

January 29, 1970

MEMORANDUM FOR JOHN EHRLICHMAN

FROM: CHUCK COLSON

If we do not accept the Postal/Pay Reform compromise, we can expect that HR13000 will be very shortly sent to the President. It is only the existence of the Postal Pay/Reform package which is bottling up HR13000 in the conference.

The following tabulation might be useful in evaluating our options and particularly in considering the consequences if we now abandon the Pay/Reform proposal:

COST COMPARISON:

The Reform/Pay Plan and the Administration's Comparability
Recommendations

Fiscal Year	1970	\$175 million
Fiscal Year	1971	\$1.4 billion *

HR13000 - Senate Version

Fiscal Year	1970	\$700 million
Fiscal Year	1971	\$2.8 billion

HR13000 - House Version

Fiscal Year	1970	\$900 million
Fiscal Year	1971	\$3.4 billion

Obviously, if HR13000 comes to us the net cost will be somewhere between the Senate and House versions.

It should be noted that the Pay Act of 1962 contemplates treating all Federal employees alike. (This is legally distinguishable from the two step increase in the reform plan.)

* Assumes January 1, 1971 date as recommended in the budget. This is probably not realistic.

The attached memorandum from Bob Hampton shows a pay line comparability analysis at Level 5, which after the 5.7% that will be recommended will be \$971. Prior to the recommended 5.7% increase, the disparity is \$1361 or approximately 20% of Step 4 in Level 5. This is a real problem in the classified service where the average employee is at Step 4. Our comparability recommendations will not come anywhere near closing the gap. In the postal service, however, the average employee is at Level 8, which after the comparability increase will put him within \$80 of the civilian comparability level. The comparability rate will, therefore, make the postal employees whole. Since the BLS formula, however, compares Step 4 the unions will try to argue that there is the 20% disparity. In fact, there is not but this does create a political problem, which we obviously must counter.

It also points out what is really wrong with the BLS system. We should also be prepared for a tremendous outburst from the Government employees, who may have a very legitimate argument -- but this is another matter.

January 29, 1970

MEMORANDUM FOR TOD HULLIN

FROM: CHUCK COLSON

Please substitute the attached page 2 for my memorandum of this date to John Ehrlichman. Of the two memos I sent over, it was the one that contained the cost comparisons of the various pay plans.

January 29, 1970

MEMORANDUM FOR THE POSTMASTER GENERAL

FROM: CHUCK COLSON

The attached Page two has been substituted with John Ehrlichman for the earlier memo. Please also change your copy.



CHAIRMAN

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

JAN 28 1970

MEMORANDUM FOR CHARLES W. COLSON
Special Counsel to the President

In accordance with our conversation, I am setting forth in this memorandum the steps that must be taken in connection with the salary comparability review which must be made under the provisions of chapter 53 of title 5, United States Code.

The Chairman of the Civil Service Commission and the Director of the Bureau of the Budget (who are designated as the President's agents by Executive Order 11073) must

- provide unions with findings of the Bureau of Labor Statistics with respect to private enterprise salaries, and with the methods and results of the comparison between industry and Federal salaries;
- receive and consider union views;
- obtain and consider recommendations from Post Office, State and Veterans Administration; and
- submit to the President their report comparing private industry salaries with Federal salaries (i. e., General Schedule, Postal Field Service Schedule, Foreign Service Schedules and the schedules for doctors, dentists, and nurses in the Department of Medicine and Surgery of the Veterans Administration). This report must include the views of the unions and the recommendations of the Postmaster General, the Secretary of State and the Administrator of Veterans Affairs.

The CSC/BoB staffs have made the comparison between industry salaries and Federal salaries on the basis of the 1969 BLS survey. Table 1 attached shows the 1968 and 1969 BLS private enterprise salary averages with the percent increase by grade level. While the average increase was 5.75 percent, the increase at the important GS-5 level, the level to which postal clerk and letter carrier rates are linked, increased 7.05 percent. When a payline is constructed which not only reflects the increased industry salaries but also provides suitable pay distinctions between grades, the increase over current rates comes to about 5.75 at all grades above GS-1. See table 2 attached.

(At the GS-5/PFS-5 level the payline rate last year was \$824 less than the private enterprise average at that grade. This year's results will actually increase this gap to \$971. The size of this gap is the critical issue in the union attack which can be expected this year as last on the comparability process.)

The President is required by law to send annually to the Congress a report which compares the rates fixed by statute for the four statutory pay systems (GS, PFS, Foreign Service, and VA/DM&S) with rates of pay paid for the same levels of work in private industry as determined on the basis of the Bureau of Labor Statistics Survey. Since 1962, this report has included the Joint Report made by the Director of the Bureau of the Budget and the Chairman of the Civil Service Commission.

The President's report to the Congress is also to contain "such recommendations for revision of statutory pay schedules, pay structures, and pay policy, as he considers advisable." This leaves the President a wide area of discretion. For example he could recommend that the comparability increase not be applied to postal schedules on the grounds that the salaries for postal employees in the future should be fixed by negotiations between the unions and postal management.



Robert E. Hampton
Chairman

Attachments

*If you have any questions
please call. —*

Table 1
Rise in Private Enterprise Rates, From 1968 to 1969

Grade	Occupation	1968	1969	Percent Increase	Grade	Occupation	1968	1969	Percent Increase
GS-1	File clerk I	\$ 3,674	\$ 3,883		GS-9	Accountant III	\$ 9,367	\$ 10,029	
	Office boys or girls	<u>4,011</u>	<u>4,272</u>			Auditor III	9,977	10,726	
	Average	3,843	4,081	6.19%		Attorney I	10,293	11,020	
GS-2	File clerk II	4,110	4,328			Job analyst III	10,401	10,595	
	Keypunch operator I	4,566	4,797			Chemist III	10,187	11,063	
	Switchboard operator I	4,587	4,822			Engineer III	10,963	11,701	
	Tabulating machine operator I	4,702	5,021			Engineering technician V	9,788	10,321	
	Typist I	<u>4,206</u>	<u>4,451</u>			Buyer III	<u>10,260</u>	<u>10,942</u>	
	Average	4,434	4,684	5.64%		Average	10,155	10,800	6.35%
GS-3	Engineering technician I	5,585	5,942		GS-11	Accountant IV	11,273	11,967	
	Draftsman-tracer	4,951	5,301			Auditor IV	12,303	13,125	
	Accounting clerk I	4,708	4,941			Chief accountant I	12,289	13,212	
	File clerk III	5,055	5,320			Attorney II	12,602	12,780	
	Keypunch operator II	5,189	5,482			Job analyst IV	12,577	12,830	
	Stenographer, general	4,861	5,192			Director of personnel I	11,029	11,847	
	Switchboard operator II	5,445	5,689			Chemist IV	12,751	13,359	
	Tabulating machine operator II	5,779	6,060			Engineer IV	13,095	13,893	
	Typist II	<u>4,890</u>	<u>5,155</u>			Buyer IV	<u>12,431</u>	<u>13,151</u>	
	Average	5,163	5,454	5.64%		Average	12,261	12,907	5.27%
GS-4	Engineering technician II	6,661	7,011		GS-12	Accountant V	13,531	14,373	
	Draftsman I	6,110	6,454			Chief accountant II	14,135	14,637	
	Accounting clerk II	6,179	6,448			Attorney III	15,283	15,879	
	Secretary I	5,563	5,869			Director of personnel II	13,215	13,925	
	Stenographer, senior	5,614	5,884			Chemist V	15,263	16,080	
	Tabulating machine operator III	<u>7,008</u>	<u>7,371</u>			Engineer V	<u>15,223</u>	<u>16,107</u>	
	Average	6,189	6,506	5.12%		Average	14,442	15,167	5.02%
GS-5	Accountant I	7,451	8,002		GS-13	Chief accountant III	16,577	17,714	
	Auditor I	7,645	8,367			Attorney IV	17,936	19,163	
	Job analyst I	...	8,137			Director of personnel III	16,005	16,738	
	Chemist I	8,061	8,736			Chemist VI	17,324	18,529	
	Engineer I	9,023	9,662			Engineer VI	<u>17,361</u>	<u>18,577</u>	
	Engineering technician III	7,596	8,040		GS-14	Average	17,041	18,144	6.47%
	Draftsman II	7,548	7,988			Chief accountant IV	19,046	20,586	
	Buyer I	7,344	7,877			Attorney V	22,152	23,685	
	Secretary II	<u>6,272</u>	<u>6,586</u>			Director of personnel IV	19,715	20,585	
	Average	7,618	8,155	7.05%		Chemist VII	22,561	22,473	
						Engineer VII	<u>20,216</u>	<u>21,192</u>	
GS-6	Secretary III	6,692	7,032		GS-15	Average	20,338	21,706	6.73%
						Attorney VI	28,841	29,421	
GS-7	Accountant II	8,277	9,013			Chemist VIII	25,416	27,092	
	Auditor II	8,707	9,287			Engineer VIII	<u>23,280</u>	<u>24,020</u>	
	Attorney I	9,338	...	2/		Average	25,846	26,844	3.86%
	Job analyst II	8,820	9,081						
	Chemist II	8,931	9,626		Overall				5.75%
	Engineer II	9,771	10,455						
	Engineering technician IV	8,767	9,300						
	Draftsman III	9,233	9,755						
	Buyer II	8,660	9,269						
	Secretary IV	<u>7,271</u>	<u>7,697</u>						
	Average	8,778	9,276	5.67%					

