵⁷

53. See generally *Sullivan v. United States*, 348 U.S. 170 (1954), wherein a Department of Justice Circular Letter, which was sent to all district attorneys but never promulgated as a regulation of the department or published in the Federal Register, was determined to be a mere housekeeping provision of the department and not entitled to the effect of a regulation.

54. PODP # 126, *supra* note 52, at 1 (emphasis added).

55. *Id.* at 2.

56. *Id.* at 3.

57. *Id.* at 6.

Reference to the past campaign is not frankable. . . .⁵⁸

The prominent label "Democrat" or "Republican" on member's picture is nonfrankable. . . .⁵⁹

Although the opinion only stands as a guideline, it is illustrative of the administrative interpretation of "official business" as contained within section 3210. There being no official interpretation contrary to the one set forth above, the opinion could serve as a deterrent standard and a partial clarification of the undefined concepts contained within section 3210.⁶⁰

Administrative and judicial application of these informal departmental rules could aid in obviating the tremendous potential for abuse inherent in the broad language contained within the statutory grant of the congressional franking privilege. Unfortunately this cannot be the case. The publication of these guidelines must have caused some complaint by members of Congress. On December 26, 1968, only eight months after publication of the guidelines, the General Counsel of the former Post Office Department dispatched to every congressman an explanatory letter regarding the nature of its prospective regulatory policy and the force and effect of the opinion. The Postal Service stated that it was not attempting to censor congressional mail⁶¹ but that the

use of the franking privilege for correspondence on official business is a matter strictly between the member of Congress and his conscience. Under these circumstances we therefore feel that we can provide advisory guidelines to the officials possessing a franking privilege, but that they themselves should have the responsibility for policing themselves.⁶²

As a federal district court in California later recognized, "it seems that the Post Office Department has in no way withdrawn its earlier criteria but has adopted an understandable 'hands off' policy rather than tangle with possessors of the privilege."⁶³ The informal guidelines were therefore sapped of any regulatory strength and reduced to an impotent statement merely intended to aid a congressman in dealing with his conscience.

In summation, the meaning of "official business" in section 3210

58. *Id.*

59. *Id.*

60. 39 U.S.C. § 3210 (1970).

61. Letter from Timothy J. May, General Counsel of the Post Office Department to all members of Congress, December 26, 1968, noted in *Rising v. Brown*, 313 F. Supp. 824, 827 n.3 (C.D. Cal. 1970).

62. *Id.*

63. *Id.*

remains in need of clarification. The Postal Service regulations fail to aid in its interpretation. Further, the informal set of guidelines opined by the Service clearly have no administrative value or deterrent effect. In the absence of administrative action, the use of the congressional franking privilege remains an unfettered and constant source of potential abuse.

II. SECTION 3212—FRANKING THE CONGRESSIONAL RECORD

Misuse of the provisions of section 3210 is not the sole source of franking abuse. The other franking statutes also offer great potential for congressional misuse.⁶⁴ The greatest potential for abuse is contained within the broad language of section 3212. The section authorizes the franked mailing of any part of the *Congressional Record*, including reports or speeches.⁶⁵ While the section appears innocuous on its face, a careful analysis of its content reveals the statute's character to be so expansive that it may easily be utilized as a means of accomplishing the dissemination of campaign literature.

Since section 3212 allows any part of the Congressional Record to be mailed without limitation or qualification, the possibility arises that campaign material could be inserted into the *Record* for the sole purpose of permitting a future mass mailing. The United States district court in *McGovern v. Martz*⁶⁶ recognized that, "[c]ongressmen undoubtedly have a responsibility to inform their constituents, and . . . circulation of the *Congressional Record* is a convenient method."⁶⁷ It is undeniably true that congressmen are vested with the representative responsibility of informing their constituents. However, the extent of that function is by no means qualified by the franking statute. The statute fails to define the nature of material that may be inserted and subsequently extracted from the *Record* for public dissemination at no

64. 39 U.S.C. § 3211 (1970) allows the franked mailing and receipt of all public documents printed by order of Congress. The text of the section reads as follows:

The Vice President, Members of Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, the Clerk of the House of Representatives, and the Sergeant at Arms of the House of Representatives, until the thirtieth day of June following the expiration of their respective terms of office, may send and receive as franked mail all public documents printed by order of Congress.

44 U.S.C. § 907 (1970) provides for reprint of public documents and reports at cost on order of a Member of Congress. 39 U.S.C. § 3213 (1970) allows the franked mailing of seeds and agricultural reports. 39 U.S.C. § 3218 (1970) permits the spouse of a deceased Congressman to utilize franking privileges for 180 days after his death if the correspondence relates to the death.

65. See note 44 *supra* for the text of this section.

66. 182 F. Supp. 343 (D.D.C. 1960).

67. *Id.* at 348.

cost to the Congressman. The unclear "official business" qualification of section 3210 is omitted from section 3212, either by neglect or design. Furthermore, section 3212 does not restrict the congressman to intra-district circulation of franked matter. He is therefore allowed to distribute material embodied in the *Record* to any potential voter under the pretext of fulfilling his congressional responsibility.

The administrative agency responsible for the execution of this statute, the Postal Service, has failed to enact a policy which would alleviate the opportunity for glaring abuse offered by section 3212. The Service has not promulgated any rules that would regulate the use of the statute. The only action undertaken by the Service has been a brief reference to the section in the informal guidelines⁶⁸ presented in the aforementioned administrative opinion "The Congressional Franking Privilege":

[T]he Department has now concluded that pictures cannot be considered to be a part of the Record or of the speech or report in the Record, and, therefore, may not be accepted under Section 4163.⁶⁹

Although photographs must be excluded, any campaign statements or reports may be included in the *Record* for the purpose of allowing their later dissemination under the franking privilege.

The ease with which the section may be abused is matched only by the potential for its misuse. There are no limitations upon who may be the recipient of material franked under this statute. Senator Williams of Delaware, cognizant of the problem, has seen fit to remark:

[T]here [is] nothing to prohibit a Congressional Member who [is] running for the Presidency from using his franking privilege to circulate the entire United States with political propaganda and letting the taxpayers pay the postage merely by putting his speeches in the Congressional Record and having them reprinted.⁷⁰

This section 3212 which is unlimited and unrestricted, provides an even greater potential for abuse than 3210. As is the case with section 3210, the lack of administration regulations governing section 3212 is striking.⁷¹

Within the series of franking statutes contained in Title 39 of the *United States Code* there is only one effective prohibitory statute, section 3215.⁷² This section forbids a congressman from lending or per-

68. See text accompanying notes 52-60 *supra*.

69. PODP # 126, *supra* note 52, at 9, discussing 39 U.S.C. § 4163 (1960), as amended 39 U.S.C. § 3212 (1970).

70. 109 CONG. REC. 11711 (1963) (remarks of Senator Williams).

