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SPECIAL REPORT

OF THE

JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

PURSUANT TO

SECTION 402(a)(2) OF THE
LEGISLATIVE REORGANIZATION ACT OF 1970

IDENTIFYING

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

THE FRANKING PRIVILEGE OF MEMBERS OF CONGRESS

October 16, 1972

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SPECIAL REPORT

OF THE

JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

CONGRESS OF THE UNITED STATES

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SENATOR LEE METCALF, Montana, *Vice Chairman*

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(II)

THE FRANKING PRIVILEGE OF MEMBERS
OF CONGRESS

October 16, 1972

Printed for the use of the Joint Committee on Congressional Operations

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1972

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[Public Law 91-510]

TITLE IV—CONGRESS AS AN INSTITUTION

PART 1—JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

* * * * * * *

DUTIES OF JOINT COMMITTEE

Sec. 402. (a) The Joint Committee shall—

* * * * * * *

(2) identify any court proceeding or action which, in the opinion of the Joint Committee, is of vital interest to the Congress, or to either House of the Congress, as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of that House of the Congress which is specifically concerned or to both Houses of the Congress if both Houses are concerned.

* * * * * * *

INTRODUCTION

Two recent opinions announced by United States District Court judges and other pending actions in federal courts involving the proper use of the congressional franking privilege by Members of Congress have focused the attention of all Members on this issue.

The Joint Committee has received numerous requests for copies of decisions and information regarding these court proceedings. In order to facilitate our response to these requests and in order to afford all Members of Congress an opportunity to study these late-breaking developments regarding the handling of congressional mail, we have prepared this committee print: *The Franking Privilege of Members of Congress.*

The two recent decisions—*Hoellen* v. *Annunzio*, decided September 15, 1972, and *Schiaffo* v. *Helstoski*, decided October 10, 1972—have held that the mailing of material under the congressional frank—such as questionnaires outside the boundaries of the congressional district (*Annunzio*), and questionnaires, surveys, and public documents reproduced at the Member's expense, even including a parchment reproduction of the Declaration of Independence, mailed within the boundaries of the reapportioned congressional district (*Helstoski*)—constitutes a misuse of the franking privilege by a Member.

An appeal has been filed in the *Annunzio* case and one is being prepared in the *Helstoski* case. Certainly the law is not settled by these recent developments. However, because of the nature and the timing of these actions and resulting decisions, and in order to facilitate your attention to these decisions at the earliest possible moment, this Special Report of the Joint Committee has been prepared. In it are case briefs of the pending actions involving use of the frank, of which we are aware, and the full text of the *Annunzio* and *Helstoski* decisions.

In addition, the text of the only previously reported franking decisions—*Straus* v. *Gilbert*, decided June 11, 1968, and *Rising* v. *Brown*, decided June 1, 1970—have been included, in order to make this committee print as complete a document as we could make it, relating to court proceedings involving the congressional frank.

JACK BROOKS, *Chairman.*
LEE METCALF, *Vice Chairman.*

COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS

THE FRANKING PRIVILEGE OF MEMBERS OF CONGRESS

Schiaffo v. *Helstoski*

Civil Action No. 1571–72 (D.N.J.)

Brief.—This action was brought to enjoin Representative Henry Helstoski of the 9th Congressional District of New Jersey from mailing certain documents and materials under his congressional frank. Plaintiff in the action is Alfred D. Schiaffo, a New Jersey State Senator and Representative Helstoski's opponent in his campaign for reelection to the 93d Congress.

The complaint alleges that Mr. Helstoski has mailed under his frank specifically described documents and materials to residents of the communities comprising the present 9th Congressional District and of the communities that were added to that district by the reapportionment decision of the U.S. District Court for the District of New Jersey of April 26, 1972. In that court reapportionment, some eight municipalities now in the 9th District were removed and some eight other municipalities were added.