1/ Data did not meet BLS publication criteria.

2/ Change in standard made GS-9 the entry level for attorney.

Table 2

Comparison of Comparability Payline Fitted to 1969 Private

Enterprise Rates with Current General Schedule Rates

Grade	1969 Private Enterprise Averages	Comparability Payline		Current Fourth Rates	Increases Needed	
		Intergrade Differentials	Rates		Dollars	Percent
GS- 1	\$ 4,081		\$ 4,479	\$ 4,279	\$ 200	4.67%
2	4,684	13.2%	5,070	4,795	275	5.74
3	5,454	27.7%	5,720	5,409	311	5.75
4	6,506	12.3	6,424	6,074	350	5.76
5	<u>8,155</u>	25.6	7,184	<u>6,794</u>	390	5.74
6		11.4	8,003	7,569	434	5.73
7	9,276	23.7	8,887	8,404	483	5.75
8		10.6	9,829	9,295	534	5.75
9	10,800	22.0	10,842	10,253	589	5.74
10		10.0	11,926	11,278	648	5.75
11	12,907	20.5	13,065	12,355	710	5.75
12	15,167	19.2	15,573	14,727	846	5.74
13	18,144	18.1	18,392	17,393	999	5.74
14	21,706	17.2	21,555	20,385	1,170	5.74
15	26,844	16.5	25,112	23,749	1,363	5.74
16		16.0	29,130	27,549	1,581	5.74
17		15.7	33,703	31,874	1,829	5.74
18		15.6	35,418 <u>1/</u>	33,495 <u>2/</u>	1,923	5.74

*\$1361
difference*

1/ Single (entry) rate. Payline rate is \$38,961.

2/ Single (entry) rate. Fourth rate would be \$36,846.

Estimated Cost of H. R. 13000, Senate Version and House Version
(Includes cost of military pay raises as well as civilian)

SENATE VERSION

For Fiscal Year 1970 -- about \$0.7 Billion

For Fiscal Year 1971 -- about \$2.8 Billion

HOUSE VERSION

For Fiscal Year 1970 -- about \$0.9 Billion
(Assumes an April 1, 1970 pay adjustment
of. 5.75%)

For Fiscal Year 1971 -- about \$3.4 Billion
(Assumes an April 1, 1971 pay adjustment
of 5.75%)

No Cost Projected on Accelerated Step Increases

THE GENERAL COUNSEL
POST OFFICE DEPARTMENT
WASHINGTON, D. C. 20260

January 26, 1970

MEMORANDUM FOR MR. CHARLES COLSON

SUBJECT: Constitutionality of Giving Voting Power
to the Congressional Members of the
Executive Council of the Postal Service
Authority

Pursuant to our recently conversation, I enclose a copy
of the Memorandum of Law I prepared on the constitutional
question. I expect to be discussing the Memorandum shortly
with Bill Rehnquist in the Justice Department.



David A. Nelson

Attachment

THE GENERAL COUNSEL
POST OFFICE DEPARTMENT
WASHINGTON, D. C. 20260

January 26, 1970

MEMORANDUM FOR MR. JOHN D. EHRLICHMAN

SUBJECT: Administration Position on the Postal Reform -
Postal Pay Package

The Postmaster General asked me to send you the attached statement, which reflects the Department's understanding of where we stand on the compromise package.

D.A.N.

David A. Nelson

Attachment

cc: Chuck Colson ✓

The Post Office Department continues to believe that H. R. 11750, the original Administration reform bill, is preferable to H. R. 15430. Nevertheless, the Department endorses the basic concepts underlying Title I of H. R. 15430. Title I appears to contain the key elements we feel are critical to true postal reform (i. e., assurance of continuity of top postal management on a basis that makes management responsible for performance, while insulating it from partisan politics; collective bargaining to determine wages for rank and file postal employees; authority for top management to modify the postal rate structure, after fair and impartial review by a professional rate commission; and authority to obtain adequate capital financing by issuing bonds.)

With regard to Title II of H. R. 15430, which would establish a two-step pay increase for employees in the Postal Field Service effective January 1, 1970 (equivalent to 5.4% increase), the Department would not object to such an increase as long as it is part of true reform legislation. Only the long range operational efficiencies that such reform would provide can justify a wage increase of this magnitude.

The Administration has made no commitment on any additional pay increase for postal employees in 1970, and has made no commitment with regard to compression of the time it takes postal employees to reach the top pay step within grade.

January 24, 1970

MEMORANDUM FOR JOHN EHRLICHMAN

FROM: CHUCK COLSON

SUBJECT: ATTACHED MEMORANDUM TO PMG

I have read the entire memorandum as attached to the PMG. Even though we took out the one sentence objectionable to him, I still sense that he is not happy. The statement in the enclosed which could be issued publicly will satisfy the unions because it can only be read to mean that we will not deduct the 5.4% increase from any subsequent general pay increase (nor, by the way, under the law could we).

This whole argument is beginning to seem silly to me the more I think about it. The law is quite clear; so is our budget. I do agree that we should keep all of the President's options open and I suppose that the President always has the right to change his mind if the national interest requires. Therefore, I think the attached very neatly resolves the problem for the moment. What distresses me is that beneath the surface, there is, in fact, disagreement. The PMG has no intention of including the postal workers in any subsequent raise and might say so. Our budget clearly does include them. If the PMG tips his hand as to his intentions anytime before the reform package is passed, we are not only blown out of the water but, more importantly, the President's credibility is really challenged.

I therefore conclude that this memo should be sent and that we should get the PMG's agreement to say what is quoted in the enclosed and no more. If we can't be absolutely certain that he will say no more then I think the issue should be taken to the President and flatly resolved. We do, in fact, have an issue but it is glossed over by the memo enclosed.

If you have any questions about the enclosed, please call me.

January 23, 1970

MEMORANDUM FOR THE POSTMASTER GENERAL

FROM: JOHN EHRLICHMAN

SUBJECT: POSTAL PAY

I agree with you that it is important that the Administration's position on the postal pay question be very explicitly stated and that all of us involved in the issue take a consistent line. The following reflects my understanding of the Administration's position with which you and I are in agreement based on our phone conversation this morning:

"It is the position of the Administration that the comparability issue cannot be related to the postal pay/reform package now being considered. Postal employees will be treated on the same basis as all other Federal employees while they remain in the Federal service.