71. See text accompanying notes 48-50 *supra*.

72. 39 U.S.C. § 3215 (1970) reads as follows:

mitting the use of his frank by anyone unauthorized to use it.⁷³ The prohibition applies to any person, non-congressional committee, organization or association. Under these terms, any type of political campaign committee would be expressly prohibited from using the incumbent's frank. But the prohibition would have no restricting effect upon the free mailing of campaign literature when the material is mailed personally by the incumbent. The fact that Congress enacted the statute indicates that the legislature was of the opinion that some measures were required to terminate franking abuse. While the inhibitive effect of the section's language may be relatively limited, the statute nevertheless serves as a valuable precedent for the future enactment of legislation to restrict franking abuse.⁷⁴

Congress has not specifically disallowed franked campaign mailings in any of the above discussed statutes. However, if the franking privilege is misused by a congressman for the mailing of political missives without charge, the incumbent candidate is not only given a competitive advantage during campaigning,⁷⁵ but he is given this advantage at the taxpayer's expense.⁷⁶ Can this be what Congress intended? Senator Williams was of the opinion that "[i]t was not intended that the Congress extend free junk-mailing privileges to political candidates who happen to hold office in the Congress."⁷⁷ Regarding the taxpayer's burden, he stated:

The taxpayers never were supposed to be shouldered with the responsibility of financing the postal charges of political campaigns either in congressional districts or in the senatorial races or for some Member of Congress who might have the presidential "bug."⁷⁸

The "official business" limitation in section 3210 arguably was designed not only to prohibit franked correspondence of a non-official, personal nature, but also to deny the use of the frank for campaign material. Congress must have been aware of the myriad possibilities for

A person entitled to use a frank may not lend it or permit its use by any committee, organization, or association, or permit its use by any person for the benefit or use of any committee, organization, or association. This section does not apply to any committee composed of Members of Congress.

73. *Id.*; 13 OP. ATT'Y GEN. 157 (1869) and 11 OP. ATT'Y GEN. 35 (1864) interpret the franking privilege as a strictly personal privilege which cannot be delegated by one enjoying it to any other person.

74. See text accompanying notes 182-184 *infra* for a discussion of the need for further prohibitory language in the franking statutes.

75. *Rising v. Brown*, 313 F. Supp. 824, 828 (C.D. Cal. 1970).

76. See 39 U.S.C. § 3216(a) (1970).

77. See 109 CONG. REC. 22888 (1963) (remarks of Senator Williams).

78. *Id.* at 22886.

abuse. The prohibitory language of section 3215 apparently was enacted to prevent what would have been a common method of misuse of the privilege, i.e., use by campaign committees. However, neither Congress nor its delegated administrator, the Postal Service, has taken further effective action. Administrative regulation under any of the franking statutes has thus far been largely ineffectual. The Postal Service guidelines contained in the administrative opinion previously quoted⁷⁹ have little, if any, coercive effect or interpretative value.

As a practical matter, there are obvious political reasons underlying franking abuse. Use of the privilege during political campaigning could influence the outcome of an election. Misuse of the privilege during electioneering allows the congressman to utilize direct mailing, an effective campaign tool, without incurring its usual prohibitive cost. When the privilege is abused in this manner, the incumbent candidate is saving at least eight cents in first class postage per letter. The average population of a congressional district in the 91st Congress was reported at 410,000.⁸⁰ Based on this statistic, an incumbent congressman running for re-election in the House of Representatives could achieve savings in postal charges in the sum of \$32,800 per franked mailing if the letter were sent to everyone residing in the district. In the alternative, a California senatorial incumbent could conceivably utilize the franked campaign mailing to contact the 7,102,000 Californians who voted in the 1968 senatorial election⁸¹ at a savings of \$568,160. Although these figures may represent extreme instances of abuse, they are nonetheless indicative of the magnitude of the problem. The sums of money saved could then be channeled into other campaign areas. Obviously, the incumbent would gain an unfair advantage over his non-incumbent opponents.

[A]n incumbent in either the House or the Senate would have an unfair advantage over his opponent at home, because it would mean that [the incumbent] could finance with free postage circulation of his political material, whereas his opponent would have to raise the cash to pay the postage. . . . It could run into a sizeable amount of money.⁸²

The entire cost of transporting the franked campaign literature would be borne by the taxpayer since the carrying cost of franked mail is appropriated yearly by the Congress from the treasury.⁸³

79. See text accompanying notes 52-59 *supra*.

80. BUREAU OF THE CENSUS, 1970 STATISTICAL ABSTRACT OF THE UNITED STATES 363.

81. *Id.* at 365.

82. 109 CONG. REC. 22886 (1963) (remarks of Senator Williams).

83. 39 U.S.C. § 3216(a) (1970). See note 33 *supra* for the text of this section.

III. JUDICIAL INTERPRETATIONS

In the entire history of congressional employment of the franking privilege there have been only two instances in which an alleged misuse of the privilege for campaign purposes has resulted in judicial scrutiny.⁸⁴ *Straus v. Gilbert*⁸⁵ and *Rising v. Brown*⁸⁶ provide illustrative examples of the problems herein recognized and the necessity for legislative reform and administrative regulation. The two cases arose within the last four years; the courts, however, arrived at divergent results.

In *Straus* the defendant was the incumbent representative of the 22nd Congressional District of New York, Jacob H. Gilbert.⁸⁷ Congressman Gilbert franked three sets of letters to every postal patron in his district, principally for the purpose of campaigning in the 1968 Democratic Party primary contest.⁸⁸ Each of the three mailings contained a letter re-

84. *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970); *Straus v. Gilbert*, 293 F. Supp. 214 (S.D.N.Y. 1968). The existence of only two reported cases litigating issues of abuse of the franking privilege is not indicative of the fact that there have been only two violations but is more likely attributable to the difficulty of detecting violations.

85. 293 F. Supp. 214 (S.D.N.Y. 1968).

86. 313 F. Supp. 824 (C.D. Cal. 1970).

87. 293 F. Supp. at 215.