The documents and material of which plaintiff complains are categorized and described in detail by the U.S. District Court (for the District of New Jersey) judge, Judge Leonard I. Garth, in his opinion, as is noted below. In each instance, the franked mailings were sent to specifically-identified addresses or addressed to "Postal Patron—Local, 9th Congressional District, New Jersey."

Plaintiff contends that all of the described franked mailings were "an abuse and illegal use of the franking privilege" and sought, in addition to an injunction against future such mailings by defendant, damages in the amount of the postage costs defendant would have incurred had the items not been mailed under the frank.

Status.—Following the denial by the court of a temporary restraining order requested by plaintiff, hearings were held on the issuance of a preliminary injunction. The parties agreed that those hearings would constitute the final hearings regarding the permanent relief requested and the decision of the court was announced from the bench by Judge Garth on October 10, 1972. The transcript of those proceedings was released by the court on October 13, 1972, to serve the purposes of a formal opinion.

Judge Garth, in his findings of fact, described the franked mailings under contention as follows:

> Group I: *The Yearbook of Agriculture, 1963*, sent unsolicited to some 280 persons with a brief "cover" letter explaining the purpose of the book and the identity of the sender; *The Capitol, Symbol of Freedom*, a 1961 edition, of which some 500 copies were mailed to Republican County Committee

persons, unsolicited, again with a cover letter (Democratic Committee persons had previously received copies); a GSA publication, "Consumer Product Information," some 50,000, received under a congressional allotment, were sent out stamped with a "compliments of . . ." stamp.

Group II: Reprints, prepared at the Congressman's expense of the "Consumer Product Information" pamphlet; a newsletter, "Washington Report," mailed to postal patrons in a quantity of about 206,000, prepared at the Congressman's expense; an annual legislative questionnaire, again sent postal patron and prepared at the expense of the Congressman; a "1972 Young Voter Opinion Survey" sent to 15,000 specifically addressed young voters; a brochure on drugs, privately prepared at the Congressman's expense.

Group III: A postal patron mailing of the results of the earlier legislative questionnaire, of which 206,000 copies were sent; the Declaration of Independence, prepared on parchment for framing, copies of which were yet to be mailed with a reprint of a statement by the Congressman from Congressional Record to Republican and Democratic County Committee people, local officials, schools and libraries.

Group IV: A report on revenue sharing, 280 copies mimeographed at the Congressman's expense, mailed to public officials on an unsolicited basis; a survey on gun control legislation, to be sent to some 40 police chiefs.

After his disposition of the questions of jurisdiction (specifically, plaintiff's standing) and justiciability in a manner favorable to the plaintiff and, with his rejection of Mr. Helstoski's contention that "the ascertainment as to what is official business and how that business is to be conducted by duly elected Congressmen is, within broad limits, a matter which is exclusively reserved to the legislative branch of government," Judge Garth moved on to the merits of the case.

He found that all the documents under Group I, above, were "public documents printed by order of Congress" and specifically authorized to be mailed out under the frank by a Member in accordance with section 3211 of Title 39, United States Code.

In arriving at this initial conclusion, Judge Garth carefully traced the legislative history of the congressional franking privilege back to its origin in the Act of June 12, 1895, and declared that, from that time until the most recent congressional enactment of a franking provision in the Postal Reorganization Act of 1970 [Pub. L. 91–375, 84 Stat. 719], the language had remained

> . . . identical with the original statute of 1895 as respects public documents sent out by Congressmen during their terms. Since no change in substance or Congressional intent has occurred since the original enactment, the original Congressional intent and purpose behind the statute is controlling. [*Transcript*, printed p. 5, at p. 21.]

He dismissed plaintiff's allegations that even such mailings of public documents must be limited to the present constituency of a Member ("the 1895 Act makes no such distinction between a Congressman's constituency and any other persons") and that the inclusion of

a cover letter made the mailings unfrankable (it is "in accordance with the spirit of the requirement in the original statute of 1895, namely that distributors . . . stamp their name and office upon them").