The Administration's budget request for 1971 contains comparability pay recommendations including postal employees and also includes funds for the two step increase contained in the present pending pay/reform package."

The foregoing leaves all of the President's options open as to when and on what basis he will accept comparability. It does say that we will not treat postal employees differently if and when there is a general Federal pay increase. If the increase is objectionable for any reason (including the inclusion of postal employees on any basis considered unacceptable) the President can consider any recommendations and/or reasons for a veto. This possibility should not be publicly discussed now, however, for fear of jeopardizing the Reform Plan. Also, we want to keep all options open consistent with the above statement.

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"It is the position of the Administration that the comparability issue cannot be related to the postal pay reform package now being considered. Postal employees will be treated on the same basis as all other Federal employees while they remain in the Federal service. As to any subsequent Federal pay legislation which may be recommended by or approved by the President, the adjustment contained in the present legislation will not be deducted.

The Administration's comparability pay recommendations contained in the budget include postal employees."

The foregoing leaves all of the President's options open as to when and what basis he will accept comparability. It does say that we will not treat postal employees differently if and when there is a general Federal pay increase.

I do not suggest that we issue this statement publicly but rather that it be a guide for all of us in dealing with Congress and/or the unions.

January 23, 1970

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I do not suggest that we issue this statement publicly but rather that it be a guide for all of us in dealing with Congress and/or the unions.

The comparability issue is not related to the postal pay reform package, now [REDACTED] being considered. It is not the position of the Administration as to any subsequent Federal pay [REDACTED] legislation which may be recommended [REDACTED] or approved by the President to distinguish between postal and other federal employees nor to deduct the amount [REDACTED] of pay adjustment involved in the pending legislation from any subsequent legislation .

The Administration's [REDACTED] comparability pay [REDACTED] comparability pay recommendations contained in the budget include postal employees.

THE GENERAL COUNSEL
POST OFFICE DEPARTMENT
WASHINGTON, D. C. 20260

January 22, 1970

MEMORANDUM FOR THE POSTMASTER GENERAL

SUBJECT: Constitutionality of Legislation Providing for the
Participation by Individual Members of Congress
in the Operation of the Postal System

The proposed "Postal Reform and Salary Adjustment Act of 1970," as embodied in the committee print published by the House Post Office and Civil Service Committee on December 19, 1969, and in H.R. 15430, introduced on December 23, 1969, would establish a United States Postal Service Authority, as an instrumentality of the United States, charged with responsibility for "operating the postal system of the United States." (39 U.S.C. 202, as contained in section 102 of the bill.)

The Authority would be headed by a 13-member Executive Council, which would "direct the exercise of the powers of the Authority." (39 U.S.C. 203(a), as set forth in section 102.) 39 U.S.C. 203(d) would provide that:

"Four Members of Congress shall be appointed members of the Executive Council, as follows:

"(1) two from the United States House of Representatives, one by the Speaker of the House and one by the Minority Leader of the House; and

"(2) two from the United States Senate, one by the President pro tempore of the Senate and one by the Minority Leader of the Senate."

The bill does not fix any term for the Congressional members of the Council, and I have been informed by the staff of the House Post Office and Civil Service Committee that it is contemplated that each of the Congressional members of the Council would serve at the pleasure of the official who appointed him.

The Congressional Councilors would receive no compensation for their services as Council members. While they would not have a vote in the selection of the Director General (the Authority's chief executive officer) or his Deputy, they would be full participants in the business of the Council in all other particulars.

In general, the Executive Council of the new Authority would be vested with all of the powers that the Postmaster General now has with respect to the operation of the postal system, plus a number of additional powers which the Postmaster General does not have under existing law. As voting members of the Executive Council, the Congressional Councilors would have an equal voice with other members of the Council in directing the exercise of the Authority's powers in such matters as contracting for the construction and equipping of facilities; contracting for transportation services; borrowing funds for capital improvements or other purposes; entering into collective bargaining agreements covering wages, hours and terms of employment for postal employees; and determining the types of postal services to be offered and the prices to be charged therefor.

You have requested my views on the constitutionality of the organizational structure of the proposed Postal Service Authority, in the light of Article I, Section 6, Clause 2 and Article II, Section 2, Clause 2 of the Constitution of the United States. Those clauses provide, in pertinent part, as follows:

Art. I, Sec. 6: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." (Underscoring supplied.)

Art. II, Sec. 2: "[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . 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."

Conclusion

While the constitutionality of the provisions in question is debatable, I believe there is a strong possibility that the courts would hold that under

the bill as presently drafted, the members of the Executive Council are "officers of the United States" who can only be appointed in the manner prescribed by Article II, Section 2 of the Constitution, and the position of council member is an "office under the United States," the holding of which would be incompatible with membership in either House of Congress. Uncertainty as to the constitutional status of the Executive Council could have a serious adverse effect on the marketability of bonds issued by the Postal Service Authority, and could also lead to litigation contesting the validity of any postal rate changes the Authority might wish to institute.

No such problems would be presented, in my view, if the proposed legislation were amended to give the Congressional members of the Executive Council consultative status, with a right to participate in the deliberations of the Executive Council and report to Congress thereon, but without a right to engage directly in the operations of the postal system. If such a change were made, I believe it would be appropriate to restore the provisions contained in the Administration's postal reform bill (H.R. 11750) authorizing the disapproval of proposed rate changes by Congressional resolution.

Discussion

a. Precedents

There are no United States Supreme Court decisions affording a definitive answer to the question whether the position of Congressional Councilor would constitute an "office under the United States," as that phrase is used in Article I, Section 6, Clause 2 of the Constitution. The term "office" has been the subject of judicial construction in other contexts, however, and a definition frequently quoted is that found in United States v. Hartwell, 73 U.S. 385, 393 (1867). The Hartwell case, which involved the indictment on embezzlement charges of a clerk in the office of one of the Assistant Treasurers of the United States, afforded the Supreme Court an opportunity to make the following statement in holding that the defendant was an "officer" within the meaning of the Sub-Treasury Act of 1846:

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."

Under this definition, it could be argued that an "office" the holding of which disqualifies a person from membership in Congress is an office that carries a salary or other emoluments. The Constitutional Convention certainly had the matter of emoluments very much in mind when considering the clause in question. Much of the debate on this

subject turned on the importance of making it impossible for the executive branch of the government to corrupt members of the legislature through the bestowal of lucrative offices. See Madison's Debates in the Federal Convention of 1787, (Hunt and Scott ed. 1920), reprinted in H. R. Doc. No. 398, 69th Congress, 1st Session, 109 (1927), hereinafter cited as Madison's Debates. In the first part of Article 1, Section 6, Clause 2, moreover, the founding fathers clearly evidenced their concern over the dangers of this kind of corruption by specifying that during the time for which he was elected, any member of Congress -- even one who had vacated his seat or was prepared to do so -- would be barred from appointment to "any civil office under the authority of the United States" which had been created during the time for which the member was elected or the emoluments of which had been increased during such time. A possible -- but by no means necessary -- inference from the reference to emoluments in connection with the phrase "civil office under the authority of the United States" in the first part of the clause might be that the phrase "office under the United States," as used in the second part of the clause, was intended to mean a paid office.

Militating very strongly against such a conclusion, however, is the fact that on two separate occasions during the course of the Constitutional Convention Mr. Pinkney urged the Convention to consider a provision that would have declared the members of each House "incapable of holding any office under the U.S. for which they . . . receive any salary, fees, or emoluments of any kind" Madison's Debates, pages 536 - 542 and 657. (Underscoring supplied.) The fact that Mr. Pinkney's proposal was not adopted suggests that the prohibition against holding a seat in Congress and simultaneously holding another office under the United States was not intended to be limited to those situations in which the person holding the non-Congressional office would be entitled to receive a salary, fees, or other emoluments. Moreover, as pointed out by the Senate Judiciary Committee in Senate Report No. 563, Sixty-seventh Congress, second session (1922), the framers of the Constitution were motivated, in part, by a desire "to remove the temptation from Members to multiply offices to which they might be appointed, either to their honor or their profit" (Reprinted in Congressional Record for April 11, 1922, at p. 5257. Emphasis supplied.)