88. *Id.* Gilbert had franked all three of the mailouts without addressing them to any specific addressee, but by listing the recipient as "Postal Patron—Local, 22nd Congressional District, Bronx, New York." *Id.* This simplified form of addressing is authorized pursuant to the "junk mail" privilege which is employed only by members of the House of Representatives. The "junk mail" privilege was originally proposed in the House as part of the 1961 Legislative Appropriations Act. See 106 CONG. REC. 3275 (1960) (remarks of Representative Conte); *Id.* at 3283-86. The House that year included a provision for the franked distribution of unaddressed mail in the cities similar to the franking distribution which had previously been practiced in rural areas but which the Postal Service had theretofore declined to handle in urban areas. *Id.* The Senate, due to the vigorous condemnation of this proposal by Senator Williams, eliminated the provision. *Id.* at 8617-19. The next year the House of Representatives again included the provision and passed it on the very last day before Congress adjourned, thus precluding the Senate from immediately disapproving the House's action. 107 CONG. REC. 21528 (1961); see *id.* at A8300 (remarks of Representative Ashbrook). Finally, in 1963, Senator Williams proposed an amendment to the 1964 Legislative Appropriation Bill which would require the name of the specific addressee on every piece of franked mail. 109 CONG. REC. 10763 (1963) (remarks of Senator Williams). The House responded by claiming that the action was a breach of comity between the two houses of Congress in that the Senate was trying to dictate to the House on the lower body's "housekeeping functions." The Chairman of the House Subcommittee on Legislative Appropriations threatened to retaliate by exposing alleged "call girls" on a certain senator's payroll. The upper chamber was outraged by the Representative's threat and refused to accept the Senate Committee's conference report that made the proposed restriction only applicable to the Senate. *Id.* at 22885-91. Finally, the Senate acquiesced and accepted a House compromise amendment which prevented "occupant" addressing by senators but per-

printed from the *Congressional Record* in which the original *Record* type had been reset to provide for greater textual legibility.⁸⁹ The first mailing contained a cover letter in which the Congressman introduced himself to the recipient and offered his assistance.⁹⁰ The additional letters contained photographs of Representative Gilbert.⁹¹

The plaintiff, a non-incumbent opponent of Gilbert in the primary race, brought a motion before the district court for a preliminary injunction to enjoin the defendant from using his frank to send this material.⁹² The allegations set forth were that Title 39 of the *United States Code* at section 4163⁹³ required a reprint from the *Congressional Record* to be an exact copy without any variation; that material inserted into the *Record* primarily for campaign purposes could not be franked; and that franked literature could only be sent to persons residing in the 22nd District as it existed at the time of the mailing.⁹⁴

The district court dismissed the plaintiff's contentions in a terse two-page decision.⁹⁵ In response to the plaintiff's proposition that the

mitted the same for representatives, limited to the representative's congressional district. *Id.* at 25025-27.

The use of "junk mail" addressing by the House continues today notwithstanding an attempt by Representative Ashbrook in 1966 to stop the practice. H.R. REP. No. 11986, 89th Cong., 2d Sess. (1966). Although there is no express statutory authorization for simplified addressing, the Postal Service has acknowledged and impliedly approved of the practice of members of the House by the promulgation of certain regulations to control its use. 39 C.F.R. § 122.4(d)(2) (1971); *cf. id.* at § 122.4(d)(1) (1971), which requires specificity in addressing on the franked mailings sent by a member of the Senate.

It is submitted that a reasonable explanation for the House of Representative's insistence on retaining the use of "junk mail" addressing is that the representatives are required to run for re-election every two years as compared to every six years for senators. The representatives are therefore under greater pressure to keep their names in the minds of their constituents and accomplish this by regularly sending them "reports" from Washington. These reports serve a dual purpose—enlightenment of the constituency and political edification of the representative.

89. *Straus v. Gilbert*, 293 F. Supp. 214, 215 (S.D.N.Y. 1968).

90. *Id.*

91. *Id.*

92. *Id.*

93. 39 U.S.C. § 4163 (1964), *as amended*, 39 U.S.C. § 3212 (1970).

94. 293 F. Supp. at 215.

95. The Honorable Constance Baker Motley, United States District Judge of the Southern District of New York, asserted original jurisdiction over the controversy pursuant to the provisions of 28 U.S.C. § 1339 (1970):

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

This statute grants original jurisdiction in the district courts over any civil suit whose cause of action arises under an act of Congress relating to the postal service. The *Straus* court noted that the franking privilege is governed in part by 39 U.S.C.

franking statute required reprints to be exact reproductions, the court stated:

This court does not read this statute as requiring exact duplication of the Congressional Record without variance. Neither do we believe that inserting a covering letter nor the addition of a picture removes the reprint from the ambit of the statute.⁹⁶

The court therefore declined to interpret the statute in a restrictive sense but held that some variations in the reprint from the text of the *Congressional Record* are permissible.

The court then rejected the plaintiff's contention that the statute did not allow the franking of the *Record* where the reprinted material was placed in the daily journal for campaign purposes⁹⁷ and brusquely concluded that:

a) the statute has no such limitation; b) the letters here at issue do not mention the campaign; and c) this court does not, and cannot, tell Congress what it can print in its Journal.⁹⁸

Finally, the plaintiff argued that the defendant improperly franked the literature in question to persons not yet legally a part of the 22nd Congressional District and should be restricted to the district as it appeared before redistricting.⁹⁹ The court once again held that section 4163¹⁰⁰ had no such limitations.¹⁰¹ The court continued: "Defendant is properly addressing the letters to his constituents."¹⁰² The tribunal recognized that the statute fails to place any constraints on the location of an addressee of franked material,¹⁰³ and the court was not inclined to impose any judicial restraints on the section in the absence of express statutory language.

In the final analysis, the court reiterated that circulation of the *Congressional Record* is a convenient method for a congressman to inform his constituency¹⁰⁴ and remarked in closing that, in any event, it was not

§§ 4161 *et seq.* (1964), *as amended*, 39 U.S.C. §§ 3210 *et seq.* (1970). 293 F. Supp. at 216.

96. 293 F. Supp. at 216.

97. *Id.*

98. *Id.*

99. *Id.* at 215.

100. 39 U.S.C. § 4163 (1964), *as amended*, 39 U.S.C. § 3212 (1970).

101. 293 F. Supp. at 216.

102. *Id.*

103. *But see* note 88 *supra* discussing the voluntary constraints adopted by the House of Representatives to limit the franking of "junk mail" by each representative to his own district. The mailouts in this case were all of the "junk" variety. *See* 39 C.F.R. § 122.4(d)(2)(i) & (v) (1971).

