U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20015

Dear Mr. Chairman:

Previously, we provided our views on H.R. 22, the "Postal Modernization Act of 1999," as amended in the nature of a substitute and approved by the Postal Service Subcommittee of the House Committee on Government Reform and Oversight on April 29, 1999. We are submitting this supplemental letter because we believe that Congress's consideration of comprehensive postal reform legislation would be an appropriate occasion, first, for the amendment of an existing provision of the postal laws that raises a significant constitutional concern and, second, for the repeal and amendment of other provisions of the postal laws that long have been considered unconstitutional and that have, for that reason, fallen into disuse.

Appointment of the Chief Postal Inspector

Section 662(f)(2)(A) of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009, 3009-382-383, altered the manner in which the Chief Postal Inspector is to be appointed by amending 39 U.S.C. § 204 to provide, in pertinent part:

There shall be within the Postal Service . . . a Chief Postal Inspector. The . . . Chief Postal Inspector shall be appointed by, and serve at the pleasure of, the Postmaster General. . . . The Chief Postal Inspector shall report to, and be under the general supervision of, the Postmaster General. The Postmaster General shall promptly notify the Governors [of the Postal Service] and both Houses of Congress in writing if he or she removes the Chief Postal Inspector or transfers the Chief Postal Inspector to another position or location within the Postal Service, and shall include in any such notification the reasons for the removal or transfer.

As we explain below, a court might conclude that the Chief Postal Inspector is an "Officer[] of the United States" for purposes of the Appointments Clause, U.S. Const. Art. II, sec. 2, cl. 2, and that the appointment of the Chief Postal Inspector by the Postmaster General is therefore unconstitutional. Accordingly, we recommend that section 204 be amended to eliminate that risk.

The Appointments Clause provides in pertinent part that

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The terms of the Appointments Clause set forth the only means by which Congress may provide for the appointment of "Officers of the United States." See Buckley v. Valeo, 424 U.S. 1, 124-37 (1976) (per curiam); see also Edmond v. United States, 520 U.S. 651, 659-60 (1997). Principal officers must be appointed by the President with the advice and consent of the Senate; inferior officers must be appointed in the same manner unless Congress by statute provides for their appointment by the President (without Senate approval), the "Head[] of [a] Department[]," or the courts. Buckley, 424 U.S. at 132; see also Freytag v. Commissioner, 501 U.S. 868, 878 (1991) ("the Constitution limits congressional discretion to vest power to appoint 'inferior Officers' to three sources"); see generally Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: The Constitutional Separation of Powers Between the President and Congress, at 16-46, 1996 WL 876050 (May 7, 1996) (to be published in 20 Op. O.L.C.).

If the Chief Postal Inspector is an officer, that official is an inferior rather than a principal officer, see Edmond, 520 U.S. at 661-66, and in that case, must be appointed by the President, by a Court, or by the Head of a Department. The Postmaster General is none of these. Instead, he is an inferior officer. See Silver v. United States Postal Serv., 951 F.2d 1033, 1040 (9th Cir. 1991); Constitutional Separation of Powers Between the President and Congress at 29. The Postmaster General is appointed (and subject to removal) by the nine Governors of the Postal Service, see 39 U.S.C. 202(c), who themselves are appointed by the President by and with the advice and consent of the Senate, id. § 202(a). The nine Governors are principal officers who are, collectively, the "Head" of the Postal Service, which is a "Department" for purposes of the Appointments Clause. Silver, 951 F.2d at 138-39; see also Constitutional Separation of Powers Between the President and Congress at 32 n.83.[1] Because section 204 currently provides for the Postmaster General, rather than the Governors, to appoint the Chief Postal Inspector, the prescribed manner of appointment would be unconstitutional if the Inspector is an officer.[2]

Whether the Chief Postal Inspector is an "Officer" within the meaning of the Appointments Clause is a difficult question, the answer to which would depend upon the Inspector's "tenure, duration, emolument, and duties." United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868); accord Freytag, 501 U.S. at 881-82; Buckley, 424 U.S. at 126 ("any appointee exercising

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[1]Section 202(a) of title 39 provides that the "exercise of the power of the Postal Service shall be directed" by a Board consisting of the nine Governors, the Postmaster General, and the Deputy Postmaster General. Relying largely on this provision, the dissenting judge in Silver concluded that the full Board, rather than simply the Governors, are the "Head" of the Postal Service. Silver, 951 F.2d at 1044 (O'Scannlain, J., dissenting). However, the majority concluded that the full Board's power "is limited in many important respects," and that the nine Governors are collectively the "Head" of the Service by virtue of their power to appoint and remove the Postmaster General (who, with the Governors, appoints the Deputy Postmaster), their unilateral power to revoke any authority delegated by the Board, 39 U.S.C. § 402, and their authority to designate mail classifications and to set postal rates, id. § 3621. See 951 F.2d at 1038-39. To our knowledge, there is no judicial decision contrary to the majority's decision in Silver.

[2]A Postal Service regulation, 39 C.F.R. § 221.8(c), provides that the Postmaster General "shall" appoint the Chief Postal Inspector "in consultation with the Governors of the Postal Service." As explained below, we are of the view that the Appointments Clause may be satisfied if Congress provides, by statute, that the Postmaster General's appointment of an inferior officer is subject to the Governors' approval or "approbation." The "consultation" contemplated in section 221.8(c) would appear to be something short of approval; and, in any event, the requirement of approval, or "approbation," must be prescribed by statute in order to eliminate the Appointments Clause concern. See United States v. Smith, 124 U.S. 525, 533 (1888).

significant authority pursuant to the laws of the United States . . . must . . . be appointed in the manner prescribed by [the Appointments Clause]"). The Inspector well may be an employee rather than an officer, i.e., a "lesser functionar[y] subordinate to officers of the United States." Id. at 126 n.162. Employees do not wield independent discretion and act only at the direction of officers; they do not in their own right "exercis[e] responsibility under the public laws of the Nation." Id. at 131; see also Civil-Service Commission, 13 Op. A.G. 516, 521 (1871) (certain officials are employees because they are " representatives of the officers who appoint them, and who, in some particulars, are responsible for their conduct"; in such cases, "the office [is] substantially in the principal"). An employee (unlike an officer) need not be selected in the manner specified by the Appointments Clause.

There is an appreciable risk that a court would find the Chief Postal Inspector to be an officer rather than an employee. Section 204 requires that the Postmaster General "promptly notify the Governors and both Houses of Congress in writing if he or she removes the Chief Postal Inspector or transfers the Chief Postal Inspector to another position or location within the Postal Service, [and] include in any such notification the reasons for the removal or transfer." Moreover, Congress has given the Postmaster General only "general supervision" over the Chief Postal Inspector. Further, the statutory job title of "Chief Postal Inspector" itself implies supervisory authority over the multitude of other Postal Inspectors. These considerations could suggest that the Chief Postal Inspector is more than simply an employee.

On the other hand, whether an official is, for Appointments Clause purposes, an officer or an employee depends largely on whether the official has been vested with the independent or discretionary responsibility to perform any "'significant governmental duty,'" see Constitutional Separation of Powers Between the President and Congress, at 23 (quoting Buckley, 424 U.S. at 141), and the Supreme Court recently has suggested that that determination, in turn, depends largely on the duties, if any, that are assigned to that official by statute. See Freytag, 501 U.S. at 881 (distinguishing officers from employees, in part on the ground that the duties of the former are "specified by statute" whereas the duties and functions of the latter "are not delineated in a statute"); see also United States v. Cisneros, 26 F. Supp. 2d 13, 23 (D.D.C. 1998) ("To determine the scope of an official's authority [for purposes of deciding whether the official is an officer or an employee], courts look to the federal statutes which define that authority."). The postal statutes do not specify the precise duties or functions that the Chief Postal Inspector is to perform (apart from those that are assigned to Postal Inspectors generally, see 18 U.S.C. § 3061). Rather, section 204 states only that the Chief Postal Inspector "shall report to, and be under the general supervision of, the Postmaster General."[3] Moreover, the Inspector General Act provides that the Inspector General of the Postal Service "shall have oversight responsibility for all activities of the Postal Inspection Service, including any internal investigation performed by the Postal Inspection Service," and that "[t]he Chief Postal Inspector shall promptly report the significant activities being carried out by the Postal Inspection Service to such Inspector General." 5 U.S.C. App. 3 § 8G(f)(2). Therefore, the Chief Postal Inspector arguably is not an officer.

Nevertheless, because the unresolved Appointments Clause question is a serious one, we recommend that Congress amend section 204 to provide that the Governors – collectively the "Head" of the "Department" – appoint the Chief Postal Inspector.[4]

Alternatively, Congress could provide that the Chief Postal

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[3]It is possible that the phrase "general supervision" in section 204 could be construed to mean something like plenary supervision, especially if such a construction were necessary to avoid a serious Appointments Clause question. We recognize that, in the context of the Inspector General Act, the term "general supervision," 5 U.S.C. App. 3 § 3(a), has been construed to provide an agency head with only "nominal supervision" over an Inspector General's conduct of investigations. E.g., Nuclear Regulatory Comm'n v. Federal Labor Relations Auth., 25 F.3d 229, 234-35 (4th Cir. 1994). That statutory construction is based upon specific powers that the statute provides to the Inspector General, specific statutory limitations that are imposed on the agency head, and the relevant legislative history. Id. While we do not here express a view whether the phrase "general supervision" in section 204 has the same meaning as the phrase in the Inspector General Act, we note that the statutory context and legislative history of the two statutes differ in certain respects, and that therefore it is arguable that the phrase in section 204 could be construed to mean something more than simply "nominal" supervision.