Strong support for this conclusion may also be found at page 62 of the report submitted by the House Judiciary Committee on February 21, 1899 (House Report No. 2205, 55th Congress, 3rd Session), where the Judiciary Committee made the following observations:

"It may be said that there are may [sic] offices under the United States of little importance and carrying little or no pay, and that it can not be possible that the framers of the Constitution contemplated forbidding a member of the National Legislature to hold one of these small offices. This is not the question. No line could be drawn between the large and the small offices. The principle declared was that a member of the Congress of the United States shall not hold any office under the United States and retain his seat as a national legislator." (Underscoring supplied.)

If the position of Postmaster General did not carry a salary under today's law, but the powers and responsibilities of the office remained otherwise unchanged, it would be difficult to contend, I think, that a member of Congress who became Postmaster General would be constitutionally entitled to retain his seat in Congress. As stated by the House Judiciary Committee at page 60 of Report No. 2205, supra, "the framers of the Constitution intended to keep the legislative, judicial, and executive branches of our Government separate and distinct; to prevent Cabinet officers from being members of Congress, and thereby giving undue power to the President and his immediate advisers; to prevent the centralization of power and office-holding power in a few hands" But if the Postmaster General may not constitutionally hold a seat in Congress, it is difficult to see how a voting member of the Executive Council of the proposed Postal Service Authority -- which body would have a substantially greater degree of executive authority than the Postmaster General presently enjoys -- would constitutionally be entitled to retain his seat in Congress, regardless of whether his service on the Executive Council entitled him to any emoluments other than those he received as a member of Congress.

An advisory opinion rendered by the Judges of the Supreme Court of Rhode Island in the case of In re Corliss, 11 R.I. 638 (1876) is highly persuasive on this point. The question presented in the Corliss case was whether an unpaid member of the United States Centennial Commission held "an office of trust or profit under the United States," within the meaning of Article II, Section 1, Clause 2 of the Constitution, thus being ineligible for appointment as a Presidential elector.

As originally created by the Act of March 3, 1871, the Centennial Commission consisted of not more than one delegate from each state and territory. The delegates were appointed by the President on the nomination of the various State and Territorial Governors. The duties of the Centennial Commission were to prepare and superintend the execution of a plan for holding an exhibition commemorating the 100th anniversary of our independence from Great Britain. Under an act approved on June 1, 1872, the Commission was incorporated under the name of "The United States Centennial Commission," and a separate corporation, called "The Centennial Board of Finance," was created to raise and disburse funds for this event. The Board of Finance, which was to be organized under the direction of the Centennial Commission, was to prepare the grounds and erect the buildings for the exhibition, in accordance with plans to be adopted by the Commission itself. The Commission was to have the final decision in questions involving admission fees and other matters affecting the interest of the exhibitors or of the public. In an opinion subscribed by four of the five judges of the Rhode Island Supreme Court, the Court pointed out that "the duties and functions of the commission were various, delicate, and important; that they could be successfully performed only by men of large experience and knowledge of affairs; and that they were not merely subordinate and provisional, but in the highest degree authoritative, discretionary, and final in their character." The Court went on to state:

"We think that persons performing such duties and exercising such functions, in pursuance of statutory direction and authority, are not to be regarded as mere employees, agents, or committee men, but that they are, properly speaking, officers, and that the places which they hold are offices." 11 R.I. at 641. (Emphasis supplied.)

After concluding that the office in question was an office "under the United States," since it was created by an act of Congress and all its powers and duties were conferred and imposed by Congress, the Court addressed itself to the question whether the office was one of "trust or profit" under the United States. In this connection, the Court declared that:

"It is not an office of profit under the United States, for the commissioners are not entitled to any pay from the United States, nor to any perquisite or emolument under any law of the United States. But

we think it is an office of trust. It is true that originally the United States had no pecuniary interest in the exhibition. The commissioners, however, were to be intrusted with a large supervisory and regulative control of the property sent for exhibition; and from the time the government gave its sanction to the exhibition, and especially after the President issued his proclamation, the honor and reputation of the United States were pledged for its proper management to its own citizens and to foreign nations. From that time the honor and reputation of the United States were largely in the keeping of the commissioners; and in this view there was a very delicate and important trust reposed in them. It would be a narrow, and we think an improper interpretation, to hold that an office is an office of trust only when the officer has the handling of public money or property, or the care and oversight of some pecuniary interest of the government. But, even if it were so, there came a time when the United States did become pecuniarily interested in the exhibition by the appropriation of a million and a half of dollars for it, to be repaid out of the profits if any should accrue; and when, also, valuable property belonging to the United States was exhibited on the exhibition grounds. We repeat that the office is, in our opinion, an office of trust." 11 R.I. at 642. (Emphasis supplied.)

One of the Rhode Island judges dissented from this opinion, pointing out that not only were the Commissioners to receive no salary, but also that while the Constitution prohibits a person holding any office under the United States from simultaneously being a member of Congress, "it is a notable fact that the President of this very Commission was for a long time a representative in Congress." 11 R.I. at 646.

As will be seen hereafter, the fact that the same individual was simultaneously President of the Commission and a Representative in Congress could well be explained on the ground that the House of Representatives simply took no action to expel him from his congressional seat. As far as the validity of the majority opinion of the Court is concerned, however, it is significant that the House Judiciary

Committee, in its report on February 21, 1899, stated that notwithstanding the fact that no compensation was to be paid the Commissioners for their services, the Rhode Island Court "properly held that these commissioners were officers of the United States." House Report No. 2205, supra, at page 51. (Underscoring supplied.)

The argument has sometimes been advanced that "the only way in which an officer of the United States can be created is by appointment by the President, either with or without confirmation by the Senate, or by the courts of law or by the heads of departments." See the statement of the Honorable William H. Moody, M. C. before the House Judiciary Committee on January 24, 1899, as published in House Report No. 2205, supra, at page 8. This argument is based on Article II, Section 2, Clause 2 of the Constitution, which says that the President shall nominate, and with the advice and consent of the Senate shall appoint, all officers of the United States whose appointments are not otherwise provided for in the Constitution (Congress being empowered, however, to vest the appointment of such inferior officers as they think proper in the President alone, in the courts, or in the heads of Departments.)

The argument made by Congressman Moody was succinctly -- and persuasively -- answered by his colleague, Congressman Terry, in the following passage at page 9 of House Report No. 2205, supra:

"... the question as to whether particular functions exercised by a party is an office or not, does not depend so much on who appointed him as on the duties he is appointed to perform." (Emphasis supplied.)

If the President were to nominate a member of Congress to be Postmaster General, and the nomination were confirmed by the Senate, the nominee would clearly not have a constitutional right to serve simultaneously as Postmaster General and as a Member of Congress. That being so, Congressman Terry would argue, Congress could not constitutionally convert the office of Postmaster General into something other than an office by the simple expedient of vesting the appointment in the Speaker of the House rather than in the President. If the office of Postmaster General is an "office" in the constitutional sense, in other words, it would not cease to be an office if Congress attempted to vest the appointing power in itself; any such attempt would do violence not only to Article I, Section 6, but also to Article II, Section 2.

Stating this argument another way, it is really begging the question to suggest that the character of a particular position as an "office" under Article I, Section 6 depends on whether the power to fill the position is vested in one of the agencies referred to in Article II, Section 2. If the appointing power is not lodged where Article II, Section 2 says it must be lodged, the conclusion that the position is not an "office" in the constitutional sense is hardly inescapable; another possibility is that the position is in fact an "office," and the statute giving someone other than the President, a court or an agency head the power to make appointments to the office is unconstitutional as being in conflict with Article II, section 2.