104. 293 F. Supp. at 216.

willing to intrude on a political dispute.¹⁰⁵ Therefore, the plaintiff's request for a preliminary injunction was denied.¹⁰⁶

Two years after the *Straus* decision the United States District Court for the Central District of California was presented with issues similar in nature to those cursorily dismissed in *Straus*.¹⁰⁷ In *Rising v. Brown*¹⁰⁸ the court shared the *Straus* court's apprehension of judicial involvement "in disputes of a purely political nature,¹⁰⁹ especially at election time, but [recognized that] the public has an overriding interest in being protected against abuses of the franking privilege."¹¹⁰

The principal parties in *Rising v. Brown*¹¹¹ were two incumbent congressmen from nearly adjoining California districts who were battling for the Democratic Party nomination for United States Senator in the June 2, 1970 primary election.¹¹² Other major candidates for senator in this election included the incumbent, Senator George Murphy, and at least two non-incumbents who did not possess the franking privilege.¹¹³

The defendant, George E. Brown, Jr., in January, 1970, mailed a franked post card to persons residing throughout the State of California.¹¹⁴ One side of the post card introduced the Congressman to the recipient and invited the recipient to participate in a survey of voter attitudes concerning environmental problems for the Congressman's House committee.¹¹⁵ The reverse side of the post card contained nine

105. *Id.*

106. *Id.*

107. The court in *Straus* decided the case solely on the basis of section 4163, as amended, 39 U.S.C. § 3212 (1970). Note that in *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970) section 4161, as amended, 39 U.S.C. § 3210 (1970), was brought into issue in addition to section 4163.

108. 313 F. Supp. 824 (C.D. Cal. 1970).

109. The issue at bar in this case, as in *Straus*, arises out of a political dispute, but is not a "political question." Federal courts will deny jurisdiction of a case which involves a "political question" as being nonjusticiable even though such questions could involve actual controversies. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164-66 (1803). The rule is founded on the doctrine of separation of powers and judicial self-restraint. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The issues in both the *Straus* and *Brown* cases do not involve a potential conflict between two coordinate branches of government and therefore do not constitute "political questions" in the judicial sense of the words. *Powell v. McCormack*, 395 U.S. 486 (1969).

110. *Rising v. Brown*, 313 F. Supp. 824, 828 (C.D. Cal. 1970).

111. 313 F. Supp. 824 (C.D. Cal. 1970).

112. *Id.* at 825.

113. *Id.*

114. *Id.*

115. *Id.* The message on one side of the post card read as follows:

Dear Concerned Citizen:

I am asking you, a resident of California to participate in this survey. As a

questions with adjacent "Yes" and "No" boxes for the recipient to check before returning the card to Congressman Brown.¹¹⁶

Just two weeks prior to the June 2 primary, Brown began mailing 300,000 copies¹¹⁷ of a brochure to the persons who responded to the questionnaire and to others who had not responded.¹¹⁸ The brochure was entitled "Congressman George Brown—Report from Washington, May, 1970."¹¹⁹ On the first panel of the brochure was printed the following message in George Brown's handwriting: "Thanks for answering my questionnaire—thought you would be interested in seeing this. George Brown."¹²⁰ The brochure, when unfolded, contained eight panels, two of which were concerned with a discussion of the work of the House Science and Astronautics Subcommittee investigating environmental problems and the results of the January, 1970, voter survey.¹²¹ One panel listed environmental proposals introduced by the Congressman during the 91st Congress; another panel contained Brown's views on the Southeast Asian conflict; and another listed the Congressman's voting record in the House of Representatives on war-related issues.¹²² The remainder of the mailing contained ten photographs, six of which were of Brown in various speaking poses.¹²³ These brochures were not printed at government expense but were prepared for the Congressman by the public relations firm that was managing his campaign. They were printed in Los Angeles and were stuffed into envelopes by volunteer campaign workers in various campaign headquarters and in homes.¹²⁴

The co-plaintiffs, Congressman John V. Tunney,¹²⁵ his campaign

member of the Science and Astronautics Committee of the United States Congress, I am interested in your opinions of these questions. This spring, our committee will be holding hearings in California on environmental pollution. I would very much appreciate the opportunity to present your views to the committee. The data collected will be made available to all California congressmen, other elected officials and the press.

Sincerely yours,
George Brown,
Member of Congress. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Rising v. Brown*, Civil No. 70-1123-DWW (C.D. Cal., filed May 12, 1970), *Affidavit of Lee Jean Bell*, Exhibit A attached thereto, filed May 26, 1970.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. 313 F. Supp. at 826-27.

125. Mr. Tunney subsequently won the June 2, 1970 Democratic primary. *L.A. Times*, June 3, 1970, at 1, col. 1 (home ed.). Tunney went on to defeat the incumbent

manager Nelson C. Rising, and the campaign committee Friends of John V. Tunney, South, Inc., made a motion before the Honorable David W. Williams for a preliminary injunction to enjoin the defendant Brown and his campaign aides from using the defendant's franking privilege to mail the brochure in question.¹²⁶ The *Brown* court was presented with substantially similar issues brought before the *Straus* court.¹²⁷ However, in this instance a preliminary injunction issued from the court.¹²⁸

Prior to an adjudication of the case on the merits, the *Brown* court was faced with the threshold question of standing. The defendants asserted that the plaintiffs had no standing to sue and that their interest in postal revenues and the administration of postal laws was that of members of the general public.¹²⁹ The defendants relied on *Frothingham v. Mellon*¹³⁰ for the proposition that the interest of a taxpayer in the monies of the treasury does not provide standing to sue for alleged improper expenditures of public funds.¹³¹ Directing its attention to the defendant's contention, the *Brown* court stated that the holding in *Frothingham* has slowly been eroded¹³² in the nearly 50 years since the decision was announced. The court proceeded to recognize *Baker v. Carr*¹³³ as expositive of the proposition that a plaintiff has standing to maintain an action if he alleges such a personal stake in the outcome as to assure "concrete adverseness."¹³⁴

Senator George Murphy in the November 1970 final election. L.A. Times, Nov. 3, 1970, at 1, col. 1 (home ed.).

126. 313 F. Supp. at 825.

127. Involved was an interpretation of 39 U.S.C. §§ 4161, 4163 (1960), *as amended*, 39 U.S.C. §§ 3210, 3212 (1970). See note 107 *supra*.

128. 313 F. Supp. at 828.

129. *Id.* at 826.

130. 262 U.S. 447 (1923).

131. *Id.* at 487:

[The interest of the taxpayer] in the monies of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.

132. 313 F. Supp. at 826 n.1, *citing* *Flast v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 186 (1962); *Colegrove v. Green*, 328 U.S. 549 (1946); *Smiley v. Holm*, 285 U.S. 355 (1932).

133. 369 U.S. 186 (1962).