[4]Because there may, for similar reasons, be questions whether the General Counsel, Assistant Postmasters General, and the Judicial Officer of the Postal Service are "Officers of the United States" for constitutional purposes, Congress also might wish to provide that the Governors appoint those officials, as well. Pursuant to section 204, the power to appoint each of those officials currently rests with the Postmaster General.

Inspector is to be selected by the Postmaster General, subject to the approval, or "approbation," of the Governors. Such an alternative appointment mechanism would be constitutional even if the Inspector is deemed an officer. Even though the Governors' power of appointment would in some sense be "narrowed and fettered" by the provision that the Postmaster General designate persons eligible to be Chief Postal Inspector, it would be the approval of the Governors that would "give[] force and effect to the designation and breathe[] into the action of the [Postmaster] the breath of official life." Power of the Secretary of the Treasury to Remove Inspectors of Hulls and Boilers, 10 Op. A.G. 204, 206-07 (1862). Therefore, the appointment mechanism would be constitutional, at least so long as the Postmaster remains subject to removal by the Governors, see 39 U.S.C. § 202(c).[5] See Hartwell, 73 U.S. (6 Wall.) at 393-94 (finding that, pursuant to such an "approbation" statute, the official "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power"); United States v. Smith, 124 U.S. 525, 532-33 (1888) (explaining Hartwell); see also Constitutional Separation of Powers Between the President and Congress at 32 n.82 ("[l]egislation authorizing the appointment of inferior officers by a subordinate officer within a department with the approval of the head of the department," as in Hartwell, "does not transgress [the Appointments Clause] because for constitutional purposes the appointment should be deemed to be made by the department head"); Paymasters' Clerks in the Army - Retirement, 27 Op. A.G. 493, 496-97 (1909); Civil-Service Bill, 17 Op. A.G. 504, 506-07 (1883); Civil-Service Commission, 13 Op. A.G. at 522; Appointment of Inspectors of Hulls and Boilers, 12 Op. A.G. 392, 395-96 (1868); Appointment and Removal of Inspectors of Customs, 4 Op.

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[5]By contrast, if Congress constrained the Head of a Department to appoint only persons nominated by a person not subject to removal by that Department Head, it would raise a more substantial constitutional question. Cf. Promotion of Marine Officer, 41 Op. A.G. 291, 293 (1956) (although "Congress may point out the general class of individuals from which an appointment may be made and may impose other reasonable restrictions," the President "may not be bound in his selection to an officer or group of officers merely because in the opinion of others they are better qualified for promotion," because that "would be to substitute the judgment of subordinate officers for that of the President and to unduly restrict his constitutional appointive authority").

[6]Cf. also Silver, 951 F.2d at 1040-41 (upholding a statute vesting the power to appoint an inferior officer, the Deputy

A.G. 165, 166 (1843); Appointment and Removal of Inspectors of Customs, 4 Op. A.G. 162, 164-65 (1843).[6]

Nonmailability of Protected Forms of Speech

H.R. 22 would amend various sections of the postal code that render certain materials "nonmailable." We do not object to these proposed changes. However, we do think that Congress also should consider the repeal of certain other statutory provisions in 39 U.S.C. § 3001 and in 18 U.S.C. § 1461 that unconstitutionally prohibit the mailing of certain protected forms of speech regarding abortion and contraception.

Section 1461 of title 18 declares that the following things are "nonmailable matter" (underscoring added to designate clauses that we recommend deleting):

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and-
>
> Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and
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> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned

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Postmaster General, in an entity consisting of the Governors of the Postal Service (principal officers who are collectively the "head of a Department") and the Postmaster General (an inferior officer appointed by the Governors); Constitutional Separation of Powers Between the President and Congress at 32 n.83 ("It might be argued [in support of this holding in Silver] that although as a general matter the head of a department must be a principal officer and a collective head of department must consist of exclusively principal officers, the association of an inferior officer with a collective head of department in making a specific appointment is constitutionally harmless.").

Nita colloquy w/ Hyde on

> <u>matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and</u>
>
> <u>Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and</u>
>
> <u>Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing</u>.

Section 1461 further provides that such "nonmailable matter" "shall not be conveyed in the mails or delivered from any post office or by any letter carrier," and makes it a crime knowingly to use the mails to mail or to deliver such matter.

Section 3001(a) of title 39 reiterates that "[m]atter the deposit of which in the mails is punishable" under section 1461 is "nonmailable," and section 3001(e)(2) further provides that certain advertisements of "matter which is designed, adapted, or intended for preventing conception" are "nonmailable."

The Judicial and Executive branches long have treated these provisions as unconstitutional and unenforceable as applied to speech (including advertising and other forms of information) concerning abortion and contraception. <u>See generally</u> <u>Sanger v. Reno</u>, 966 F. Supp. 151, 157-58 (E.D.N.Y. 1997). In 1972, a district court declared that section 3001 was unconstitutional insofar as it rendered abortion-related speech "nonmailable." <u>Atlanta Coop. News Project v. United States Postal Serv.</u>, 350 F. Supp. 234, 238-39 (N.D. Ga. 1972). The next year, another district court declared both section 3001 and section 1461 unconstitutional as applied to noncommercial speech concerning abortion and contraception. <u>Associated Students for Univ. of California at Riverside v. Attorney General</u>, 368 F. Supp. 11, 21-24 (C.D. Calif. 1973). As Attorney General Civiletti later explained to Congress, the Solicitor General declined to appeal the decisions in <u>Atlanta Coop. News Project</u> and <u>Associated Students</u> "on the ground that 18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) were constitutionally indefensible" as applied to abortion-related speech. <u>See</u> Letter to Speaker of the House Thomas P. O'Neill, Jr., from Attorney General Benjamin R. Civiletti, at 2 (Jan. 13, 1981).

In that same letter, Attorney General Civiletti also informed the Speaker of the House and the President of the Senate that it was the policy of the Department of Justice to refrain from enforcing section 3001 and section 1461 with respect to "cases of truthful and non-deceptive documents containing information on how to obtain a lawful abortion." Id. According to the Attorney General, there was "no doubt" that those statutes were unconstitutional as applied to such speech. Id. at 1. The Attorney General left open the possibility that the two statutes might still be applied to certain abortion-related commercial speech. Id. at 3. However, two years later, the Supreme Court held that setion 3001 cannot constitutionally be applied to commercial speech concerning contraception, at least not where the speech in question is truthful and not misleading. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983). As Attorney General Reno later explained, the holding in Bolger would apply equally with respect to abortion-related commercial speech. See Letters to President of the Senate Albert Gore, Jr. and Speaker of the House Newt Gingrich, from Attorney General Janet Reno at 2 (Feb. 9, 1996) (citing Bigelow v. Virginia, 421 U.S. 809 (1975)). As Attorney General Reno also recently explained, nothing in recent Supreme Court First Amendment doctrine has affected the conclusions reached by the district courts in Atlanta Coop. News Project and Associated Students, the 1981 opinion of Attorney General Civiletti, or the Supreme Court's decision in Bolger. Id. at 4; see also Sanger, 966 F. Supp. at 160 ("[e]xisting jurisprudence substantiates the parties' opinions" that 18 U.S.C. § 1462 – an analogous provision that prohibits the interstate "carriage" of such materials – is unconstitutional as applied to abortion-related speech"). Furthermore, in her 1996 letters, Attorney General Reno informed the Congress that, in light of the Department of Justice's longstanding policy to decline to enforce the abortion-related speech prohibitions in sections 1461 and 3001 (and the analogous provision in section 1462) because they are unconstitutional under the First Amendment, the Department of Justice would not defend the constitutionality of the analogous abortion-related speech provision of section 1462 in a case challenging the constitutionality of that provision. See Reno Letter at 1; Sanger, 966 F. Supp. at 157-58. Repeal of those provisions would obviate the need to engage in abstract and time-consuming litigation such as the Sanger case.

Accordingly, we think that Congress should consider the

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[7]The first three clauses of section 1461 also might be thought to raise serious constitutional problems were they to be construed literally. For example, the first clause by its terms prohibits the mailing not only of obscene materials, but also of "lewd, lascivious, indecent, filthy or vile article[s], matter[s],

repeal of section 3001(e)(2) and of the fourth through sixth clauses of section 1461, underlined above.[7]

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this report.

Sincerely,

Robert Raben
Assistant Attorney General

IDENTICAL LETTER SENT TO THE HONORABLE HENRY A. WAXMAN, RANKING MINORITY MEMBER

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thing[s], device[s], [and] substance[s]," a vague and broad litany of materials that could be read to cover many constitutionally protected forms of expression. The second and third clauses would appear to render nonmailable all abortifacients, a prohibition that almost certainly could not survive scrutiny under modern constitutional doctrine. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). However, the Supreme Court has construed the first clause to proscribe the mailing solely of materials that are "obscene" under the standards of Miller v. California, 413 U.S. 15 (1973). See Hamling v. United States, 418 U.S. 87, 110-16 (1974). And the lower courts have construed the abortifacient prohibitions to apply only where the sender intends that the article be used for illegal abortions. See Davis v. United States, 62 F.2d 473, 474-75 (6th Cir. 1933) (quoting Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103, 108 (2d Cir. 1930) (dicta)); see also Consumers Union of United States v. Walker, 145 F.2d 33, 35 (D.C. Cir. 1944); United States v. One Package, 86 F.2d 737, 739-40 (2d Cir. 1936). As so construed, the three clauses are facially constitutional.