Again relying on the 1895 legislative history, Judge Garth held that the Group II mailings, above, were unsolicited and not within any of the permissible categories of the statute—official correspondence, public documents or any part of the Congressional Record—and were not frankable. He found the *scope* of the franking privilege unchanged since 1895, even though Congress had legislated to permit "postal patron" mailings under the frank.

Judge Garth took judicial notice of what he described as "what is evidently the current practice or usage" of Members regarding franked mail.

> A law must set cognizable standards so as to be able fairly to regulate conduct and afford public scrutiny. When standards are so broad or vague so as not to be understood, they are struck down as constitutionally infirm. Importing practice or usage into statutory construction would import the same kind of infirmity. If a law passed by Congress can be changed and altered, not by official legislative Act, but rather by practice or usage, no scrutiny over legislative action is ever afforded the public. Congress can legislate by legislative Act alone. It is for Congress and not for this Court to enlarge, restrict or otherwise modify Congressional franking privileges. Congress acted in 1895; in every subsequent Amendment or re-enactment of the law, up and through 1970, it did not evince an intent, in its official action, to deviate from its original intent. [*Transcript*, printed p. 5, at p. 31.]

Having held that the statutory provision governing the use of the congressional franking privilege prohibits all unsolicited mailings of Members to non-government officials that are not specifically identified in the statute, Judge Garth also held that the Group IV mailings, above, were unfrankable. He determined the original legislative intent to be to define Government officials as "officers of the United States, Senators, Members and Delegates in Congress." He found that intent to be unchanged and held mailings of material not otherwise identified in the statute to State or local officials to be unfrankable.

The materials in the Group III mailings, with the exception of the parchment copies of the Declaration of Independence, had all appeared in the Congressional Record. Judge Garth noted:

> I find nothing in the legislative history which prohibits defendant from copying matter that appears in the Congressional Record, printing it at his own expense, and distributing it under his frank. Unlike the public documents section [of the statute], there seems to have been no intention to restrict distribution to actual editions of the Congressional Record as printed by order of Congress. In fact, the very language of the section which permits frankable distribution of parts of speeches or reports certainly does not contemplate that Congressmen tear them out of official publications. [*Transcript*, printed p. 5, at p. 32.]

Since the Declaration of Independence had not appeared in the Congressional Record on defendant's insertion, Judge Garth found it to be in the same category as the Group II materials, unfrankable to unsoliciting addressees.

With regard to plaintiff's continued challenge of the mailings outside the Congressman's present congressional district—in this instance, to "Postal Patrons"—Judge Garth stated:

> A direct answer is provided by 39 C.F.R. 122.4(D)(2) [Code of Federal Regulations] which explicitly permits mailing under the simplified address form for a member of the House under his frank: "To customers within the district the Member or Member-elect was elected to represent; and within such other areas of the state as may be encompassed in his district under a reapportionment law." [*Transcript*, printed p. 5, at p. 33.]

The plaintiff's claim for damages was denied.

> . . . In the present situation, I find on balance, that the deterrent effect of damages is outweighed by the resulting inequity and disruption that might ensue. I cannot, for example, turn away from the fact that defendant has acted in good faith and on the example of many others who have used their frank for similar mailings. . . . I do not condone the fact that many individual members of Congress have apparently adopted a practice of franking which in my view is in violation of a statute, the substance of which they have never amended by an official Act. But I am also not unmindful of the fact that to permit damages against the defendant, and thus to open the floodgates for damage actions against large numbers of Congressmen could wreak havoc with the daily workings of the Legislative Branch. [*Transcript*, printed p. 5, at pp. 35–36.]

Judge Garth indicated that he would sign an order in accordance with his opinion granting an injunction against the mailings he had found to be impermissible.

The transcript of Judge Garth's reading of his opinion from the bench follows.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Transcript of Proceedings, Newark, New Jersey,
October 10, 1972

ALFRED D. SCHIAFFO, PLAINTIFF,

v.