134. 313 F. Supp. at 826, *citing* *Baker v. Carr*, 369 U.S. 186, 204 (1962) which held:

[The plaintiff must allege] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

The plaintiffs had stated in their reply memorandum in support of the preliminary injunction that:

this particular misuse of tax funds involves the most visible phases of the political process and some of the most sensitive questions of public policy with respect to free communication between elected representatives and voters. . . .¹³⁵

Nevertheless the court found that:

the question plaintiffs present to this Court is whether Congressman Brown shall be required to place a 6¢ stamp upon each envelope containing [the literature in question]. . . . The issue is not speculative; it presents a specific controversy; it involves the question whether tax dollars shall be reimbursed to the post office by the Congress of the United States for an illegal use of the franking privilege; and it raises the disturbing possibility that the primary campaign of a major political party is being influenced by misuse of public funds.¹³⁶

On this basis the court ruled that the need for "concrete adverseness" required by *Baker v. Carr*¹³⁷ was satisfied by the great personal stake plaintiff Tunney had in the imminent primary election and that Tunney therefore had standing to maintain the suit against Congressman Brown.¹³⁸ However, the district court declined to pass on whether the co-plaintiffs Rising or Friends had standing to sue.¹³⁹

On the merits of the controversy, the defense asserted a two-pronged argument: The mailed brochures satisfied the official business requirement of the statute; and in the alternative, the brochures were frankable as a part of the *Congressional Record*.¹⁴⁰ Employing a process of statutory analysis, regulatory interpretation and factual application, the court cogently rejected both of the defendant's contentions.¹⁴¹

The court's opinion was focused largely on whether the franked brochures were of an "official business" nature. The defendant set forth the argument that the pamphlets in issue represented the results of the questionnaire survey initiated by the defendant and thus the mailing was on official business and within the defendant's franking privi-

135. *Rising v. Brown*, Civil No. 71-1123-DWW (C.D. Cal., filed May 12, 1970), Plaintiff's Reply Memorandum in Support of Preliminary Injunction at 8, filed May 26, 1970.

136. 313 F. Supp. at 826 (quoting plaintiff's brief).

137. 369 U.S. 186 (1962).

138. 313 F. Supp. at 826.

139. See text following note 171 *infra*.

140. 313 F. Supp. at 826-27.

141. *Id.* at 826-28.

lege.¹⁴² Upon analysis and in recognition of the Postal Service guidelines,¹⁴³ the court noted that the brochure did indeed concern itself in part with the work of the defendant's environmental subcommittee and was directed to the results of the questionnaire,¹⁴⁴ but that "at least 50 percent of it is devoted to other matters which strongly lends itself to the suspicion that it is promotive of getting votes for the sender."¹⁴⁵ The fact the Congressman was an outspoken opponent of the Southeast Asian war and the fact two entire panels of the brochure were devoted to the Congressman's views and voting on this subject were further noted by the court.¹⁴⁶ Consequently, the "sudden departure in [Brown's] brochure from the environmental interest of his subcommittee to his views on the war [suggested] a dual purpose."¹⁴⁷ In light of the fact that the material was paid for by Brown, prepared by a public relations firm, printed and stuffed in California, and most significantly, mailed but two weeks before the primary election,¹⁴⁸ the court concluded that "[t]hese facts support the claim that the material is not 'official business' but is more closely related to campaign material."¹⁴⁹

Alternatively, the defendant asserted that the brochure was frankable under section 4163¹⁵⁰ since the entire text of the pamphlet had been inserted into the *Congressional Record*. The defendants cited *Straus v. Gilbert*¹⁵¹ for the holding that section 4163 does not prohibit a congressman's use of the frank to mail reprints of the *Congressional Record* even if mailed for campaign purposes.¹⁵² The defendant Brown had caused the brochure to be inserted into the *Congressional Record* on May 21, 1970.¹⁵³

The court remarked that it was not bound by the *Straus* case¹⁵⁴ but

142. *Id.* at 826.

143. *Id.* at 827. The fact that the court included the Postal Service guidelines in its opinion without expressing disapproval of their contents strongly implies the court's agreement with the guideline provisions. See text accompanying notes 44-59 *supra* for the partial text of these guidelines.

144. 313 F. Supp. at 826.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 826-27.

149. *Id.* at 827.

150. 39 U.S.C. § 4163 (1964), as amended, 39 U.S.C. § 3212 (1970).

151. 293 F. Supp. 214 (S.D.N.Y. 1968). See text accompanying notes 86-105 *supra*.

152. 313 F. Supp. at 827.

153. 116 CONG. REC. E4645-46 (daily ed. May 22, 1970).

154. *Straus v. Gilbert*, 293 F. Supp. 214 (S.D.N.Y. 1968), is a trial level federal case from another district and is therefore only persuasive authority.

nevertheless distinguished the instant case from *Straus*:

Here, the defendant caused the pamphlet to become part of the Congressional Record one day after this Court had granted a temporary restraining order and after many thousands of the brochure had already been mailed with use of franking privilege.¹⁵⁵

Brown had not inserted the material into the *Record* until nine days after the case was filed. The court continued:

I do not believe that § 4163 can be interpreted as to eliminate all protections against the abuse of the frank, else a congressman could cause undisputed campaign material to be inserted into the Congressional Record for the sole purpose of allowing him to disseminate it among the people of his district or state by using the franking privilege. In instances where persons possessing the franking privilege were running for public office against persons not possessing the privilege, the former would be given a distinct and unfair advantage.¹⁵⁶

In accordance, the court issued the preliminary injunction.¹⁵⁷

Although *Brown* and *Straus* are purportedly distinguishable, they are nevertheless irreconcilable in their implications and approach. The two cases provide demonstrable examples of the necessity of administrative and legislative reform.

Straus declined to interpret the privilege in a restrictive manner. While it is conceded that *Straus* addressed itself primarily to the defendant's insertion of the material into the Congressional Record as a permissible means of constituent communication,¹⁵⁸ the material disseminated had been transformed from that appearing in the *Record*.¹⁵⁹ The defendant had given it a politically competitive gloss.¹⁶⁰ Nevertheless, the court found the statute not to require "exact duplication"¹⁶¹ and declined to judicially impart any other limitations into the statute. This accordingly broadened the already wide range of potential abuse of the franking privilege.¹⁶² Recognizing the necessity of congressional communication with the populace,¹⁶³ the court was heedless of the dual purpose that the actual use of section 4163 is capable of in the absence of regulation. Section 4163 allows both legitimate utilization for

155. 313 F. Supp. at 827.

156. 313 F. Supp. at 827-28.

157. *Id.* at 828.

158. 293 F. Supp. at 216.

159. *Id.* at 215.