OFFICE OF MANAGEMENT AND BUDGET

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Comments:

Per your request, attached please find the final Justice letter cleared on 5/21/99.

-Ben

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

May 21, 1999

Honorable John M. McHugh
Chairman
Subcommittee on the Postal Service
Committee on Government Reform
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 22, the "Postal Modernization Act of 1999," as reported by the Subcommittee on April 29, 1999. We continue to evaluate the bill and, therefore, we may present additional views in a supplemental letter.

In the years since the Postal Reorganization Act of 1970 there has been an explosive growth in competitive markets for postal products and services, led by the private sector. In carrying its mandate under the 1970 Act, the Postal Service ("USPS") has embraced competition and emerged as an aggressive and successful competitor for market share in domestic and international markets. Given these developments, the Department of Justice supports clarifying the scope of the postal monopoly and the application of the Federal antitrust laws to non-monopoly activities of the USPS. While the Department of Justice cannot endorse H.R. 22 in its present form, we look forward to working with you to improve the bill.

From a competition policy standpoint, the question for policymakers is whether an acceptable system can be devised to put the USPS on roughly the same footing as other competitors in those areas in which it faces competition. Such a system should ensure that the USPS has neither inherent advantages nor disadvantages over other competitors, while ensuring that the USPS has the ability to efficiently meet the requirements of the universal service obligation and provide the service for which it does not face competition.

As structured, H.R. 22 proposes a reasonable framework for achieving important competition policy objectives without diminishing the important policy dimension of universal service and the critical role of the USPS in carrying out that policy objective.

Appointments Clause Concerns

While we support competitive reform in this area, we have several concerns about H.R. 22. Section 212(a) of the bill would amend 39 U.S.C. 3601(a) to provide new criteria for the President's appointment of commissioners to serve on the Postal Rate Commission. A sentence of that provision would read: "The Commissioners shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration, and may be removed by the President only for cause." While there is nothing objectionable about including the enumerated, reasonable qualifications as criteria that the President should consider in making his appointments, it would be unconstitutional to make such qualifications the exclusive criteria for the President's consideration. The use of the word "solely" in this provision would appear to preclude the President from consideration of other permissible criteria. Such a limitation would unreasonably limit the President's choices and therefore would be inconsistent with the Appointments Clause. U.S. Const. art. II, § 2, cl. 2. See, e.g., Civil Service Comm'n, 13 Op. Att'y Gen. 516, 520-21 (1871). Accordingly, we urge that the word "solely" be deleted.

Similarly, section 212(b)(1) of the bill would amend 39 U.S.C. 202(a) to provide that, in choosing appointees to be Directors of the Postal Service (currently known as Governors of the Postal Service), the President shall make choices "solely on the basis of [Directors'] demonstrated ability in managing organizations or corporations (in either the public or private sector) of substantial size." For the reasons stated above, the word "solely" should be deleted.

Proposed section 202(a) also would provide (in conformity with the current section 202) that Directors "may be removed only for cause." We have serious doubts about the constitutionality of such a "for cause" restriction on the President's power to remove such officers. See Myers v. United States, 272 U.S. 52 (1926); Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: The Constitutional Separation of Powers between the President and Congress, 1996 WL 876050, at 46-51 (May 7, 1996). Accordingly, we would urge omission of the "for cause" removal limitation from the proposed revision of section 202.

Section 212(b)(3) of the bill would add to 39 U.S.C. 202 a new subsection (b)(2)(A), which would provide, in part, that:

> [n]otwithstanding any other provision of this section, in the case of the office of the Director the term of

which is the first one scheduled to expire at least 4 months after the date of enactment of this paragraph-

> (i) such office may not, in the case of any person commencing service after that expiration date, be filled by any person other than an individual chosen from among persons nominated for such office with the unanimous concurrence of all labor organizations described in section 206(a)(1).

This limitation would be unconstitutional under the Appointments Clause. The requirement that the President select the specified director only from candidates nominated with the unanimous concurrence of certain labor organizations plainly would be an undue limit on his power of appointment. See, e.g., Civil Service Comm'n, 13 Op. Att'y Gen. at 518-20. Accordingly, proposed section 202(b)(2)(A)(i) should be eliminated from the bill.

The President's Authority to Negotiate Treaties

Section 306(a) of the bill would amend 39 U.S.C. 407. In this letter, we take no position as to whether the current section 407 should be amended. However, we would stress that if section 407 is to be amended, certain constitutional concerns should be addressed.

Under the bill, a new section 407(b)(1) would provide as follows:

> The Secretary of State shall be responsible for formulation, coordination, and oversight of foreign policy related to international postal services and other international delivery services, except that the Secretary may not negotiate or conclude any treaty, convention, or other international agreement (including those regulating international postal services) if such treaty, convention, or agreement would, with respect to any competitive product (as that term is defined in chapter 37), grant an undue or unreasonable preference to the Postal Service, a private provider of international postal or delivery services, or any other person.

The prohibition against negotiating or concluding any agreement that would "grant an undue or unreasonable preference," while perhaps marginal in its impact, see UPS Worldwide Forwarding, Inc. v. United States Postal Serv., 66 F.3d 621, 634-35, 626 (3d Cir. 1995) (construing a similar "undue or unreasonable preferences" provision to accord the negotiating postal authorities "broad latitude" to provide for "reasonable" and nonarbitrary discrimination and preferences), cert. denied, 516 U.S. 1171 (1996), nevertheless would be unconstitutional if it were construed to impose a limitation on the President's constitutional authority to negotiate treaties. See U.S. Const. Art. II, sec. 2, cl. 2; see also, e.g., Earth Island Inst. v. Christopher, 6 F.3d 648, 652-53 (9th Cir. 1993) ("The President alone has the authority to negotiate treaties with foreign countries. 'Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.' . . . [The negotiation] power [is] exclusively granted to the Executive Branch under the Constitution.") (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936)). For that reason, we assume that the provision is not intended to impose a limitation on that constitutional power, but instead is intended to provide authorization for the Secretary of State to effect what are known as "congressional/executive agreements." As such, the apparent limitations on diplomatic negotiating authority in proposed section 407(b)(1) would merely be conditions on special powers that Congress would be extending to the Executive branch to "conclude" international agreements without following the treaty-making procedure prescribed in Article II.

For more than two centuries, Congress has by statute authorized executive international agreements concerning postal matters (including rates) to be brought into effect as domestic (and international) law without further action either by the Senate (under the Treaty Clause, U.S. Const. Art. II, sec. 2, cl. 2) or by the Congress (under ordinary Article I procedures for bicameral passage). From at least 1792 until 1872, the Postmaster General was given the power "to make arrangements with foreign postmasters with reference to the reciprocal receipt and delivery of mails." Postal Conventions with Foreign Countries, 19 Op. Att'y Gen. 513, 519 (1890); see also id. at 516-18 (recounting history). Beginning in 1872, Congress expressly authorized the Postmaster General, and later the USPS, to negotiate and "conclude treaties upon postal matters, at least so far as fixing the rates of postage between two countries." Id. at 519; see also id. at 518-19 (recounting statutory history between 1872 and 1890); UPS Worldwide Forwarding, 66 F.3d at 624-25 (describing statutory history through 1995). That statutory procedure, providing authorization for "congressional/executive agreements," has enabled the Executive branch to bring international postal conventions into force both internationally and domestically, without further recourse either to the Senate or to the full Congress.

The power of the Executive branch to effect such agreements currently is codified in 39 U.S.C.A. 407(b)-(d) (West 1999). As of last year, most of the USPS's previous authority to "negotiate and conclude" treaties, conventions and amendments was transferred to the Secretary of State. Id. at § 407(a). Section 407(a) currently provides:

> (1) The Secretary of State shall have primary responsibility for formulation, coordination and oversight of policy with respect to United States participation in the Universal Postal Union, including the Universal Postal Convention and other Acts of the Universal Postal Union, amendments thereto, and all postal treaties and conventions concluded within the framework of the Convention and such Acts.
>
> (2) Subject to subsection (d) [which requires that the Secretary and the Postal Service engage in certain consultation "[i]n carrying out their responsibilities under this section"], the Secretary may, with the consent of the President, negotiate and conclude treaties, conventions and amendments referred to in paragraph (1).

Because section 407 currently permits Executive branch officials to "conclude treaties, conventions and amendments" without Senate approval, it "gives the President powers that he clearly would not [otherwise] have" by virtue of his constitutional authority. The President — Authority to Participate in International Negotiations — Trade Act of 1974 (19 U.S.C. § 2101) — Participation in Producer-Consumer Fora, 2 Op. O.L.C. 219, 230 (1978). For that reason, it is permissible for Congress to impose some limitations and requirements upon the President's power to "negotiate and conclude" such agreements — limitations and requirements that it could not similarly impose on the President's constitutional power to negotiate Article II treaties with foreign countries. "If the President wishes to exercise the specific powers conferred by the Act, he must do so pursuant to the procedures and in accordance with the standards prescribed in the act." Id. Compare id. at 228 n.1 (Congress could not impose restrictions on the President's constitutional authority to conclude treaties subject to the Senate's approval power, or on the President's authority "to participate in the antecedent negotiations").