The case of United States v. Germaine, 99 U.S. 508 (1878), cited by Congressman Moody to show that the question whether a position is an "office" can be answered solely on the basis of who has the statutory authority to make appointments thereto, is not really dispositive. The Germaine case arose out of an indictment returned under a statute that made it a criminal offense for an "officer of the United States" to extort money under color of his office. The defendant was a surgeon appointed by the Commissioner of Pensions to give medical examinations to pensioners, as the Commissioner deemed necessary, at a fee of \$2 per examination. In holding that such a surgeon was not an officer of the United States, the Supreme Court did stress that the position was not filled by the President, the courts, or a department head.¹ The Court also made it clear, however, that the nature of the defendant's employment was not such as to make him an officer. The duties of the

1. See also United States v. Mouat, 124 U.S. 303 (1888), where, in holding that a Navy paymaster's clerk was not an "officer of the navy" within the meaning of a statute governing reimbursement of travel expenses, the Supreme Court stated that the clerk was not, strictly speaking, an officer of the United States because he did not hold his place by virtue of an appointment by the President or one of the courts of justice or a Department head. As can readily be seen by comparing this decision with that handed down on the same day in United States v. Hendee, 124 U.S. 309 (1888), however, the term "officer" does not have a single, fixed meaning; in the Hendee case the Supreme Court held that a paymaster's clerk was an "officer of the Navy" within the meaning of a statute governing longevity pay!

surgeon, as the Court pointed out, were occasional and intermittent. He was to act only when called upon by the Commissioner of Pensions to make an examination in a particular case. He might make fifty such examinations a year, or none. He gave no bond and took no oath. In actuality, said the Court, "he is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid [the Commissioner] in the performance of his own official duties." 99 U.S. at 512. The Court went on to observe that:

"If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute." (Loc. cit.)

In other words, the Court was suggesting, the surgeon really occupied the position of an independent contractor, rather than being an officer in the sense that the clerk involved in the Hartwell case, supra, was an officer. That being so, there was obviously no reason to question the constitutionality, under Article II, Section 2, of the statute authorizing the Commissioner of Pensions to appoint examining surgeons; and Congressman Moody's reliance upon the Germaine case thus seems to have been misplaced.

The specific problem to which Congressman Moody and Congressman Terry were addressing themselves in the colloquy set forth at pp. 8 and 9 of House Report No. 2205 involved the constitutionality of the "Postal Commission" created by Section 5 of the Act of June 13, 1898, 30 Stat. 440, 445. That statute (the general Post Office Appropriation Act for Fiscal Year 1899) created a commission consisting of the Chairmen of the Post Office and Post Roads Committees of the House and Senate, three Senators to be appointed by the President of the Senate, and three members of the House to be appointed by the Speaker. The Commission was created "to investigate the question whether or not excessive prices are paid to the railroad companies for the transportation of the mails . . . and all sources of revenue and all expenditures of the postal service, and rates of postage upon all postal matter." The Commission was not vested with any powers whatever over the actual operation of

the postal system; its sole function was to investigate the matters referred to in the statute and to report to Congress on the testimony and evidence taken in the course of the investigation, the conclusions reached by the Commission, and any recommendations for correcting any abuses or deficiencies that might be found to exist.

The House Judiciary Committee had no difficulty in concluding that the members of the Postal Commission were not officers of the United States within the meaning of the Constitution. (Page 53 of House Report 2205, supra.) In reaching that conclusion, the Judiciary Committee did not rely on the fact that the Commissioners were unpaid, or on the fact that they were appointed by someone other than the President, a court, or a department head. Instead, the Committee's conclusion appears to have rested primarily upon the fact that the function of the Commissioners was to advise the Congress and not to execute the laws. As the Committee report said of the members of the kinds of commissions of which the Postal Commission was representative,

" [t]hey are persons designated by authority of Congress to make certain investigations, inquiries, etc., or to conduct certain negotiations preliminary to and as a basis for possible action by the Congress of the United States or by one branch of it. They neither make law, execute law affecting the rights of the people, nor perform judicial functions. These commissioners are and are intended to be mere advisory agents of the Congress of the United States. Their investigations are confined to some particular matter or subject, and they are not required to take an oath of office. They have no power to decide any question or bind the Government or do any act affecting the rights of a single individual citizen."

* * *

" The acts performed are for the information of the Congress, and it alone. Their suggestions and recommendations have no force; they may or may not be adopted. To make their suggestions or recommendations operative bills or resolutions must be introduced

embodying the provisions recommended, or their substance, and these must be enacted into law. If a treaty is recommended by peace commissioners it must be submitted to the Senate and by it ratified. The acts of such a commission do not bind the President, the Senate, or the Government. Then such commissioners neither make, execute, nor interpret law. They do not possess or exercise any of the sovereign power of the Government of the United States." House Report No. 2205, supra, p. 52. (Underscoring supplied.)

One of the commissions of which the House Judiciary Committee was speaking in the foregoing passage was the so-called "Hawaiian Commission," which had been appointed pursuant to law to study the question of a legislative code for Hawaii, after the Islands were annexed to the United States, and "to recommend to Congress concerning the Hawaiian Islands such legislation as they shall deem necessary or proper." There were five commissioners, all appointed by the President; the only limitation on his choice was that two were required to be residents of Hawaii. President McKinley appointed President Dole and Mr. Justice Frear as the Hawaiian members, and to fill the remaining positions on the commission he appointed Senators Cullom and Morgan from the United States Senate, and Congressman Hitt from the House of Representatives.

The House Judiciary Committee concluded that there was no constitutional problem in having Members of Congress serve on the Hawaiian Commission, since the function of the Commission was purely advisory. Notwithstanding that the Commission's only duty was to recommend legislation, however, rather than to execute the laws in the sense that the President and his subordinates do, it is interesting to note that the Senate Judiciary Committee agreed almost unanimously to a resolution disapproving the practice of appointing Members of Congress to commissions like the Hawaiian Commission. The Senate Committee did not publicly report its findings at the time, thinking that to do so might be construed as an act of discourtesy to the members who had served on such commissions, but the Chairman of the Senate Judiciary Committee -- Senator Hoar, a distinguished lawyer from Massachusetts -- was

instructed to call on President McKinley privately and tell him that the Senate Judiciary Committee hoped that the practice would not be continued. Senator Hoar came away from the meeting with the impression that President McKinley had come to feel the constitutional objections very strongly, and would not make any more such appointments. (Senator Hoar's account of this incident is published as Appendix B to Senate Report No. 563, 67th Cong., 2nd Sess. (1922), pp. 5260 and 5261 of the Congressional Record for April 11, 1922.)

The question that was under consideration by the Senate Judiciary Committee in Senate Report No. 563, supra, involved the eligibility of Senator Reed Smoot and Congressman Theodore Burton to serve on the World War Foreign Debt Commission. That Commission, which was created by Public Law 139, 67th Congress, approved February 9, 1922, consisted of the Secretary of the Treasury, who was to serve as Chairman, and four other members appointed by the President, with the advice and consent of the Senate. Subject to the approval of the President, the Commission was authorized to refund, convert, and extend the loans made by the United States to foreign governments during the First World War.

A majority of the Senate Judiciary Committee concluded that Senator Smoot and Congressman Burton were not eligible to membership on the Commission, notwithstanding an unpublished opinion signed by Attorney General Harry Daugherty (dated March 8, 1922, and printed at page 5286 of the Congressional Record for April 11, 1922), in which Mr. Daugherty advised President Harding that in his judgment "the appointment of Senator Smoot and Representative Burton does not offend Article I, section 6 of the Constitution." The Attorney General recognized that the application of the constitutional provision "does present a serious and debatable question." He stated that "the language of the Constitution is so broad and comprehensive that it cannot be denied that the commissioners in question, in a general sense, hold a 'civil office under the authority of the United States'" In the absence of any authoritative judicial interpretation of the constitutional provision, however, the Attorney General was prepared to attach great weight to the practical construction historically placed on Article I, Section 6. "In such practical construction," he said, "a distinction has always been

made between special employment on the one hand and offices on the other, and between offices -- using that term in a general sense -- which serve only a temporary purpose, and those which have duration and permanency. From the very beginning of the Government Members of the Senate and House have, from time to time, been asked to render services for the Government upon commissions of various kinds, and it has never been decided that such temporary employment for a special service and to serve an immediate exigency constituted a 'civil office' within the meaning of the constitutional provision above referred to." (Emphasis supplied.) The Attorney General went on to point out that the tenure of the members of the Commission was limited in time (the statute provided that the authority of the Commissioners should terminate at the end of three years), and their responsibilities were restricted to a single object. Moreover, he pointed out, "the commissioners can take no action except with the approval of the President. Their duties, therefore, are primarily those of negotiators for the terms of such adjustment, and, secondarily, as an advisory body to the President of the United States."