160. *Id.*

161. *Id.* at 216.

162. See text accompanying notes 64-83 *supra*.

163. 293 F. Supp. at 216.

constituent enlightenment and highly questionable misuse for campaign purposes. Senator Lausche recognized this dual purpose when he stated:

I understand the benefits which result from communication, but altogether too frequently the franking privilege is used, not for the purpose of informing and edifying the minds of the citizenry, but for the purpose of edifying ourselves on the political level.¹⁶⁴

Apparently the *Straus* court did not wish to draw this distinction. The court expressed reluctance at the prospect of inhibiting the activities of a congressman and remarked in closing that it would not intrude on a political dispute.¹⁶⁵

The *Brown* court approached the issues with a definite awareness of the potential abuse of the franking privilege. Mindful of the ambiguity inherent in the phrase "official business," the court applied the administrative guidelines in an ad hoc manner. Although the court avoided a direct confrontation with the *Straus* opinion, its dicta indicate that it assumed a dissimilar view concerning the scope of section 4163: "[This section cannot] be interpreted as to eliminate all protections against the abuse of the frank" ¹⁶⁶ This dicta would seem to indicate that the fact of Brown's tardiness in causing the pamphlet to be printed in the Congressional Record¹⁶⁷ was not the determinative factor in the court's decision. Rather, this court apparently would disallow any reliance upon section 4163 if the material were placed in the *Record* for the sole purpose of using it in a later campaign.

The *Brown* court expressed "an understandable unwillingness . . . to become involved in disputes of a purely political nature. . . ." ¹⁶⁸ as did the court in *Straus*, "but the public has an overriding interest in being protected against abuses of the franking privilege where, as here, the size of the mailing is so large." ¹⁶⁹ It is submitted, however, that the public has the right to be protected against *any* abuse of the congressional franking privilege, a privilege given to a public official not as a right but as a public trust. Still, the ultimate effect of the holding in *Brown* is prohibitory since it provides an interpretation of both sections 4161¹⁷⁰ and 4163¹⁷¹ which further restricts the unauthorized use of free

164. 106 CONG. REC. 8619 (1960) (remarks of Senator Lausche).

165. 293 F. Supp. at 216.

166. 313 F. Supp. at 827.

167. *Id.*

168. *Id.* at 828.

169. *Id.*

170. 39 U.S.C. § 4161 (1960), *as amended*, 39 U.S.C. § 3210 (1970).

171. 39 U.S.C. § 4163 (1960), *as amended*, 39 U.S.C. § 3212 (1970).

mailing privileges for the protection and benefit of the citizen taxpayer.

The *Brown* decision has raised another issue which will necessitate future clarification. An action initiated by one other than a congressional candidate remains open to attack on the basis of lack of standing to sue. The *Brown* court stated that Tunney had standing to sue on the grounds of his personal stake in the election. However, "personal stake" in this instance might imply a variety of standards, each based on different analytical interpretations of the rights and duties inherent in the political process. For example, a campaign aide might assert a personal stake in an action on the basis of his close association with the candidate in an economic and professional sense. He has directed a great deal of time and effort toward the election outcome. A financial contributor has expended funds and thus may arguably have acquired a personal stake. Additionally, any political supporter might be thought to be entitled to relief from the injuries that would flow from the defendant's violation of the franking privilege. A more extreme formulation would enable any voter to assert standing on the grounds that his personal stake is directly imbedded in the representative essence of government itself. The extremes capable of conjecture reveal the necessity of defining in the future a precise standard that governs the right to sue; the cases reveal the necessity of regulatory action and judicially workable guidelines.

IV. CRIMINAL SANCTIONS

This Comment has primarily concerned itself with potential, rather than actual, abuse of the franking privilege. Although the present statutory qualifications and administrative regulations are of questionable deterrent value, criminal sanctions may offer a viable alternative if utilized.

Section 1719 of the United States Criminal Code provides:

Whoever makes use of any official envelope, label, or indorsement authorized by law, to avoid the payment of postage or registry fee on his private letter, packet, package, or other matter in the mail, shall be fined not more than \$300.¹⁷²

Since congressional immunity fails to exempt congressmen from the

172. 18 U.S.C. § 1719 (1948), derived from the Act of March 3, 1877, ch. 103, § 5, 19 Stat. 335; Act of March 3, 1879, ch. 180, § 29, 20 Stat. 362; Act of July 5, 1884, ch. 234, § 3, 23 Stat. 158; and Act of July 2, 1886, ch. 611, 24 Stat. 122. Section 1719 is the only statute in the criminal code that makes abuse of the franking privilege a criminal act. The statute is entitled "Franking Privilege" but has general application to the illegal use of penalty mail as well as to the misuse of franked mail. *See*

reach of section 1719, this criminal sanction could provide an effective means of enforcing violations of the franking statutes.¹⁷³ The Immunity Clause was intended to prevent interference with the legislative process by ensuring that legislators are not distracted from or hindered in the performance of their legislative duties by being called into court to defend their actions.¹⁷⁴ But the privilege against criminal arrest does not extend any farther than the speech or debate part of the Clause. The terms "treason, felony and breach of the peace" contained within the Clause¹⁷⁵ have been construed by the Supreme Court to include all criminal offenses¹⁷⁶ arising other than from a speech or debate delivered in Congress.¹⁷⁷ Therefore, a congressman would not be exempt from a criminal subpoena¹⁷⁸ or an arrest for violation of section 1719.¹⁷⁹

39 U.S.C. §§ 3202-09 (1970)—the term "penalty mail" is historically derived from the penalty imposed by section 1719.

Criminal prosecution for an offense under section 1719 is exclusively a function of the federal government. To obtain a conviction the government would be required to prove beyond a reasonable doubt the fact of use of the franking privilege with the intent to avoid payment of postage. Criminal intent is an element of this class of crime even though it is not specifically mentioned in the statute. *Cf. Morissette v. United States*, 342 U.S. 246 (1952) (conversion of government property, 18 U.S.C. § 641); *Walker v. United States*, 342 F.2d 22 (5th Cir. 1965) (theft, 18 U.S.C. § 1708); and *United States v. Jordan*, 284 F. Supp. 758 (D. Mass. 1968) (embezzlement, 18 U.S.C. § 1709). The government would also be required to prove that the mailing was private in character.

A readily assertable defense to a prosecution under section 1719 would be that the mailing was correspondence upon "official business" as allowed by 39 U.S.C. § 3210 (1970). The trier of fact would then be required to make a factual determination of the character of the mailing. This determination would probably turn upon the same criteria as discussed in the text accompanying notes 45-63 *supra*.