It appears that the proposed revised section 407 may be intended to provide the Secretary of State the power to negotiate and "conclude" treaties, conventions and amendments "related to international postal services and other international delivery services." But the proposal is not as clear on this point as it should be, in large part because it would omit the express provisions to that effect currently found in section 407(a). Accordingly, if Congress were to amend section 407 (a question on which we take no position here), we recommend that the authority be made express, by adding language such as that currently found in section 407(a). For instance, the provision could be amended to read:

> **The Secretary of State shall be responsible for** formulation, coordination, and oversight of foreign policy related to international postal services and other international delivery services, and shall have the power to conclude treaties, conventions and amendments related to international postal services and other international delivery services, except that the Secretary may not ~~negotiate or~~ conclude any treaty, convention, or other international agreement (including those regulating international postal services) if such treaty, convention, or agreement would, with respect to any competitive product (as that term is defined in chapter 37), grant an undue or unreasonable preference to the Postal Service, a private provider of international postal or delivery services, or any other person.

With this amendment, the provision plainly would result in no impairment to the President's Article II negotiating and treaty-making powers. The President's authority to negotiate and conclude Article II treaties (subject to Senate approval) would remain free of any congressionally imposed conditions. Only if the President wished to avail himself of the special authorities provided by section 407 would the Secretary of State be required to abide by the limitations that law would impose.

Section 306(a) of the bill also would create a new 39 U.S.C. 407(d)(2)(C), which would provide:

> The Secretary of State shall, to the maximum extent practicable, take such measures as are within the control of the Secretary-
>
> > (i) to complete the renegotiation of any treaties, conventions, or other international agreements (including those regulating international postal services), and
> >
> > (ii) to encourage the governments of other countries to make any changes in their laws (consistent with the policies carried out by the provisions referred to in subparagraph (B)),
>
> which may be necessary in order to satisfy the conditions specified in subparagraphs (A) and (B)(ii) of paragraph (1) in a manner consistent with the goal of making available to the Postal Service and private companies a range of nondiscriminatory customs

procedures that will fully meet the needs of all types of American shippers. The Secretary of State shall consult with the United States Trade Representative and the Commissioner of Customs in carrying out this subparagraph.

The "conditions specified in subparagraphs (A) and (B)(ii) of paragraph (1)" refer to certain restrictions that the statute would impose on the USPS and on the Customs Service with respect to shipments of international mail.

Like the limitation discussed above, these requirements would be unconstitutional if they were to be applied to the President's constitutional authority to negotiate international treaties. But such requirements may legitimately be imposed as conditions upon the Executive's statutory power to "conclude" postal treaties absent Senate approval — a power that we assume the drafters intend to give the Secretary of State pursuant to proposed section 407(b)(1). Accordingly, if Congress adopts a new section 407(d)(2)(C), we recommend that it be drafted along the following lines:

> In exercising the authority pursuant to subsection (b) to conclude new treaties, conventions and amendments related to international postal services and to renegotiate such treaties, conventions and amendments, the Secretary of State shall, to the maximum extent practicable, take such measures as are within the Secretary's control to encourage the governments of other countries to make any changes in their laws (consistent with the policies carried out by the provisions referred to in subparagraph (B)), and take such other actions, which may be necessary in order to satisfy the conditions specified in subparagraphs (A) and (B)(ii) of paragraph (1) in a manner consistent with the goal of making available to the Postal Service and private companies a range of nondiscriminatory customs procedures that will fully meet the needs of all types of American shippers. The Secretary of State shall consult with the United States Trade Representative and the Commissioner of Customs in carrying out this subparagraph.

In addition, we note that other agencies may have additional concerns, from a policy perspective, with the proposals in section 306(a) of the bill.

Appointments Clause Concerns:
Removal of Executive Branch Officers for Stalking

Section 811(a) of the bill would create a new Federal criminal offense prohibiting the "stalking" of Federal and postal officers and employees, to be codified as 18 U.S.C. 881. A new 18 U.S.C. 881(c) would provide for civil relief from violations of the stalking prohibition. That subsection would provide, in pertinent part:

> (1) Whoever is aggrieved by a violation of this section may, in a civil action, obtain appropriate relief from the person engaging in that violation. Such relief may include compensatory and punitive damages, and injunctive or declaratory relief, and shall include reasonable attorney's fees.
>
> (2) If--
>
> > (A) the court issues an injunction under this subsection;
> >
> > (B) the person against whom the injunction is issued is an officer or employee in the executive branch of the Federal Government or in the United States Postal Service; and
> >
> > (C) there is a nexus between the enjoined conduct and such person's office or employment;
>
> the court may order that the person be suspended or summarily discharged from such office or employment.

If proposed section 881(c)(2) were construed to give courts the discretionary authority to order the suspension or discharge of Executive branch officers, it would permit an impermissible intrusion on the President's power to appoint such officers, and to supervise and retain such officers subject to Congress's power of impeachment. See U.S. Const. Art. I, sec. 3, cl. 7; id. Art. II, sec. 4. Compare, e.g., 21 U.S.C. 622 (1994) (in essence establishing a qualification for office by providing that officers who are convicted of violating the felony provision automatically "shall . . . be summarily discharged from office"). Accordingly, the words "officer or" should be deleted from proposed section 881(c)(2)(B).

Drafting Concern

Section 811 also raises a drafting concern. We do not believe that the organization of proposed new section 881(a) (which section 811 would create) accurately reflects the drafter's intent. We suggest that the subparagraph (1) of paragraph (a) be made to follow immediately after the word "Whoever," and not be a separate paragraph unto itself. Paragraphs "(2)" and "(3)" apparently are meant to include the language in "(1)," but under the current structure they do not actually include that language.

Reduction of USPS Sovereign Immunity

We also have serious concerns regarding proposed section 307. Section 307 would amend 39 U.S.C. 409, a provision relating to litigation involving the USPS, in several important respects. Initially, section 307 would amend section 409 to provide that to the extent that the USPS engaged in conduct with respect to any service not reserved to the United States then the USPS "shall not be considered a 'Federal Agency' for purposes of [the Federal Tort Claims Act] and shall be liable for action in tort in the same manner as a private company." Thereby, the statute would exclude the USPS from the limitations and exclusions of the Federal Tort Claims Act. The USPS also would become subject to liability under the copyright laws and the antitrust laws as well as subject to various State and local zoning, building, and land use regulations. We oppose provisions that reduce the USPS's sovereign immunity, although it appears that, as under existing law, judgments against the Service would be paid from funds available to the USPS.

Justice Department Representation of the USPS

Additionally, section 307 would explicitly prohibit the Department of Justice from representing the USPS in the context of its "competitive" activities. While we have a number of objections to this provision, we strongly oppose it for three principal reasons.

First, the prohibition against Justice Department representation of an agency of the Federal government is unprecedented. It is derogation of the Attorney General's responsibilities.

Second, a Federal entity's activities, including those of the USPS, frequently raise litigation issues of concern not only to that particular agency, but to other Federal agencies as well. A prohibition against Justice Department representation would interfere with the Attorney General's ability to protect the interests of the United States overall.

Third, the proposal is inherently unworkable because of the USPS' integrated operational structure. An act or acts giving rise to alleged liability well may have occurred in the context of both "competitive" and "non-competitive" activities, making it impossible to separate acts for which Justice Department representation is permitted from those for which it is prohibited.

Moreover, we have particular concern that some activities of the USPS would be under the regime of the Federal Tort Claims Act and others would not. Apart from the representation problems discussed above, such a bifurcation of responsibility inevitably would lead to inordinate problems of management and artful pleading.

Application of Murder and Assault Statutes

Section 801 purports to make applicable to postal contract employees the Federal murder statute and the statute prohibiting assault in the course of the performance of official duties. This section appears intended to respond to United States v. Kirkland, 12 F.3d 199 (11th Cir. 1994), which held that the then-applicable version of 18 U.S.C. 1114 did not include contract employees of the USPS. However, in Kirkland, the court approved but distinguished an earlier ruling in United States v. Schaffer, 664 F.2d 824, upholding the application of section 1114 to contract persons "assisting" a deputy United States Marshal.

Significantly, after Kirkland was decided, 18 U.S.C. 1114 was amended in the wake of the Oklahoma City bombing to include any officer or employee of the United States while performing official duties "or any person assisting such an officer or employee," language which did not exist previously. In light of this amendment, we believe that contract employees assisting postal workers are covered currently by section 1114 and that the proposed amendment is unnecessary. Moreover, its adoption could be interpreted as endorsing a narrow reading of the "person assisting" language in section 1114 and could be used against the Government in other situations.

Asset Forfeiture Proceeds

Section 803 would allow the USPS to retain asset forfeiture recoveries. This provision would affect the Justice Department asset forfeiture fund, established by 28 U.S.C. 524(c) adversely and repeal important portions of an existing agreement on the allocation of recoveries.

Section 803 would amend 31 U.S.C. 2003(b)(7) to require deposit into the USPS fund of "amounts (including proceeds from the sale of forfeited items) from any civil forfeiture conducted by the Postal Service and from any forfeiture resulting from an investigation in which the Postal Service has primary responsibility." Under the current version of section

2003(b)(7), only amounts from civil forfeitures "conducted by the Postal Service," i.e., forfeitures carried out in administrative proceedings conducted by the USPS, are deposited into the USPS fund. Section 803 effectively would add the proceeds of judicial forfeitures "resulting from an investigation in which the Postal Service has primary responsibility" for deposit to the USPS fund. Additionally, the proposed language might be construed to include administrative forfeitures "resulting from an investigation in which the Postal Service has primary responsibility," even if the administrative forfeiture actually was conducted by another agency.