HENRY HELSTOSKI, DEFENDANT.

BEFORE: Hon. Leonard I. Garth, U.S.D.J.

Appearances: Robert B. Budelman, Jr., Esq. (New York Bar), Attorney for the Plaintiff; Alfred A. Porro, Jr., Esq., Attorney for the Defendant; Eugene L. Dinallo, Esq., Attorney for House of Representatives of the United States.

Fred M. Caruso, C.S.R.

The COURT. Gentlemen, I have read your briefs, your initial briefs, your supplemental briefs, your briefs submitted in response to questions that I had, your briefs submitted with respect to the 1895 legislative history that we turned up and the various issues that have been presented. Is there argument that is not covered in your brief, Mr. Budelman, in your numerous briefs, Mr. Budelman, that you feel that you must necessarily make at this time?

Mr. BUDELMAN. Your Honor, in view of the Court's statement I have an affidavit which I served on my adversary this morning.

The COURT. Well, I have not seen that one, have I?

Mr. BUDELMAN. No, Your Honor.

The COURT. Why am I getting an affidavit after we have left the starting gate and are practically approaching the finish line?

Mr. BUDELMAN. Well, first of all, Your Honor, on Friday afternoon, September the 29th was the conclusion of the hearing; subsequent to the conclusion of the hearing

we came into possession of another document which has been sent out by the Congressman.

The COURT. When did you come into possession of that?

Mr. BUDELMAN. It was the latter part of the week, Your Honor, it must have been—I did not physically get possession of this document, I guess, until Thursday or Friday.

The COURT. All right. Let us see what you have, Mr. Budelman. The reason I ask you as to whether or not either counsel have anything further to say is that I have a draft of a memorandum that has been prepared on the basis of your respective briefs, but there is no point, if you have something else which might influence my thinking or decision then I obviously will hold that until after I have heard from you gentlemen, if not then I will be prepared to announce my decision at this point.

Mr. BUDELMAN. Your Honor, here is the affidavit I have, the affidavit also includes, Your Honor, the copy of a face page of a booklet called *"The Constitution"* which was printed by order of Congress and also includes a copy of a statute which deals with the distribution of an article called *"The Declaration of Independence,"* and I bring both of these to the attention of the Court on the question of public document.

The COURT. With exception of the affidavit is there anything else you desire to address the Court on?

Mr. BUDELMAN. Your Honor, I would like to limit myself on one item that was not questioned in the brief and that was on a question of the postal patron mailings, Your Honor, and I would like to limit my comments to that.

The COURT. I am not restricting you, but I just want to know, sir.

Mr. BUDELMAN. Your Honor, I think from the legislative history of the postal patron mailings it indicates that prior to 1963 that the members of Congress could send out postal patron mailings in rural areas, whereas they did not have that privilege in city areas, and that after 1963 they were given the privilege to send it out to city areas. But the public is not given that privilege, insofar as the regulations are concerned postal patron mailings can still only be sent by the public into rural

areas. So that when you talk about a candidate for public office he is not on equal footing insofar as——

The COURT. Isn't the issue before me on the terms of what is known as official business and isn't it so that the postal patron mailings do not lend any gloss to the definition of official business, do not restrict or expand it but say whatever is official may or may not be sent by postal patron mailings, is that correct?

Mr. BUDELMAN. Yes, sir. But with the further caveat that postal patron mailings cannot be sent into an area which is not encompassed in the Congressman's district. One of the problems here is the extent of the amount of mail which is going into seven municipalities which are not encompassed within the district, and as I understand this Court's decision in the Reapportionment case, that the district is set up for elections, and in the dissenting opinion the Court indicates that "These districts are created only as an interim change which will be changed apparently by the Legislature after November."