A minority of the Senate Judiciary Committee shared this view, and expressed itself in the following language:

"The commission has no power whatsoever. Its duties are purely preliminary and advisory. It can do nothing that will bind the Government of the United States in any respect or degree. Every act that it performs is without the least force or effect until approved by the President. It is not invested with any part of the sovereign authority of the United States. It has no function save to present to the President its work for his approval. It is to the President that Congress has delegated the authority to enter into a binding agreement. While the work of the commissioners may be more dignified and important than the work of any of the employees of the commission, it is in every sense of the same character. It is the President who becomes responsible for everything that is done."

* * *

"[The] commission can make no order, enter into no contract, make no arrangement of any description until the President approves it. It is his approval, and his approval alone, which gives to the work of the commission its validity. The commission may negotiate, gather information, put proposed agreements into form, and report to the President. Its duties and powers are then concluded and if nothing further is done their work is valueless and can not in any manner affect the people or the Government of the United States. It is the President, and the President alone, who gives life and force to the agreements which may be presented to him. The conclusion is irresistible; the commissioners are not officers under the authority of the United States."

(Page 5266 of the Cong. Rec. for April 11, 1922.)

A majority of the Senate evidently agreed, and the nominations of Senator Smoot and Congressman Burton were approved by a vote of 47 to 25. 6 Cannon's Precedents of the House of Representatives, Sec. 64 (1936).

The arguments used by the Attorney General and the dissenting members of the Senate Judiciary Committee to support the conclusion that Senator Smoot and Congressman Burton were constitutionally entitled to serve on the World War Foreign Debt Commission clearly do not support the conclusion that members of Congress could constitutionally serve as voting members of the Executive Council of the proposed Postal Service Authority. The tenure of such members on the governing body of the Authority would not be limited in time. Their duties would not be confined to a single limited objective. Their responsibilities would not be limited to advising either the President or the Congress -- on the contrary, the Postal Service Authority would have plenary power to carry out and execute the provisions of a comprehensive body of statutory law governing the operation of the entire United States postal system. Over a period of years the Postal Service Authority could, for example, enter into contracts committing the Authority to repay up to \$10 billion in borrowed funds; it could enter into collective bargaining agreements having a profound impact on the postal system; and it would superintend the expenditure of postal revenues and appropriated funds amounting to billions of dollars every year. The executive responsibilities of the Authority would not only be broad, moreover,

they would be of indefinite duration; responsibility for directing the operation of the nation's postal system can hardly be characterized as a "temporary employment," and the task of delivering the nation's mails is hardly the kind of "immediate exigency" entailed in a one-time readjustment of war debts.

Many of the same comments can be made with respect to membership on delegations to the United Nations and its constituent agencies, and membership on such temporary bodies as the Fur Seal Arbitration Tribunal created under the Treaty of February 29, 1892 between the United States and Great Britain to determine the jurisdictional rights of the United States in the seal hunting areas of the Bering Sea, and the tribunal to decide the boundary line between Alaska and Canada under the convention of January 24, 1903 between the United States and Great Britain.

As pointed out by Senator Nelson in his separate opinion on the World War Foreign Debt Commission question (page 5268 of the Congressional Record of April 11, 1922), the two tribunals last mentioned, although temporary in nature, did have authority to make final and binding arbitral decisions without review either by the President or by the Congress. There is a question, however, as to whether membership on an international body created by treaty could ever be an "office under the United States" in the constitutional sense. See 22 O.A.G. 184 (1898), where Attorney General Griggs declared that the dual compensation statute did not prohibit the Secretary of State from paying a Federal Judge for his service as a member of the commission created under the Convention of February 8, 1896 to decide claims growing out of the seizure of vessels in the Bering Sea. In declaring that the commissionership was not a position appointment to which was required by the Constitution to be made in the ways enumerated in Article II, Sec. 2, the Attorney General observed:

"It would seem . . . that there was no expectation that the 'officers of the United States' would be established by treaties between the United States and other countries." (22 O.A.G. at 185)

See also the headnote to this opinion, which states that "occasional and temporary commissionerships created by international agreement" are not constitutional offices.

There is some precedent for Members of Congress serving on Federal boards of a permanent character. The Smithsonian Institution, for example, although it is a "private, nonprofit corporation," discharges functions that are "both private and governmental." (United States Government Organization Manual 1969-70, p. 498.) The Smithsonian Institution is an establishment the members of which are the President, the Vice President, the Chief Justice, and the heads of the executive departments. 20 U.S.C. 41. The statute creating the Smithsonian provides that "[t]he business of the institution shall be conducted at the city of Washington by a Board of Regents . . . to be composed of the Vice President, the Chief Justice of the United States, and three members of the Senate and three members of the House of Representatives; together with six other persons" 20 U.S.C. 42. The Senatorial members of the Board of Regents are appointed by the President of the Senate, to serve during the senatorial term for which they were elected. The regents appointed from the House of Representatives are named by the Speaker of the House to serve for two-year terms. 20 U.S.C. 43. Each member of the board is entitled to be paid necessary and actual expenses incurred in attending board meetings, "but his service as Regent shall be gratuitous." 20 U.S.C. 44.

The constitutionality of having Members of Congress serve on the Board of Regents of the Smithsonian has never been tested in the courts, and, as far as I am aware, has not been the subject of an opinion by the Attorney General. The House Judiciary Committee, however, in its report of February 21, 1899, expressed the view that "the regents and directors and consulting trustees to the various public institutions in the District of Columbia and appointed by the Speaker of the House, are not, nor are any of them, officers of the United States within the meaning of the Constitution." House Report No. 2205, 55th Cong., 3rd Sess., at p. 54. While the report of the House Committee is a detailed and exhaustive one, setting forth a persuasive argument in support of the conclusion that Members of Congress may constitutionally serve on advisory commissions such as the Postal Commission and the Hawaiian Commission, the report is entirely silent as to the reasons which prompted the Judiciary Committee to conclude that the regents and directors of the various public institutions in the District of Columbia were not officers under the United States in the constitutional sense. Neither does it contain any attempt to explain how the Committee's conclusion with respect to these public institutions can be reconciled

with the Committee's express approval of In re Corliss, 11 R.I. 638, supra, where it was held that an unpaid commissioner of the United States Centennial Commission did hold a constitutional office of trust under the United States.

Similarly uninformative is the Attorney General's opinion reported at 26 O.A.G. 457 (1907), wherein the Attorney General concluded, as stated in the third paragraph of the head-note, that "[t]here is no constitutional objection to the election of a member of Congress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to sound public policy."

The National Home for Disabled Volunteer Soldiers, as created by the Act of March 21, 1866, was an establishment consisting of the President of the United States, the Secretary of War, the Chief Justice of the United States, and nine other "managers" elected to six-year terms by joint resolution of Congress. The statute gave the Board of Managers the right of perpetual succession, with power to acquire, hold, and convey real and personal property, to sue and be sued, and to make by-laws, rules and regulations "for carrying on the business and government" of a home for disabled volunteers of the United States Army. (Revised Statutes, Sec. 4825.) While the members of the Board were to receive their actual expenses, none was to receive any compensation as such. (Revised Statutes sec. 4828.)