Section 803 also would amend 39 U.S.C. 2003(b)(7) to provide "that nothing in this paragraph shall preclude the Postal Service, on such terms as it may determine, from sharing such amounts with any Federal, State, or local law enforcement agency which participated in any of the acts which led to the seizure or forfeiture of the property." Under current law, the proceeds of judicial forfeitures, including those "resulting from an investigation in which the Postal Service has primary responsibility," are deposited in the Justice Department's asset forfeiture fund, pursuant to 28 U.S.C. 524(c)(4) and (c)(11)(A). Section 524(c)(4) provides that "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice, except all proceeds of forfeitures available for use by . . . the Postmaster General of the United States pursuant to 39 U.S.C. 2003(b)(7)" shall be deposited in the Justice Department asset forfeiture fund. (emphasis added).

For judicial forfeitures, section 524(c)(11) provides that, for purposes of section 524, property is forfeited pursuant to a law enforced or administered by the Department of Justice where it is forfeited pursuant to "a judicial forfeiture proceeding when the underlying seizure was made by an officer of a Federal law enforcement agency participating in the Department of Justice Assets Forfeiture Fund or the property was maintained by the United States Marshals Service." 28 U.S.C. 524(c)(11)(A). For administrative forfeitures, section 524(c)(11) provides that property is forfeited pursuant to a law enforced or administered by the Department of Justice where it is forfeited pursuant to "a civil administrative forfeiture proceeding conducted by a Department of Justice law enforcement component or pursuant to the authority of the Secretary of Commerce." 28 U.S.C. 524(c)(11)(B).

The USPS shares in the Justice Department's asset forfeiture fund pursuant to the "Agreement on Sharing of Forfeiture Proceeds Between the Department of Justice and the Postal Inspection Service," dated March 22, 1991 (the "Agreement"). The Agreement is not written in terms of the proceeds of forfeitures "resulting from an investigation in which the Postal Service has primary responsibility." However, paragraph 2 of the Agreement concerns

"Judicial Forfeitures in Solely [Postal] Service Cases" and provides that

> [i]n any judicial forfeiture cases based exclusively upon the investigative efforts of the [Postal] Service, 80% of the net proceeds shall be transferred to the Postal Service Fund with the remaining 20% to be retained in the Department of Justice Assets Forfeiture Fund to reflect the efforts of components of the Department in maintenance, forfeiture, and disposition of seized property.

Paragraph 1 of the Agreement, "Judicial Forfeitures in Joint Cases," provides for the transfer of "an equitable share" of the net proceeds from the Justice Department asset forfeiture fund to the USPS fund in any judicial forfeiture cases involving joint investigation or operations of the USPS and other agencies participating in the Department of Justice Asset Forfeiture Program. Paragraph 3 of the Agreement ("Exceptional Judicial Forfeiture Cases") provides for negotiated distributions in "exceptional" judicial cases. Paragraph 4 of the Agreement ("Administrative Forfeiture in Joint Cases") provides for the transfer of "equitable shares" of the net proceeds from the USPS fund to the Justice Department asset forfeiture fund in any administrative forfeiture cases involving the joint efforts of the USPS and other agencies participating in the Department of Justice asset forfeiture program. Paragraph 5 of the Agreement ("Reduction of Sharing by Amount of Fund Allocations") acknowledges that "sharing" transfers from the Justice Department to the USPS fund are to be reduced by the amount of Justice Department monies allocated to the USPS due to its participation in the Justice Department asset forfeiture fund.

Section 803 effectively would supersede a significant part of the Agreement. Under section 803, the proceeds of judicial forfeitures "resulting from an investigation in which the Postal Service has primary responsibility" would be deposited into the USPS fund rather than into the Justice Department fund. This would be the case even if another law enforcement agency participating in the Justice Department fund made the seizure, if the property was maintained by the Marshals Service, and if an agency other than the USPS administratively conducted the actual forfeiture. Section 803 might even be read to require deposits to the USPS fund where a Justice Department component conducted the actual administrative forfeiture. In addition, the proposed amendment, would give the USPS virtually unfettered authority to share forfeiture proceeds with other law enforcement agencies that participated in the forfeiture "on such terms as [the USPS] may determine."

We note that "primary responsibility" in an investigation can change over time. It also may vary according to the specific investigative activity involved. Finally, it need not coincide with primary responsibility for the forfeiture involved. Nevertheless, under section 803, the determination of primary investigative responsibility would control the disposition of forfeiture proceeds.

Section 803 also leaves unclear how the Department of Justice would be reimbursed for the expenses of maintenance, forfeiture, and disposition of seized property in judicial forfeitures where the USPS has primary responsibility for the investigation.

We suggest amending section 803 as follows:

Sec. 803 ALLOW POSTAL SERVICE TO RETAIN ASSET FORFEITURE RECOVERIES

Paragraph (7) of section 2003(b) of title 39 United States Code, is amended to read as follows:

"(7) amounts (including proceeds from the sale of forfeited items) from any civil forfeiture conducted by the Postal Service ~~from any forfeiture resulting from an investigation in which the Postal Service has primary responsibility~~ <u>and from any transfer from the Department of the Treasury Forfeiture Fund or the Department of Justice Assets Forfeiture Fund made to reflect the participation of the Postal Service in the law enforcement effort resulting in any forfeiture conducted by a Department of the Treasury law enforcement organization or a Department of Justice component</u>, except that nothing in this paragraph shall preclude the Postal Service, on such terms as it may determine, from sharing such amounts with any Federal, State, or local law enforcement agency which participated in any of the acts which led to the seizure or forfeiture of the property; and".

Duplication of Controlled Substances Act Provisions

Section 812 of the bill, the "Nonmailability of Controlled Substances," would establish a five year penalty for mailing a controlled substance in such an amount as would constitute a felony under the Controlled Substances Act, 21 U.S.C. 801 <u>et seq</u>. We believe that this provision unnecessarily duplicates existing drug statutes, 21 U.S.C. 841 and 846, which may lead to significant legal challenges, including a challenge as to whether charging someone under title 18 precludes charging a more severe offense under title 21. In addition, whether an offense is a felony or misdemeanor, under the Controlled Substances Act, is not determined by the amount of the controlled substance but rather by the intent to distribute. It is further unclear whether the use of the term "mail" is intended to encompass the various commercial courier companies that are also significant tools of drug traffickers. At minimum, this provision should state clearly that it would not constitute the exclusive remedy under Federal law for such conduct or preclude prosecution under the Controlled Substances Act. We suggest that language such as the following be added at the end of section 812 of the bill:

> Prosecution and punishment under this section does not preclude prosecution and punishment for the same conduct under any other applicable section of the United States Code.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

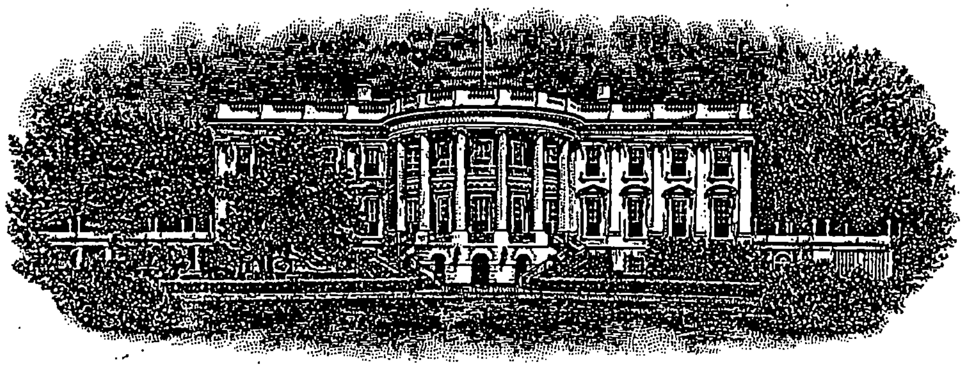
Jon P. Jennings

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable Chaka Fattah
Ranking Minority Member
Subcommittee on the Postal Service
Committee on Government Reform

Honorable Dan Burton
Chairman
Committee on Government Reform

Honorable Henry A. Waxman
Ranking Minority Member
Committee on Government Reform



THE WHITE HOUSE

ROBERT WESCOTT
SPECIAL ASSISTANT TO THE PRESIDENT
NATIONAL ECONOMIC COUNCIL
202-456-5905 (ph)
202-456-~~[illegible]~~ (fax)
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TO: GENE SPERLING

PHONE: * RUSSIA ECONOMIC POLICY *

FAX:

DATE: 5/31 PAGES TO FOLLOW: 3

COMMENTS: PLEASE SHOW TO GENE BEFORE 12:30 RUSSIA BRIEFING -- IF POSSIBLE.

Thanks,
Rob

May 30, 2000

Gene and Lael,

Subject: Illarionov's Economic Plans for Russia

- This little note gives a summary of Andrei Illarionov's economic plans for Russia. These include:
    - the imposition of a currency board,
    - widespread deregulation, and
    - rolling out the red carpet for foreign banks.
- The analysis concludes that Illarionov's ideas are good in theory, but more the ravings of a starry-eyed economic idealist than an actual blueprint of plans that could be implemented anytime soon.

Rob

ZURICH
FINANCIAL SERVICES

FAX COVER SHEET

DATE: May 30, 2000
TO: Robert Wescott
FROM: David Hale
RE:
CC:

TIME: 3:37 PM
PHONE:
FAX: 202-456-5812
PHONE: 312-537-1760
FAX: 312-537-1203
Email: debra.hamilton@kemper.com

Number of pages including cover sheet: 2

Message

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Fax to Rob Wescott

Renaissance Capital Morning Monitor

Politics and Economics

Andrei Illarionov Suggests a Currency Board

Chief economic advisor to the President, Andrei Illarionov, yesterday produced his own version of an economic programme. Following on from the sterling effort by German Gref's Centre for Strategic Studies, Andrei Illarionov attempted to go one better and produce a programme that was even more radical. Mr Illarionov is something of a free market maverick and his programme should be treated as his own personal opinion, rather than anything that will have much of an impact on policy. For the record, his proposals include:

- **Establishment of a currency board.** This is the centre-piece of Mr Illarionov's reform proposals and characterises his rather ambitious programme. While arguably a good idea for a country with a decent institutional framework wanting to find a radical cure to an addiction to inflation, a currency board in Russia would simply prove a spectacular failure. Without a bond market, sterilisation instruments, an independent central bank or even a banking system, Russia could not sustain a currency board.