So that, Your Honor, I think that the constituents of the Ninth Congressional District as it existed prior to this Court's decision had the right of representation by Congressman Helstoski. I think the Court, insofar as I had understood the decision, changed this only insofar as of January 1, there would be elections held which would then encompass a new district, but the Court did not intend to disenfranchise people who were already members of the Ninth Congressional District. And for that part, Your Honor, we say that those mailings which went into the seven municipalities which were not in the Ninth Congressional District as of January 1 of this year are entirely improper and not provided for by the postal regulations.

The COURT. All right. I have some questions I would like to put to you, Mr. Porro, if I may, and I just want to clear my mind on something. It is conceded, is it not, that of the 50,000 consumer index pamphlets allotted to Congressman Helstoski that they have all been distributed, is that not correct?

Mr. PORRO. Yes, sir.

The COURT. Is it also the fact, is it not, that the "*Declaration of Independence*" which the Congressman wanted to send out was on a partial basis and not actually in the Congressional Record. Is that correct?

Mr. PORRO. The Congressional piece I have with me, Your Honor, does not reprint, so to speak, the Declaration itself.

The COURT. All it has is comments of the Congressman?

Mr. PORRO. Yes, sir.

The COURT. I do not think that appears in the exhibits.

Mr. PORRO. I did not consider it as part of the subject matter of the case.

The COURT. That came out in the colloquy toward the end of the hearing when I inquired of other matters, and I would like to have that marked as C–2, it troubled me at the time I made my findings of fact and I thought this would be the case, but I wanted to be absolutely certain, sir.

(Reprint of September 21, 1972 Congressional Record, Number 148, marked Exhibit C–2 in evidence.)

The COURT. C–2 in evidence is a reprint of a September 21, 1972 Congressional Record, Number 148, of the proceedings and debates of the 92nd Congress, Second Session, and it reflects comments by Mr. Helstoski, but it does not reflect the exact verbiage of the "*Declaration of Independence*", it just refers to it.

Mr. PORRO. The record should show, however, I do not think there was much question that the "*Declaration of Independence*" has in fact not only been referred to, but cited in whole and in part many and many times throughout the Congressional Record.

The COURT. But it is not that which the Congressman expects to distribute, he expects to distribute about 5,000 facsimile copies?

Mr. PORRO. Yes, sir.

The COURT. I have two questions that I desire to direct to the both of you: I have furnished to you either the citations or a copy of the 1895 Act which had not initially been referred to by either of you gentlemen pertaining to the franking privilege and I should like your views as to whether or not you regard that, and on what you base your views, as being a restrictive act and as to whether or not it should or can control the determination of the Court. Who wants to start? I will hear either of you or both of you or you may submit just on your papers of what you have already given me; because I have some views of my own in that regard.

Mr. BUDELMAN. Your Honor, I think the 1895 Act has to be taken into consideration with the debate which occurred in 1893 which definitely shows the intention by the House at that time, which is the only portion of the debate which I had in the Congressional Record, shows the intention to limit the word "Correspondence" to——

The COURT. I am familiar with the debate, that is the one I cited to you, is it not?

Mr. BUDELMAN. Yes, sir.

The COURT. You contend that it is controlling upon the Court?

Mr. BUDELMAN. Yes, sir. And I think if the Congress intended to expand the item of correspondence it could have done so at any particular time.

The COURT. What about you, Mr. Porro?

Mr. PORRO. Quite frankly, Your Honor, I am looking for the section you are talking about. I think that we here today are bound by one thing: The statutes as they read today. The legislative history gives us the indication of interpretation over the years and the reason for certain changes; I have found nothing either in the citation or in the discussion, that discussion that was referred to was not a legislative history kind of discussion as I see it. But, as we said in our brief, and I will rest on that, that since that point of discussion many of the details of the franking privilege has been clarified. And I think Your Honor must decide this case on the backdrop of those clarifications throughout the years.