173. *See* U.S. CONST. art. I, § 6, cl. 1 which provides in part:

[T]he Senators and Representatives shall in all cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance of the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

174. The Immunity Clause prevents "intimidation by the executive and accountability before a possibly hostile judiciary . . .", *United States v. Johnson*, 383 U.S. 169, 181 (1966), as well as the inconvenience caused by having to defend private lawsuits. *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenny v. Brandhove*, 341 U.S. 367, 377 (1951).

175. *See* note 173 *supra*.

176. *Williamson v. United States*, 207 U.S. 425 (1908).

177. *Id.* *See also* *United States v. Johnson*, 383 U.S. 169 (1966) (Speech and Debate Clause bars the criminal prosecution of a congressman for the making of a speech on the floor of the House solely in consideration for the receipt of money).

178. *United States v. Cooper*, 4 U.S. (4 Dall.) 341 (1800).

179. *Cf. United States v. Wise*, 28 F. Cas. 742 (No. 16,746a) (Cr. C. Dist. Col. 1842).

The application of the statute, however, is the measure of its deterrent value. Since section 1719 is phrased in the singular, "use of any official envelope, label, indorsement . . . to avoid the payment of postage . . . on his private letter, packet, package. . ." ¹⁸⁰, it is arguable that legislative intent requires the application of the statute in multiple counts should the illegal mailing be numerous in quantity. ¹⁸¹ Thus, each letter or packet mailed in violation of the section might constitute a separate violation of the statute. This would bring a maximum fine of \$300 *per* letter. If the illegal mailing were of a mass character, the ultimate fine would reach immense proportions upon conviction of each of the alleged counts if the \$300 penalty were always imposed.

Although in a mass mailing context the ultimate fine theoretically could become quite substantial, there are no reported cases of an application of this statute to prosecute a congressman. Its deterrent effect upon congressional abuse of the franking privilege is therefore questionable. Section 1719 does not allow imprisonment as a sentencing alternative, and the court is free to impose a nominal fine which would merely slap the errant congressman's hand for his misdeed. The genuine deterrent effect of the statute actually lies in the threat of non-official sanctions. The adverse publicity connected with a prosecution could anathematize a politician in an election year. Application of the existing sanctions could therefore provide a means to publicly castigate a congressman who misused his franking privilege. But the fact that there have been no reported cases filed against Congressmen is evidence of the Attorney General's reluctance to prosecute a member of a coordinate branch of government for the offense. The statute therefore provides dubious deterrence.

V. PROPOSED REFORM

Enforced criminal sanctions are a means of curtailing congressional abuse of the frank. However, only the elimination of the unclarified language of the present code through direct statutory revision will be effective. ¹⁸² This could be accomplished by an addition to the series

180. 18 U.S.C. § 1719 (1948).

181. *Cf.* 18 U.S.C. §§ 1461-62 (1958) (Prosecutions for mailing or transporting obscene matter). The United States Attorney will seek and prosecute upon a multiple count indictment for the violation of these statutes, i.e., one count for each such item the defendant attempts to mail. *See Miller v. United States*, 431 F.2d 655 (1970) where the defendants were indicted on twenty-one counts for the violation of sections 1461-62.

182. There are presently pending several bills in Congress concerning the franking privilege. These bills, however, do not attempt to tighten up the present franking

of franking statutes specifically denying *any use* of the congressional franking privilege for campaign purposes. The proposed section would extend the effective scope of section 3215¹⁸³ if it is framed as an absolute limitation.

The effect of the additional restrictions would be twofold. They would substantially eliminate statutory misinterpretation by the users of the frank, law enforcement agencies and the courts. The persons possessing the right to frank mail would be given clear notice of the limitations on the privilege in the area of political communications. Further, the proposed restrictions would specifically obviate the problems presented by section 3212 reprints of *Congressional Record* insertions. Congressmen would still be allowed to insert whatever they desire into the *Congressional Record*, but they would not be permitted to mail the reprinted material as franked mail if it is of a campaigning nature. A congressman would no longer be at liberty to flood the entire country with political propaganda and force the taxpayers to pay the postage merely because he caused his political speeches or other material to be placed in the *Congressional Record* for later reprinting and franking under section 3212.

The proposed new section would also afford a means to remedy abuse of the privilege through criminal prosecution of the abuser for violation of section 1719 of Title 18 of the United States Code. The proposed addition to Title 39 need not specify penalties for its violation because its enforcement could easily be linked with the sanctions imposed in the criminal code against the general abuse of the franking privilege. However, even this simplistic solution will have a negligible effect upon franking abuse unless the Postal Service, as the administrative agency responsible for the execution of the postal laws, takes the decisive action required to regulate the franking privilege and to police its proper utilization by members of Congress.

Lax administrative regulation is a major cause of the indefiniteness that pervades the entire problem of franking abuse. The holders of the privilege in the absence of effective regulation will remain uncertain of the limits to which the frank may be exercised. Furthermore, regulatory interpretation is essential for effective enforcement of the existing statutory restrictions.¹⁸⁴

statutes, but are proposing to provide for the mailing of letter mail to members of Congress from their constituents at no cost or at reduced rates. S. 1643, 92nd Cong., 1st Sess. (1971); H.R. 6013, 10215, 10703, 92 Cong., 1st Sess. (1971).

183. 39 U.S.C. § 3215 (1970). See text accompanying notes 72-74 *supra* for discussion of this section, and note 72 *supra* for the text of the section.

184. See text accompanying notes 78-79 *supra*.

The current absence of administrative action in regulating franking use might be due to administrative reluctance to step on political toes, rather than administrative oversight.¹⁸⁵ It should be noted that prior to the recent Postal Reorganization Act, the Postmaster General and the Assistant Postmasters General were appointed by the President by and with the advice and consent of the Senate.¹⁸⁶ Their terms of office were limited to the administration of the President who appointed them.¹⁸⁷ This system of political appointment caused a great deal of patronage in the executive departments of the Post Office. The possible attrition of the entire upper echelon of management was dependent upon the whim of each new administration.¹⁸⁸ The spoils system may well be the primary explanation for administrative unwillingness to take any action which would curry political misfavor.

Fortunately, Congress has recently taken steps in the Reorganization Act to end the system of patronage. An express purpose of the Act is to "[c]onvert the Post Office Department into an independent establishment in the Executive Branch of the Government, freed from direct political pressures. . . ."¹⁸⁹ A method chosen to accomplish this purpose was to change the system of selection of the Postmaster General. He is now appointed by the newly created Board of Governors of the Postal Service rather than by the President.¹⁹⁰ The Assistant Postmasters General, General Counsel and Judicial Officer are appointed by the Postmaster General.¹⁹¹

185. The court in *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970) remarked: "it seems that the Post Office Department has . . . adopted an understandable 'hands off' policy rather than tangle with possessors of the privilege." *Id.* at 827, n.3. See text accompanying notes 61-62 *supra* for discussion of the letter of the General Counsel of the Post Office to members of Congress.