- **Widespread deregulation.** Mr Illarionov proposes removing controls from capital movements, exports, prices, business registration and residential rights. Russia certainly needs to scrap large swathes of regulation, if it is ever to attract the investment needed to sustain the current recovery. However, precisely how Mr Illarionov intends to implement the deregulation is left unclear.

- **End restrictions on foreign banks' activity and end government supervision over banks.** Few would disagree that it is imperative to find some solution to Russia's chronic lack of a functioning banking system. While the invitation of foreign banks into the sector is certainly one means of achieving this aim, it is politically implausible. Given the number of targets for reform, political capital could be well spent elsewhere – Russia has done surprisingly well without a banking sector over the last year.

- **Cut the number of ministries.** Again, a great idea, and one that is being implemented by Mr Putin and company.

Mr Illarionov's plans are a blueprint of radical economic reform for Russia. Living up to his reputation, he has produced a programme that could in theory impose a free market, and yet in practice would be unimplementable. The programme is interesting in that it shows the kind of advice that Mr Illarionov is providing to Mr Putin, but it has little practical application.

Politics and Economics
Roland Nash

7 (501) 258 7916
Yaroslav Lissovolik

NARAL FAX

NARAL
Reproductive Freedom & Choice

TO Heather Howard

ORGANIZATION

FAX NUMBER 456 - 2878

SENDER Allison

DATE 5/26

TIME OF TRANSMISSION

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NOTES Hope this material is helpful.

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Frank's most recent bill

I

106TH CONGRESS
1ST SESSION

H. R. 2808

To amend title 18, United States Code, to eliminate the prohibitions on the transmission of abortion related matters, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 8, 1999

Mr. FRANK of Massachusetts (for himself, Mrs. LOWEY, Mr. WAXMAN, Mr. STARK, Mrs. THURMAN, Mr. HASTINGS of Florida, Ms. NORTON, Ms. SCHAKOWSKY, and Mr. LANTOS) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 18, United States Code, to eliminate the prohibitions on the transmission of abortion related matters, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Comstock Cleanup Act of 1999".

SEC. 2. IMPORTATION OR TRANSPORTATION OF CERTAIN ABORTION-RELATED MATTERS.

Section 1462 of title 18, United States Code, is amended—

(1) by striking "or" at the end of subparagraph (b) of the first undesignated paragraph; and

(2) by striking subparagraph (c) of the first undesignated paragraph.

SEC. 3. MAILING OF ABORTION-RELATED MATTERS.

Section 1461 of title 18, United States Code, is amended by striking "; and" the first place it appears, and all that follows through "Is declared" and inserting "is declared".

○

Colloquy bet. Hyde and Lowey

Mr. HYDE.

* * *

Mr. Speaker, I am happy to yield to the gentlewoman from New York [Mrs. LOWEY] for the purpose of engaging in a colloquy.

Mrs. LOWEY. Mr. Speaker, I would like to congratulate the gentleman from Virginia [Mr. BLILEY], the chairman of the committee, and other members of the conference in bringing this very important conference report to the floor today. However, I would like to bring to your attention one section that is very troubling to me.

Section 507 amends the preexisting section of the Criminal Code (18 U.S.C. 1462) and applies it to the Internet. Now, it was my understanding that your intent behind adopting this provision was to place reasonable restrictions on obscenity and indecency on the Internet. I support this goal.

However, a section of this act may be construed to curb discussions about abortion. It seems to me this provision would certainly be unconstitutional.

Mr. HYDE. Well, reclaiming my time, Mr. Speaker, I certainly agree with the gentlewoman that any discussion about abortion, both pro-life and pro-abortion rights, is protected by the first amendment guarantee of free speech; and I certainly agree, nothing in title V should be interpreted to inhibit free speech about the topic of abortion.

Further, it is correct that our principal intent in adopting this provision was to curb the spread of obscenity and indecency, speech that is not protected by the first amendment, from the Internet in order to protect our children.

Mr. HYDE.

* * *

Concerns have been raised about the amendment to 18 U.S.C. § 1462 regarding an interactive computer service. Section 1462 generally prohibits the importation or transportation of obscene matter. Subsection 1462(c) prohibits the importation or interstate carriage of "any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters or things may be obtained or made * * *."

We are talking about the advertisement, sale or procurement of drugs or medical instruments or devices, used to bring about an abortion. This language in no way is intended to inhibit free speech about the topic of abortion, nor in any way to limit medical or scientific discourse on the Internet. This amendment to subsection 1462(c) does not prohibit serious discussions about the moral questions surrounding abortion, the act of abortion itself, or the constitutionality of abortion. This statutory language prohibits the use of an interactive computer service for the explicit purpose of selling, procuring or facilitating the sale of drugs, medicines or other devices intended for use in producing abortions. The statutory language is confined to those commercial activities already covered in section 1462(c) of title 18 and in no way interferes with the freedom of individuals to discuss the general topic of abortion on the Internet.

Republic, nor have we conducted an investigation directed at Republic in respect of its banknotes dealings with Russian banks.

Very truly yours,

FINANCIAL CRIMES ENFORCEMENT NETWORK,
Vienna, VA, January 24, 1996.

ANNE T. VITALE, Esq.,
Senior Vice President and Deputy General Counsel, Republic National Bank of New York, New York, NY.

DEAR ANNE: Your letter to me, dated January 17, 1996, concerned an article entitled "The Money Plane" in the January 22 issue of New York Magazine. That article dealt, in part, with the sale of American currency to banks in Russia by Republic National Bank of New York ("Republic").

As you point out in your letter, the shipment of bank notes by United States banks to other banks, in Russia or anywhere else, is permitted by U.S. law and there is nothing inherently illegal about such activities. The New York article was certainly unfair in suggesting otherwise. Furthermore, we have never encountered a money laundering scheme which seeks to convert assets already in financial institutions into bank notes.

Banks such as Republic, with a history of strong compliance programs and valuable cooperation with law enforcement authorities in this country, can be expected to recognize the risks of particular transactions in their efforts to avoid becoming ensnared in wrongdoing. Republic has indeed, as your letter also points out, been supplying voluntary reports to federal law enforcement of its shipments of bank notes to Russia and other countries in an effort to assist U.S. authorities.

Our program of partnership with the financial community relies on highly experienced officials such as you and banks such as Republic to carry out our law enforcement mission. I look forward to continuing to work with you in the fight against money laundering.

With best wishes.

Sincerely,

STANLEY E. MORRIS,
Director.

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., ATTORNEYS AT LAW,
Washington, DC, January 29, 1996.

EDITOR, New York,
K-III Magazine Corporation,
New York, NY.

DEAR SIR: The article entitled "The Money Plane" in your January 22, 1996 issue of New York magazine misleads your readers by relying on anonymous innuendo to impeach the integrity of respected U.S. banks. As a former Ambassador to Russia, I have seen firsthand the importance of selling dollars to Russian banks: U.S. currency helps to stabilize the Russian economy as that nation's political leadership struggles to modernize and democratize their country and that in the best interests of the U.S. and the free world.

The circulation of the U.S. currency in Russia is an important element of U.S. trade and foreign policy. Through banknote and other transactions, U.S. banks remain engaged with their Russian counterparts, introduce them to and reinforce the high standards of the international banking system, and prevent the sort of economic isolation that could undermine the continuing development of Russia's financial system. Providing a steady supply of U.S. currency to Russian banks is perhaps the single most efficient form of support the U.S. can offer any country in a position as delicate as Russia's. Not to be overlooked is the fact that this banking activity also opens important avenues of commerce between Russia and the West.

Your article alleges that U.S. banks, Republic National Bank in particular, knowingly conduct banknote transactions with Russian banks that are controlled by or associated with organized crime. No one can deny that crime and corruption are today among the greatest threats to the creation of a modern democracy in Russia. However, while I am no expert on the subject, my understanding is that all banknote transactions between U.S. and Russian banks are conducted in strict accordance with the reporting and "know-your-customer" evidence to the contrary. The fact is that the U.S. banks that handle banknote transactions, with Russia or any other country, monitor to the best of their ability the activities of the banks with which they do business, continuously seek reliable information regarding the integrity of those institutions, and will discontinue transactions with any institution that government authorities indicate is involved in criminal activity. Furthermore, I know of no instances where federal banking or law enforcement officials have indicated that there are Russian banks with whom business should be discontinued.

As far as criminal activity in Russia is concerned, it should be stopped by increasing the resources and capabilities of Russian law enforcement and continuing the cooperation that exists between U.S. and Russian authorities.

You did a disservice to your readers and I hope that, as a matter of integrity, you will publicly apologize and correct your misstatements that I am sure were inadvertent.

Respectfully,

ROBERT S. STRAUSS.

At a press conference on January 18, 1996, United States Ambassador to Russia, Thomas Pickering stated:

American and international banks who are depositories with the federal reserve system will be the principal conduits, may be as many as a dozen of those bringing money here to Russia, where it will be redistributed through their arrangements with the Russian banking system into the Russian system to meet the demands that people will have in this country for new dollars.