The COURT. Thank you, gentlemen. I do not think that the material submitted to me this morning, although I will direct that they be filed, the affidavit that is Mr. Budelman's, that Mr. Budelman submitted, I do not think that they are controlling with respect to the issues which I intend to discuss with you. By virtue of the fact that we have had a relatively short period of time between the conclusion of the testimony this morning, that time I might parenthetically note has been shortened by the imminence of election and the activities which both parties should or may desire to utilize for their own benefit, I do not have as yet a written opinion for you gentlemen so I am going to have to trespass upon your time in reading into the record, you may have the transcript, of course, the decision that I have reached with respect to the submissions made and my own research and my

own views of the matter. To the extent that I may eliminate in the reading of this some of the citations then you may get them from the final opinion. I do not think they are going to be essential to you for the purposes of any review that you may desire to make of my decision, and my own thought was it was more important to get this immediately out to you than it was to wait for the refinements and the polished, hopefully polished opinion that you might otherwise expect.

First, let me deal with the findings of fact that I have made as a basis of my opinion.

Defendant, a Democrat, has served eight years in the Congress, is in his fourth term, commenced his first term in February, 1965, and is running for election to the newly reapportioned Ninth Congressional District.

Plaintiff, a Republican, is presently a State Senator in the New Jersey State Senate and is his party's candidate for the defendant's Congressional seat in the November, 1972 election.

The Ninth District consists presently of the following municipalities in Bergen County:

> "NINTH DISTRICT—Bergen County: That portion embracing the Boroughs of Alpine, Bergenfield, Bogota, Carlstadt, Cliffside Park, Closter, Cresskill, Demarest, Dumont, East Rutherford, Edgewater, Englewood Cliffs, Fairview, Fort Lee, Haworth, Leonia, Montvale, Moonachie, New Milford, North Arlington, Northvale, Norwood, Old Tappan, Palisades Park, Ridgefield, Rockleigh, Rutherford, Tenafly, Teterboro, Wallington and Wood-Ridge, City of Englewood and Townships of Lyndhurst, Ridgefield Park, Rivervale, and Teaneck. Population (1960), 390,134; estimated to July 1969, 510,000. Congressional Directory 92nd Congress, Second Session, P. 108.

For ease in reference throughout this opinion I shall refer to the aforesaid district as area A.

On April 26, 1972, the United States District Court for the District of New Jersey, in the case of David v. Cahill, 342 F. Supp. 463 (1972) Ordered, adjudged and decreed that Governor William T. Cahill and all election officials of the State of New Jersey "shall conduct the primary election on June 6, 1972 to choose candidates

for membership in the House of Representatives from New Jersey and the general election on November 7, 1972, for membership in the House of Representatives from the following single member districts, which districts were thereafter designated and resulted in a redistricting of the Ninth District, as well as other Congressional districts.

By reason of the redistricting decree the following municipalities will be included in Congressional districts other than area A: Montvale, North Arlington, Wallington, Wood-Ridge, Ridgefield Park, Teaneck, Bogota. And the following municipalities will now be included in the new Ninth District: Bergen County: Harrington Park, Little Ferry, Park Ridge, River Edge, Portion of South Hackensack. Hudson County: Secaucus, Union City, North Bergen.

The additional towns to be included in the Ninth Congressional District will be referred to as Area B.

With respect to the particular mailings and publications brought into issue by the complaint and hearing I will refer to four different groups.

GROUP I: The Yearbook of Agriculture, 1963. On or about June 16, 1972, after the primary election, approximately 280 copies of a Department of Agriculture Publication which is also a House Document entitled "The Yearbook of Agriculture 1963—A Place to Live" was mailed under defendant's franking privilege to specifically-addressed public officials in Areas A and B. Enclosed between the cover and the first page of each Yearbook was a brief "cover" letter explaining the purpose of the book and identifying its sender. With the exception of three or four requests, the mailing of these 280 books was unsolicited. Defendant intends to continue distribution of various editions of this publication under his frank.