In 1907, a Member of the House of Representatives wrote to the President asking whether a Member of Congress could be appointed to serve at the same time as a Member of the Board of Managers of the National Home for Disabled Volunteer Soldiers, as well as becoming a local manager of one of the homes. In expressing the view that there was no constitutional prohibition against simultaneous service in Congress and on the Board of Managers, the Attorney General pointed out that the statute as originally enacted had provided that the nine elective managers could not be members of Congress, and this limitation had been deleted by an amendment to the statute enacted in 1867. The Attorney General was thus obviously correct in concluding that Congress intended that its own members should be eligible for election to membership on the Board. The Attorney General also pointed out, correctly, that since the office had been created in the 1860's, and carried with it no emoluments, election of a member of Congress to a seat

on the Board of Managers in 1907 would not conflict with the first part of Article I, Section 6, Clause 2, which prohibits the appointment of a Senator or Representative, during the time for which he was elected, to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time. With respect to the second part of Article I, Section 6, Clause 2, however, the only analysis offered by the Attorney General consisted of this sentence:

"Nor are such managers 'Federal officers' who are prohibited by the Constitution from being members of Congress (U.S. v. Mouat, 124 U.S., 307)." 26 O.A.G. 459.

(As indicated by the headnote quoted above, the Attorney General went on to say that while there was no constitutional objection to a Member of Congress being elected to serve as a manager of the home, "such an election would seem to be contrary to the principles of sound public policy" 26 O.A.G. at 459.)

As we have already seen, the case cited by the Attorney General in his Soldiers Home opinion, United States v. Mouat, *supra*, was not a case arising under Article I, Section 6. The only question presented in Mouat was whether a Navy paymaster's clerk was an officer of the Navy under a statute providing for the reimbursement of travel expenses, and, as demonstrated in United States v. Hendee, 124 U.S. 309 (1888), a paymaster's clerk can be an "officer" within the meaning of one statute and not an "officer" within the meaning of another statute. The precedential value of the Mouat case in a situation like that now under consideration is, in my judgment, limited.

The Board of Managers of the National Soldiers Home, like the Board of Regents of the Smithsonian Institution, were intended to perform a function very different from that performed by the boards of visitors to the service academies. The latter boards -- on which a number of members of Congress serve -- are not responsible for operating the service academies. The Board of Visitors to the Naval Academy, for instance, is simply empowered to visit the Academy, inquire into the state of morale and discipline, curriculum, instruction, etc., and submit a written report to the President setting forth the visitors' views and recommendations pertaining to the Academy. 10 U.S.C. 6968. The Board of

Visitors does not hold title to the property of the Academy, does not hire or fire the staff, does not contract for supplies, and does not have any other executive responsibility. There can thus be little doubt of the validity of the conclusion reached by the House Judiciary Committee in its 1899 Report that the Visitors to the Military Academy and the Naval Academy are not officers under the United States within the meaning of the Constitution. House Report No. 2205, supra, at page 54.

It is well established that an officer on active duty in the armed forces of the United States does hold an "office under the United States" in the constitutional sense. See 40 O.A.G. 301 (1943), where Attorney General Biddle, after citing numerous Congressional precedents, expressed the view that when a member of Congress enters the Armed Forces by enlistment, commission or otherwise, "the individual ceases to be a member of the Congress provided the House or the Senate, as the case may be, chooses to act." 40 O.A.G. at 303.

A comparable conclusion was reached in the opinion reported at 17 O.A.G. 365 (1882), involving the case of a United States Senator who had resigned his seat in the Senate and whom the President wished to appoint to a seat on the Tariff Commission. The Tariff Commission had been created under a statute passed during the term for which the Senator had been elected, and the term was one that would not expire until a year after the time when the President wished to make the appointment. After consulting with the Solicitor General, from whom he obtained a written opinion (which apparently has not been published), the Attorney General advised the President as follows:

"It is unnecessary to consider the question of the policy which occasioned this constitutional prohibition. I must be controlled exclusively by the positive terms of the provision of the Constitution. The language is precise and clear, and, in my opinion, disables him from receiving the appointment. The rule is absolute, as expressed in the terms of the Constitution, and behind that I can not go, but must accept it as it is presented regarding its application in this case." 17 O.A.G. at 365. (Underscoring supplied.)

b. Consequences of a Conflict between the Proposed Legislation and Article I, Section 6.

"It is a rule of general law, that an officer who accepts another appointment inconsistent with the first, is held to have thereby resigned the first." Rowle, A View of the Constitution 184 (2nd ed. 1829). Cf. House Report No. 2205, supra, at pages 58 and 61. As pointed out in 40 O.A.G. 301 at 303, "[t]here have, of course, been cases in which the congressional body affected did not choose to raise the question." If the United States Postal Service Authority were created in the form proposed, it is reasonable to assume that the 92nd Congress, at least -- which would doubtless number among its members many who had voted in favor of creating four offices that could only be filled by Members of Congress -- would not raise the question of whether the Members appointed to such offices should retain their seats in Congress. Moreover, if loss of the Congressional seat were the only possible adverse consequence of a determination that membership in Congress is incompatible with membership on the Executive Council, the risk that either House would act to disqualify a Member who accepted an appointment to the Executive Council might not be of direct concern to the Authority, regardless of how the Members might feel about it. In the context of our present problem, however, loss of the Congressional seat is not the only result that could follow from an apparent conflict between the terms of the legislation and the terms of the Constitution. The proposed legislation does not merely permit Members of Congress to be named as voting members of the Executive Council, it goes so far as to prohibit four of the thirteen seats from being filled by appointment other than from among Members of Congress. If the two types of office are incompatible, there is an obvious risk that because the incompatibility is built into the statute -- that is, because the statute requires appointments to be made from Congress, rather than simply failing to prohibit Congressional appointments -- part or all of the statute might be held unconstitutional by the courts.

In this connection, the Supreme Court has declared that:

"The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is wholly operative as a law." Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 234 (1932).

Section 110 of the bill with which we are concerned here contains a severability provision declaring, in effect, that if any part of the statute is held invalid, the remainder of the statute shall not be affected thereby. The Supreme Court has said, however,

that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." United States v. Jackson, 390 U.S. 570, 585, footnote 27. Notwithstanding the the severability clause, therefore, if a court were presented with the question whether the entire statute must fall because of the fact that almost one-third of the voting members of the governing body of the Authority are required to be members of Congress, it is conceivable that the court might hold that Congressional representation on the governing body is such an integral part of the statutory scheme that the entire statute must fall if the provisions relating to Congressional Councilors are in conflict with Article I, Section 6 of the Constitution.

On the other hand, it is also conceivable that a court which considered the Congressional Councilor provisions to be unconstitutional might decide that such provisions are severable from the rest of the statute, as section 110 of the bill indicates they should be. In that event, the vote of a Congressional Councilor on a proposed rate change, a resolution to issue bonds, or any other matter pertaining to the operation of the postal system would, in contemplation of law, be a nullity. The presence of Congressional Councilors could not be counted in determining the presence of a quorum under 39 U.S.C. 203(h) as contained in section 102 of the bill, and any resolution of the Executive Council -- including resolutions on bond issues and rate changes -- which depended on the vote of a Congressional Councilor for passage would necessarily fail of adoption.

I consider it unlikely that the so-called "de facto doctrine" could be invoked successfully in this context. As applied in cases involving a defect in the authority of a judicial officer, the de facto doctrine has been described as meaning that "where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer de facto and binding upon the public." McDowell v. United States, 159 U.S. 596, 602 (1895). It appears to be well settled, however, that where the challenge to the officer's authority "is based upon nonfrivolous constitutional grounds," the de facto doctrine will not prevent the Supreme Court from examining the authority of the officer to act. See Glidden Co. v. Zdanok, 370 U.S. 530, 535, and 536 (1962).