186. Act of Sept. 2, 1960, Pub. L. No. 86-682, §§ 302, 305, 74 Stat. 579.

187. *Id.* § 302.

188. The Post Office virtually became a political mechanism under the administration of Andrew Jackson in 1829 and has remained the principal patronage-dispensing agency of the party in power since that time. See generally G. CULLINAN, *THE POST OFFICE DEPARTMENT* 44 (1968); HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE, *POSTAL REORGANIZATION ACT*, H.R. REP. NO. 91-1104, 91st Cong., 2d Sess. 13 (1970):

There is wide agreement that vestiges of 19th century political patronage practices have persisted in the Post Office Department too long and that one of the cardinal needs of postal reform is to seal off the Postal Service from partisan political influence.

189. HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE, *POSTAL REORGANIZATION ACT*, H.R. REP. NO. 91-1104, 91st Cong., 2d Sess. 1 (1970), quoting in part from the legislative recommendations of President Richard M. Nixon given to Congress in his message of April 16, 1970.

190. 39 U.S.C. §§ 202(c), 203 (1970).

191. *Id.* § 204.

The Reorganization Act was passed on August 12, 1970 and the sections changing the selection process of the Postmaster General became effective on that date.¹⁹² But the aforementioned regulations¹⁹³ were promulgated on December 23, 1970.¹⁹⁴ The fact that the current regulations are so innocuous in content would tend to show that the Postmaster General still treads lightly for fear of causing congressional reprisal.

The Postal Service must take the necessary steps to assure proper regulation of the free mailing privileges granted by the franking statutes. The agency should immediately promulgate a series of regulations which would effectively curtail franking abuse. The advisory Postal Service guidelines to the use of the franking privilege previously discussed herein¹⁹⁵ are a step in the right direction but fall far short of what is necessitated by the magnitude of the overall problem. These guidelines should be promulgated as regulations that would have an effect upon the users of the privilege.

An analogous area of federal regulation where more effective rules have been promulgated is in the administration of the "fairness doctrine" imposed by the Federal Communications Commission upon radio and television broadcasters¹⁹⁶ in general, and the "equal time" requirement under the "fairness doctrine" in particular. The equal time provision requires a broadcaster, if he permits any person to use his facilities, to allot equal air time to all other candidates for the same public office.¹⁹⁷ Enforcement of the provisions of the section 315 equality doctrine have posed enormous problems of statutory definition and administrative execution.¹⁹⁸ Section 315, like the franking statutes, did not attempt to define its terms. Therefore, the FCC, as the agency responsible for the execution of the statute, promulgated regulations to rectify the ambiguity created by the code. For example, the term "legally qualified candidate" is defined by the "equal time" regulations¹⁹⁹ as a candidate who has publicly announced his intention to

192. Act of Aug. 12, 1970, Pub. L. No. 91-375, § 15, 84 Stat. 754.

193. 39 C.F.R. § 137.1 (1971). See note 48 *supra*.

194. 35 Fed. Reg. 19441 (1970).

195. See text accompanying notes 54-59 *supra*.

196. 47 U.S.C. §§ 301 *et seq.* (1934).

197. 47 U.S.C. § 315 (1959).

198. See generally Blaine, *Equality, Fairness and 315: The Frustration of Democratic Politics*, 24 MD. L. REV. 166 (1964); Derby, *Section 315: Analysis and Proposal*, 3 HARV. J. LEGIS. 257 (1965); Erbst, *Equal Time for Candidates: Fairness or Frustration?*, 34 S. CAL. L. REV. 190 (1961); Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 27 MD. L. REV. 221 (1967).

199. 47 C.F.R. §§ 73.120(a), 73.290(a), 73.590(a), 73.657(a) (1971).

seek office,²⁰⁰ who qualifies under applicable law to hold the office if elected,²⁰¹ who is eligible to receive votes,²⁰² and has either been nominated by a known political party or has made a substantial showing that he is a bona fide candidate.²⁰³ The FCC has at least made an effort to provide clarity and intelligibility in its interpretation of the terms of section 315. There is no reason why the Postal Service cannot take similar action to clear up the ambiguities in the franking statutes. In fact, the above-mentioned FCC regulations could be adopted and adapted by the Postal Service for use in regulation of the franking privilege.

The question of use presents a more complex problem for regulation in the franking area. The "equal time" regulations define "use" as virtually synonymous with "appearance" on any broadcast.²⁰⁴ The rationale of this rule is that any exposure over a broadcasting facility is valuable to the candidate in that it serves to acquaint the viewer with him.²⁰⁵ But in the franking area this standard would be untenable because legitimate franking use is possible during a campaign period. Nevertheless an expansion of the previously published postal guidelines into preemptive regulation delineating the area of franking utilization would be a step in the right direction. If a definitive series of regulations were promulgated by the Postal Service, the possessors of the franking privilege would be put on notice of the permissible scope of their activity and judicial evaluation of franking abuse controversies would be simplified.

VI. CONCLUSION

Direct mailing of campaign literature is an effective, albeit expensive, form of voter solicitation. The candidate who establishes this valuable contact with the electorate through the abuse of his congressional franking privilege acquires an unfair competitive edge over both his less-advantaged and more scrupulous rivals. The candidate thus frees funds otherwise earmarked for direct mailing for expenditure in another area of campaign endeavor. The franking statutes, especially sections 3210 and 3212, are couched in nebulous language

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Use of Broadcast Facilities by Candidates for Public Office, 27 Fed. Reg. 10063, 10066, para. III(6) (1962).

205. Derby, *Section 315: Analysis and Proposal*, 3 HARV. J. LEGIS. 257, 277 (1965).

which unfortunately gives tacit approval to this questionable practice. Regulatory supervision over the exercise of the frank has been lax and ineffective. Moreover, the absence of any attempt by the Postal Service to promulgate workable guidelines for the use of the frank was a major cause of the contradictory results encountered in the *Straus* and *Brown* cases, the only published opinions in this area. The reforms proposed in this Comment, if adopted, would clarify existing statutory language and impose stiffer penalties to halt the misuse of the frank. It will be incumbent upon the Postal Service, however, to promulgate regulations which will effectively police the utilization of the frank.

H. Andrew Wasmund