The Capitol, Symbol of Freedom. On or about August 23, 1972, defendant sent out unsolicited approximately 500 copies of the 1961 edition or some other edition of a magazine entitled "The Capitol, Symbol of Freedom" a House Document printed by order of Congress. Defendant had made similar mailings of this magazine for the past eight years. The magazines involved in the 1972 mailing were mailed under defendant's franking privilege to Republican County Committee people in Areas A

and B. They were sent only to Republicans because (1) defendant had previously mailed similar publications to Democratic Committee persons the year before, and (2) defendant had copies of the magazine left over in his office.

Defendant's office stamped these magazines "Best Wishes Henry Helstoski, Congressman New Jersey Ninth District" and enclosed with them a cover letter explaining the purpose of the distribution as well as inviting the recipients of the magazine to call upon the defendant any time they had need of other Federal publications made available to him for distribution. Defendant intends to continue mailing these publications in various editions as before.

Consumer Product Information Index. On or about September 1, 1972, defendant began a mass mailing under his franking privilege of 50,000 copies of a publication entitled "Consumer Product Information" to postal patrons in the Areas A and B. The publication is an index of pamphlets available from the Consumer Product Information Coordinating Center of the General Services Administration (GSA) and contains on its inside back cover order forms for such pamphlets on which postage has been paid by the GSA. The Index itself is printed by the GSA.

With regard to this Index, marked Defendant's Exhibit D–5, sometime in July or August 1972, defendant received an allotment of 50,000 from the Consumer Product Information Coordinating Center of the General Services Administration.

The front of the outside page of the Index as received was in blank and the address side was also in blank except for the words "Consumer Product Information, an index of selected Federal Publications on how to buy, use and take care of consumer products."

On certain copies of the GSA publication (D–5) defendant printed at his own expense and by his own printer a "Dear Friends" letter reproducing his letterhead which letterhead displayed his picture on one side and "Congress of the United States, House of Representatives, Official Business, Henry Helstoski m.c., Postal Patron—Local 9th Congressional District, New Jersey" on the address side. As to the rest of the 50,000 GSA Publications, defendant stamped one side of the brochure

with the legend "Compliments of Your Congressman Henry Helstoski 9th District, New Jersey" and enclosed the pamphlet in a brown envelope marked "public document" and bearing his frank. Defendant has already distributed his 50,000 allotment of these GSA publications throughout Areas A and B under his franking privilege.

There is no prospect of defendant distributing any further of these particular alloted pamphlets as his entire allotment has already been distributed.

GROUP II: Consumer Product Information Reprints. In addition to the alloted 50,000 GSA Index's already distributed, defendant has printed or is in the process of printing 156,000 additional copies of the Consumer Product Information Index at his own expense which copies of the Index are to be mailed unsolicited under the franking privilege as postal patron mail to Areas A and B. These additional 156,000 copies of the Index have not been provided to defendant by any official allotment, either from the Executive or the Congress, nor has their printing been in any way officially authorized.

Newsletters. On or about September 13, 1972 defendant sent unsolicited in a mass mailing as postal patron mail under his frank 206,000 newsletters entitled "Washington Report" to Areas A and B. These newsletters were addressed to "Postal Patron Local, 9th Congressional District, New Jersey" and the envelopes in which they were sent were stamped "Public Document, Official Business." Other copies of the newsletter have been sent to specific addressees outside Areas A and B.

The "Washington Report" was prepared sometime prior to August 29, 1972 at defendant's own expense. Its publication was not authorized by order or resolution of Congress. Various editions of the "Washington Report" have been distributed on a regular and unsolicited basis to defendant's constituents. Defendant intends to continue sending to postal patrons in Areas A and B copies of the "Washington Report" on an unsolicited basis.

February or March Questionnaire: From February, 1972 through May, 1972, the defendant mailed his annual legislative questionnaire to each postal patron in Areas A and B. The questionnaire had not been solicited by

any of the postal patrons. It had been printed at defendant's own expense and was mailed under his frank.