* * * * *

We do not believe that activities taken through the currency provide an effective remedy for money laundering or the use of currency in criminal activities and, indeed, suggestions that this be done, in our view, would produce greater negative effects on the stability of worldwide currency systems than they would produce benefits in attacking the criminal culture. . . .

IN HONOR OF MR. HENRY SANCHEZ ON HIS 50 YEARS OF FEDERAL SERVICE

HON. ROBERT MENENDEZ
OF NEW JERSEY
IN THE HOUSE OF REPRESENTATIVES
Tuesday, February 13, 1996

Mr. MENENDEZ. Mr. Speaker, I rise today to pay tribute to Mr. Henry Sanchez on the occasion of his 50th year of Government service. A special ceremony will be held in his honor on Friday, February 16, at the Harbor View Community Club, Military Ocean Terminal in Bayonne, NJ.

In February 1944, Mr. Sanchez began his career in the Navy as a signalman. For his part in the WWII effort, he served on a ship transporting American troops to France during the Normandy Invasion. Mr. Sanchez was discharged from the Navy in April 1948. Two years later, he began to work at the Brooklyn Army Base in New York.

Mr. Sanchez transferred to the Bayonne Naval Supply Depot in March 1950. For over 45 years, Mr. Sanchez worked in Bayonne as a firefighter and a supervisory transportation assistant at the Seavan Container Control Division, Military Ocean Terminal. In 1980, Mr. Sanchez moved to the U.S. Air Force's Water Port Logistics Office where he held the position of deputy commander GS–12. Several years later he was promoted to GS–13 as the deputy director, Personal Property Directorate, Military Traffic Management Command, Eastern Area.

Mr. Sanchez, an outstanding leader on the job, has also dedicated much of his time to the Bayonne community. He is a board member of the United Way of Hudson County, vice president of the American Legion's Mackenzie Post 165, and a trustee for the Bayonne Veterans Relief Fund.

For his outstanding work and leadership in logistical support of the European, African, Mediterranean and Arctic regions, Mr. Sanchez was awarded the U.S. Air Force Meritorious Civilian Service Medal. He has devoted himself to serving his country with honor and dignity. I ask that my colleagues join me in honoring this wonderful individual. I am proud to have such a remarkable man working in my district.

CONFERENCE REPORT ON S. 652, TELECOMMUNICATIONS ACT OF 1996

SPEECH OF
HON. NITA M. LOWEY
OF NEW YORK
IN THE HOUSE OF REPRESENTATIVES
Thursday, February 1, 1996

Mrs. LOWEY. Mr. Speaker, although I support the conference report for H.R. 1555, the Communications Act of 1995, I must rise in opposition to the provision in the bill that bans discussions about abortion on the Internet. This is a high-technology gag rule, and it is unacceptable.

Section 507 will apply portions of the Comstock Act to the Internet. In addition to banning the dissemination of obscene materials, the Comstock Act also bans the dissemination of information about abortion. As a result, section 507 of H.R. 1555 will ban both the sending and the receipt of information about abortion on the Internet.

This ban will have a chilling effect on the rights of millions of Americans. Violation of the ban bill be a felony, punishable by 5 years for the first offense and 10 years for each subsequent offense. Obviously, most American women will not risk a jail term, even to share necessary information about abortion—a legal medical procedure that is an integral part of basic women's health care.

Proponents of this provision have argued that because this provision is old and has not been enforced for decades, it will have no impact on women's speech about abortion. They say that it is dead letter law, and at worst case it only bans some types of advertisements and commercial speech.

Unfortunately, we have no way of knowing whether the proponents of this provision are right about whether this provision will be interpreted very narrowly—as they claim—or very broadly. Either interpretation is possible, because the provision's scope is unclear, That is what makes this provision so dangerous. No one knows what it will do.

One problem is that no court has addressed this provision since the Supreme Court's decision in Roe versus Wade. In fact, the only Court decision directly addressing this ban on information about abortion was decided in 1915. Obviously, quite a lot has changed since then—most notably, the Supreme Court has held that abortion was a constitutionally protected right. What does this provision mean in a world where abortion is legal?

Would H.R. 1555 ban all discussion of abortion on the Internet? Or, would it only apply to information about unlawful abortions, as the court in the 1915 held? And what, in 1996, does unlawful abortion mean? For example, abortion laws vary greatly from State to State. If a person receives information about abortion services that are legal in her State, but illegal in the State from which the information was sent, would she go to jail?

Would the provision only apply to advertisements and commercial speech, as some proponents claim? If it does, this provision potentially bars the providers of reproductive health services from having websites detailing the medical services they offer. This could also potentially bar many Internet discussions of RU–486—discussions which could be described as facilitating the sale of a drug for use in producing abortions. Whatever its breadth, this provision—by limiting the information that women can get about abortion—puts the health of American women at direct risk.

Including this restriction on speech concerning the reproductive rights of Americans in the telecommunications reform bill—a bill that has nothing to do with abortion—will impede the reproductive rights of all American women. To bar all Internet users from discussing abortion is outrageous. To bar any American from discussing a medical procedure flies in the face of every ideal that we hold dear as Americans.

Unfortunately, under parliamentary rules, I cannot offer an amendment to the conference report to strike the provision. However, I have already begun discussions with many of my colleagues about working to have this provision repealed on a future technical corrections bill. Again, although I support this conference report, I urge all of my colleagues to join me in working to remove this ban on discussions about abortion on the Internet. This high-technology gag rule must not stand.

HONORING THE 1996 FAIRFAX COUNTY CHAMBER OF COMMERCE VALOR AWARD WINNERS

HON. THOMAS M. DAVIS

OF VIRGINIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 13, 1996

Mr. DAVIS. Mr. Speaker, I rise today to pay tribute to the 1996 Fairfax County Chamber of Commerce Award Winners. On Thursday, February 15, 1996, the Fairfax County Chamber of Commerce will present the Annual Valor Awards at the McLean Hilton.

The Valor Awards honor public service officers who have demonstrated extreme self-sacrifice, personal bravery, and ingenuity in the performance of their duty. There are five categories: The Gold Medal of Valor, the Silver Medal of Valor, the Bronze Medal of Valor, the Certificate of Valor, the Life Saving Award.

The Valor Awards is a project of the Fairfax County Chamber of Commerce, in conjunction with the Fairfax County Board of Supervisors. This is the 18th year that these awards have been presented.

The Silver Medal of Valor is awarded in recognition of acts involving great personal risk.

The Silver Medal of Valor Award Winners for 1996 are: Sgt. J. Vincent Byrd, Detective Kenneth M. Pedigo, Detective Susan Lamar

The Bronze Medal of Valor is awarded in recognition of acts involving unusual risk beyond that which should be expected while performing the usual responsibilities of the member.

The Bronze Medal of Valor Award Winners for 1996 are: Detective Onzlow G. Williamson, Jr., Detective Beth A. Benham, 2d Lt. Richard H. Bearen, Sgt. Samuel J. Masiello, Police Officer 1st Class Bryan W. Holland, Police Officer 1st Class Robert D. Hill, 2d Lt. Frank J. Kitzerow, Capt. Michael LoMonaco, Sgt. Jeffrey E. Powell, Master Police Officer James T. Stewart III, Police Officer 1st Class Rolland L. Watenpaugh, Police Officer Aaron M. Kush, Police Officer 1st Class Stephen M. Needels, Police Officer Mark E. Royer, Firefighter Lawrence M. Braswell, Technician Michael A. Weldon

The Bronze Medal of Valor Unit Citation Award Winners for 1996 are: Master Police Officer Michael J. Brennan, Police Officer 1st Class Richard D. Carlton, Officer Chris C. Cochran, 2d Lt. Arthur J. Hurlock, Sgt. James Kellam, Police Officer 1st Class Steven R. Mattos, Master Police Officer Jackie L. Mitchem, Police Officer 1st Class Lee P. Northrop, Police Officer 1st Class Don C. Pierson, Police Officer 1st Class James M. Pollack, Lt. David Mr. Rohrer

The Certificate of Valor is awarded for acts that involve personal risk and/or demonstration of judgment, zeal, or ingenuity not normally involved in the performance of duties.

The Certificate of Valor Award Winners for 1996 are: Capt. Randall J. Kennedy, Firefighter Edward C. Lofties, Officer Timothy C. Benedict, Police Officer First Class Robert Egan, Sgt. Matthew W. Pifger, Master Police Officer Ralph R. Scott, Technician Edson Dewhurst, Jr.

The Lifesaving Award is awarded for acts taken in life-threatening situations where an individual's life is in jeopardy, either medically or physically.

The Lifesaving Award Winners for 1996 are: Detective Nancy G. Schaefer, Volunteer Firefighter Carl August Lief Ericson, Technician John H. Marlin, Firefighter William A. Sutphin, Jr., Master Technician Konrad A. Kurtz, Lt. Carlton G. Burkhammer, Firefighter George N. Pancione, Jr., Master Technician Michael J. Stone, Firefighter David D. Sweetland, Deputy Sheriff Kathleen A. Miller; Deputy Sheriff Sgt. Michael G. Dickerson, Deputy Sheriff Private First Class Melanie K. Sjurseth, Deputy Sheriff Cpl. John A. Craig, Deputy Sheriff Private First Class Barry V. Garlow, Deputy Sheriff Brian K. Harmon, Deputy Sheriff Alberto D. Pinto, Officer Edward K. Warren, Police Officer First Class Jarvis D. Lay, Public Safety Communications Assistant II Kimberly A. Wright

Mr. Speaker, I know my colleagues join me in commending these fine citizens who are truly deserving of the title "hero."