The constitutional question is one that could very well be presented to the courts. 39 U.S.C. 205, as it would be enacted by the bill, provides that the Postal Service Authority may be

sued in its official name, and 39 U.S.C. 1257, as contained in the bill, provides that any final decision of the Authority with respect to changes in postage rates or types of service "shall be subject to judicial review," subject to certain limitations. Such judicial review may be had by way of proceedings in the Court of Appeals to enjoin or set aside the decisions of the Authority in accordance with the rules adopted pursuant to 28 U.S.C. 2112. See 39 U.S.C. 1257, as it would be enacted by section 102 of the bill, and compare section 109(h) of the bill, amending 28 U.S.C. 2341 and 2342. Under 39 U.S.C. 1257, as contained in the bill, the Court of Appeals would be empowered to hold unlawful and set aside a final decision which the petitioner showed to be "contrary to constitutional right, power, privilege or immunity" (Underscoring supplied.) Particularly in a situation where a rate increase depended on the favorable vote of one or more Congressional members of the Executive Council, I believe that there is a strong probability that a mailer who wished to contest a rate increase could raise the constitutional issue in the Court of Appeals.

This consideration would obviously be of very great concern to the bond counsel called upon to render an opinion on a bond issue floated by the Postal Service Authority. The bill expressly provides that "obligations issued by the Authority . . . shall . . . not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States." (39 U.S.C. 1005(d)(5), as contained in section 102 of the bill.) In view of the obvious possibility that the courts might hold that the Postal Service Authority had no legal existence at all, or, in the alternative, that four of the thirteen members of the governing body of the Authority could not vote on a resolution to issue bonds or on a resolution to adopt changes in the rate structure -- a rate structure that would be expected to generate the revenues used in amortizing the Authority's bonds -- I am bound to say that if I were called upon to act as bond counsel with regard to the first Postal Service Authority obligations offered for sale to the public under the proposed legislation as set forth in the Committee Print of December 19, 1969, and particularly if the resolution to issue the bonds could not have carried without the vote of one or more of the Congressional Councilors, I do not believe I could give an approving opinion.

Without an approving opinion by recognized bond counsel, I am confident that the obligations of the Postal Service Authority could not be sold in the public market at competitive interest rates.

Within the Executive Branch of the Government, the final legal authority on a question of this type is, of course, the Attorney General. As you know, Attorney General Mitchell happens to have had a very distinguished career as a bond attorney. You may wish to solicit his views, either formally or informally.

David A. Nelson
General Counsel

January 12, 1970

MEMORANDUM

FOR: JOHN EHRLICHMAN
FROM: HENRY CASHEN AND CHUCK COLSON
SUBJECT: COMPARABILITY PAY INCREASE

We understand that the President has decided to ask for a 6% comparability increase to be effective January 1, 1971 and to disclose this in the budget; the budget will contain the item of \$1.2 billion to reflect the 6% increase for 6 months.

Under the Comparability Act the President must report to the Congress on the comparisons between Federal and private enterprise rates based on an annual BLS survey. The actual figures show 5.5 for the fiscal year ended July, 1969 and an additional 2.5 for the 6 months subsequent. By law this must be reported (not necessarily at this time, however). When reported, the disparity between the President's recommendations and the statutory basis for those recommendations will be obvious.

We do not challenge the decision but rather the strategy of how and when it is presented. An approach which we recommend is that the budget message be kept silent on the amount and/or timing of the comparability increase. The budget message could merely state that the report of the Budget Bureau and the Civil Service Commission required in accordance with Executive Order 11073 has not yet been made available to the President and will not be until April 1st, at which point the President will make appropriate comparability recommendations to the Congress. In reply to any questions as to how the \$1.2 billion was arrived at, we would merely say that it is an estimate based upon possible recommended increases and based upon projected reductions of Federal employees.

This approach would leave all option open. On April 1st we could recommend 6% beginning in July but with a 3% reduction in Federal employees or we could recommend 6% effective January 1st with no

January 12, 1970

change in Federal employees. (Our decision could take into account the legislative situation at that time.)

The disadvantage of disclosing our plan now as part of the budget message is that it will (1) imperil postal reform and (2) draw the issue very clearly for the Congress, probably causing the House and Senate conferees to report out HR 13000, which even in the lesser Senate version imposes a 7% increase beginning in April. The President presumably would have to veto it but our legislative people tell us that the chances of sustaining the veto would be very poor. We might end up, therefore, having the pay increase forced upon us and then have nothing whatever to trade with as far as postal reform is concerned.

As a practical matter it is our view that the Congress will not buy the President's recommendation, whenever it is made, now as part of the budget or later in a separate message. The only advantage to delay is that we may be able to slide in postal reform and we do keep our options open.

As a final point, the law does not require the President to disclose his intentions in the budget message and, indeed, not until a report has been formally received from the Budget Bureau and Civil Service Commission. This has not happened.

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

WASHINGTON 25, D.C.

JAN 12 1970

MEMORANDUM FOR MR. CASHEN

Subject: President's Actions Required by 1962 Salary Reform Act

Section 502 of the Federal Salary Reform Act of 1962, declares that Federal salary fixing shall be based on two principles:

- a) Equal pay for substantially equal work.
- b) Comparability with private enterprise salary rates for the same levels of work.

Section 503 states that in order to give effect to the policy set forth in Section 502, the President:

- a) Shall direct such agency (or agencies) as he deems appropriate to prepare and submit to him annually a report comparing Federal and private enterprise salary rates based on an annual survey of private enterprise rates conducted by the Bureau of Labor Statistics.
- b) Shall seek the views of such employee organizations as he deems appropriate in such manner as he may provide.
- c) Shall report annually to the Congress what the comparisons are and make such recommendations for revision of "Statutory Salary Schedules, salary structures, and compensation policy, as he deems advisable."

Section 505 authorizes the President to issue policies and rules with respect to the foregoing. Executive Order 11073 of January 2, 1963, appoints the Director, Bureau of the Budget, and the Chairman, Civil Service Commission, as the President's agents to make the comparative report, and stipulates that they shall submit it not later than December 31 of each year (a date which seldom has been met because of other considerations bearing on pay decisions).

The order further requires the Director and the Chairman:

- a) To obtain views and recommendations of agencies affected.
- b) To provide the employee organizations with the HLS findings, and the methods and results of their comparison; to receive and consider views of the organizations; and to transmit their views (along with those of the agencies) to the President with their annual report.

In summary, the law requires the HLS Survey, an annual comparative report from the President's agents, and a report from the President to Congress which includes both the comparability findings and the President's recommendations for legislative action.

(Signed) Robert P. Mayo
Robert P. Mayo
Director

January 12, 1970

MEMORANDUM

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December 17, 1969

FOR: THE PRESIDENT

FROM: JOHN EHRLICHMAN

SUBJECT: PHOTOGRAPH WITH JAMES RADEMACHER,
PRESIDENT OF THE NATIONAL ASSOCIATION
OF LETTER CARRIERS AND CHAIRMAN OF
THE GOVERNMENT EMPLOYEES COUNCIL

1. Mr. Rademacher wants the picture to be used on the cover of the letter carriers magazine in January and to be hung in every post office symbolizing the agreement between the Administration and the unions.
2. Mr. Rademacher has worked closely here with Henry Cashen and Chuck Colson in making it possible to agree on a postal bill which, although not completely identical with the Postmaster General's Bill, provides the basic essentials with which we were concerned and enables the Department to be removed from the Federal budget.
3. Mr. Rademacher has worked very hard in selling postal reform to his union, the other unions involved and the House Post Office and Civil Service Committee. The plan is that the bill will be reported out of the House Committee tomorrow or if that fails as soon as Congress returns in January.
4. Without Mr. Rademacher's support, postal reform in any form would never have been possible. This week's action is the first real progress.
5. Rademacher should be congratulated on the fine job he has done cooperating with your staff and in securing support for the reform bill. He should be encouraged to see it all the way through.
6. The meeting should be limited to the photograph and an expression of thanks. Substantive questions need not be discussed.