President's SAP on Comm. Decency Act

making predictive judgments about the effect that entry by a Bell company into long distance may have on competition in local and long distance markets. This Act also allows the Attorney General to use any available evidence, including evidence acquired under the Modified Final Judgment, and make a recommendation under any legal standard the Attorney General considers appropriate.

Further, when a regional Bell company establishes a long distance or manufacturing affiliate, the Act bars it from discriminating in favor of its own affiliates and against the interests of competing long distance providers or manufacturers, when such outside companies seek to do business with the regional Bell's local network.

The Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully.

I am also pleased that the Act requires interstate telecommunications carriers to contribute to a fund to preserve and advance universal service. The fund would be spent to provide and upgrade facilities and services, as prescribed by the FCC. And carriers would receive credit toward their contribution by providing discount service to schools, libraries, and health care providers in rural areas. In addition, equipment manufacturers and service providers would be required to address the needs of individuals with disabilities if readily achievable.

I am especially pleased that the Act requires new televisions to be outfitted with the V-chip, which will empower families to choose the kind of programming suitable for their children. The V-chip provision relies on the broadcast networks to produce a rating system and to implement the system in a manner compatible with V-chip technology. By relying on the television industry to establish and implement the ratings, the Act serves the interest of families without infringing on the First Amendment rights of the television programmers and producers.

I do object to the provision in the Act concerning the transmittal of abortion-related speech and information. Current law, 18 U.S.C. 1462, prohibits transmittal of this information by certain means, and the Act would extend that law to cover transmittal by interactive computer services. The Department of Justice has advised me of its long-standing policy that this and related abortion provisions in current law are unconstitutional and will not be enforced because they violate the First Amendment. The Department has reviewed this provision of S. 652 and advises me that it provides no basis for altering that policy. Therefore, the Department will continue to decline to enforce that provision of current law, amended by this legislation, as applied to abortion-related speech.

PATRICIA SCHROEDER
1st District, Denver, Colorado

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Congress of the United States
House of Representatives
Washington, DC 20515-0601

NATIONAL SECURITY COMMITTEE
JUDICIARY COMMITTEE

ZAP THE COMSTOCK LAW BEFORE IT BECOMES A COMPUTER VIRUS ON THE INTERNET!

Dear Colleague:

When you voted on the telecommunications bill last week, did you intend to criminalize speech about abortion on the Internet? Of course not! But hidden within Section 507 of the bill was a provision that provides for up to a $250,000 fine and/or five years in prison for using interactive computer services to provide or receive information about abortion. **Section 507 was intended to criminalize obscenity on the Internet, not speech about abortion.** Regrettably, Section 507 extends to the Internet not just the intended obscenity ban, but a much broader law from one of the most censorious times in our history -- a time when government power was used to fine and imprison people who gave out accurate birth control information. **Let's honor our oath to uphold the Constitution by deleting the ban on abortion-related speech from the obscenity law.**

The infamous Comstock Act, passed in 1873 at the urging of Anthony Comstock, secretary of the Committee for the Suppression of Vice, made it a crime to send material on birth control and abortion through the mails. As a special unpaid agent of the Post Office Department, Comstock went after people like Margaret Sanger and her husband, William, because they campaigned for accurate birth control information. Margaret Sanger was arraigned on eight counts of violating the Comstock Act in 1914 for publishing newspaper articles on birth control; William Sanger was convicted in 1915 for selling a single copy of "Family Limitation," a pamphlet on birth control. As a result of Comstock's crusade, publishers were forced to censor their scientific and physiological works, druggists were punished for giving out information about contraception, and average Americans had to live with censorship of their mail, and without access to reliable information about contraception. Two years before his death in 1915, Comstock bragged that he had been responsible for the criminal conviction of enough people to fill a 61-coach passenger train.

The Comstock Act remains on our books today, in slightly modified form, at 18 U.S.C. §1462. In 1971, Congress deleted the prohibition on birth control; but the prohibition on information about abortion remains, and the maximum fine was increased in 1994 from $5,000 to $250,000 for a first offense. If you voted for the telecommunications conference report last week, you voted to extend the Comstock Act to anyone who uses any interactive computer service to provide or receive information which directly or indirectly tells where, how, of whom, or by what means an abortion may be obtained. A broader gag rule is hard to imagine. It could criminalize:

► an Internet posting of the referral directory of your local medical society, or the Yellow Pages of the telephone directory;

► a telemedicine consultation between two doctors who are conferring about a patient who may need an abortion to save her life;

► uploading or downloading medical journal articles about RU-486, or about safe abortion techniques.

This abortion-related gag law clearly violates our cherished First Amendment rights. While the Lowey-Hyde colloquy on the floor acknowledged that at least some abortion-related speech is protected by the First Amendment, the plain language of §1462 reaches all speech "which directly or indirectly [tells] where, how, of whom, or by what means" an abortion may be obtained. Furthermore, Chairman Hyde's full statement asserts that §1462 does criminalize commercial speech about abortion. This interpretation threatens speech relating to obtaining an abortion, as well as commercial speech relating to a legal medical procedure (see the Congressional Record excerpt on reverse). Let's zap Mr. Comstock's law criminalizing information about abortion before it becomes a computer virus on the Internet. When Congress reconvenes on February 26, I will introduce legislation which leaves the anti-obscenity provisions of §1462 in place, but repeals the provision about abortion information. To be an original co-sponsor of this bill, call Carrie Nixon at x54431.

Pat Schroeder

'lanned Parenthood's Alexander Sanger protests bill.

Abortion Provision Stirs On-Line Furor

By John Schwartz
Washington Post Staff Writer

A little-noticed provision of the massive telecommunications act would appear to outlaw dissemination of abortion information on-line. But sponsors of the bill, which President Clinton signed with great fanfare yesterday, say the new law will have no such effect.

Abortion rights activists are in an uproar.

The dispute rages around a 19th-century statute, known as the Comstock law, that prohibits sending materials "of an indecent character" and "any article or thing designed or intended for the prevention of conception or procuring of abortion" through the mail. A section of the telecommunications bill inserted by Rep. Henry J. Hyde (R-Ill.), a longtime abortion foe, extended the century-old law to computer networks.

See ABORTION, C9, Col. 5

Provision in Act Alarms Abortion Rights Activists

ABORTION, From C1

Hyde declared in the Congressional Record that the new law "prohibits the use of an interactive computer service for the explicit purpose of selling, procuring or facilitating the sale of drugs, medicines or other devices intended for use in producing abortions."

The angry response to the abortion provision is part of a broader reaction to congressional attempts to regulate "indecent" speech and images on the Internet. Another section of the new law, originally proposed by Sen. James J. Exon (D-Neb.), punishes the act of making "indecent" material available to minors with up to two years in prison and as much as $500,000 in fines.

The American Civil Liberties Union and other organizations filed suit yesterday in Philadelphia to have the indecency provisions of the telecommunications act declared unconstitutional. Hundreds of organizations and individuals who maintain "home pages" on the Internet's World Wide Web registered their protest yesterday by changing the colors displayed on users' computer screens from the usual vivid array to a somber black background with white text.

While the First Amendment issues have galvanized many members of the on-line and civil liberties communities, the abortion provision has captured the attention of a larger audience. Rep. Patricia Schroeder (D-Colo.), who voted for the controversial "indecency" language in conference committee, said she would introduce legislation to remove the "crazy provision" on abortion from the telecommunications act.

Kate Michelman, president of the National Abortion and Reproductive Rights Action League (NARAL), said, "It is just another attempt on the part of anti-choice forces to make abortion unavailable and eventually illegal."

NARAL and other abortion rights organizations filed suit yesterday in U.S. District Court in Brooklyn, N.Y., seeking an order restraining the government from enforcing the abortion language. U.S. District Court Judge Charles Sifton denied the request after receiving assurances from U.S. Attorney Zachary not prosecute people who discuss abortion on-line.

Michelman said yesterday that her organization is not satisfied with a promise that only extends through the end of this administration.

The sponsors of the measure insist that it will not affect abortion. Alan Coffey, general counsel to the House Judiciary Committee, said Hyde included the Comstock language for its effect on indecent materials, not for the abortion provision. "The [abortion] language has been in the statute for many, many years, but it's not enforced. And it's probably unconstitutional because of the scope of *Roe versus Wade*," the landmark Supreme Court decision legalizing abortion, Coffey said.

During House discussions of the telecommunications bill, Hyde told Rep. Nita M. Lowey (D-N.Y.), "Nothing in this title should be interpreted to inhibit free speech about the topic of abortion."

But Hyde later inserted the passage into the Congressional Record stating that the provision would restrict "commercial activities" concerning abortion on-line. Coffey attributed the apparent contradiction between the two statements to "bad staff work."

In 1865, Congress passed a law to stop people from mailing naughty photographs—the hot new technology of the day—to soldiers in the Civil War. By 1873, conservative crusader Anthony Comstock had successfully lobbied for tougher anti-smut and anti-abortion provisions. "Comstockery" became synonymous with zealous censorship, especially of literary works.

The addition of the Comstock language underscored the irony for First Amendment scholars. "The ghost of Anthony Comstock keeps digging up from the earth," said Robert Corn-Revere, who teaches First Amendment law at Catholic University of America School of Law. "The hand is reaching from the grave to throttle the First Amendment."

FOR MORE INFORMATION

To view Internet sites that are participating in the telecommunications bill protest, see Digital Ink, The Post's on-line service. To learn about Digital Ink,

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