Young Voter Questionnaire: In or about August, 1972, defendant mailed under his franking privilege to 15,000 specifically addressed young voters, and/or graduating students in Areas A and B, a Young Voter Opinion Survey. This questionnaire was printed at defendant's own expense and had been unsolicited.

Drug Brochure: Defendant intends to mail unsolicited under his franking privilege 206,000 copies of a brochure on the drug problem which will be prepared by private individuals and printed at defendant's expense; the mailing will be sent to postal patrons in Areas A and B.

GROUP III: Results of February or March Questionnaires. Shortly after June 28, 1972, the defendant mailed, unsolicited to postal patrons in Areas A and B under his franking privilege, 206,000 copies of the results of the questionnaire which result had been printed in the Congressional Record of Wednesday, June 28, 1972. The copy of these results had been printed at defendant's own expense.

Declaration of Independence. Defendant intends to mail unsolicited under his franking privilege, prepared on parchment for framing purposes, 5,000 copies of the Declaration of Independence together with a statement inserted in the Congressional Record by defendant in the early part of September, 1972, both of which have been printed at his own expense. This mailing will be sent to the Republican and Democratic County Committee people, officials, schools and libraries with a letter indicating that more copies will be available upon request.

GROUP IV: Revenue Sharing Report. Defendant has mailed 280 copies of a report on Revenue Sharing printed at his own expense to public officials in Areas A and B and will mail unsolicited six or seven hundred updated versions of these mimeographed reports to public officials in Areas A and B. These reports will be mailed under defendant's frank.

Gun Control Survey. Defendant intends to send an unsolicited Gun Control Survey to 40 police chiefs in Areas A and B under his franking privilege. These surveys will be printed at defendant's own expense.

General Findings. I find that as a result of advisory opinions issued by Congressional Committees and pre-

viously by the post office department that defendant had reasonable cause to believe that all his mailings under discussion to date and all his intended mailings would be permitted under the franking privilege. I also find that the distribution of these materials could not be characterized as the type of electioneering aids which were found in Rising v. Brown, 313 F. Supp.

Jurisdiction. This is an action alleging abuse by the defendant of his Congressional franking privilege in violation of defendant's civil and Constitutional rights.

Plaintiff, Alfred Schiaffo, presently a State Senator of New Jersey, and the challenger in the current election scheduled for November 7, 1972 for the seat presently held by the defendant as Representative of the Ninth Congressional District; filed his complaint against the defendant on September 26, 1972.

Essentially, the complaint addressed itself to various types of franked mailings and activities on the part of the defendant which plaintiff asserts are not permitted and which he, the plaintiff, wishes to be enjoined. It should be noted here that the charges with respect to paragraph nine of the complaint dealing with the defendant's participation in the March of Dimes Solicitation have been withdrawn.

A temporary restraining order sought by plaintiff was denied by the Court by reason of disputed matters of fact and law and within about four days hearings were commenced respecting the issuance of a preliminary injunction; both parties then agreed that the hearings when concluded would suffice as and constitute the final hearing for permanent relief. The testimony and evidence resulted in the findings of fact hereinbefore noted. Although not asserted in the complaint as a jurisdictional basis, jurisdiction with respect to a claim that the franking privilege has been violated rests with this Court by virtue of 28 U.S.C. 1339 which provides:

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

See *Christian Beacon* v. *United States,* 322 F. 2d 512 (3rd Cir. 1963); *Strauss* v. *Gilbert,* 293 F. Supp. 214 (D.C. N.Y. 1968). Jurisdiction may also be found in 28 U.S.C. 1331 insofar as a question concerning more than

$10,000 arising under the alleged violation of Federal statutes 39 U.S.C. 3210, 3211 is involved.

Despite these specific jurisdictional statutes, this Court would be without jurisdiction to entertain plaintiff's complaint if plaintiff could not show that he has standing so as to present a case or controversy to this Court under Article III, section 2 of the Constitution. To establish his claim to standing, plaintiff asserts that by virtue of defendant's abuse of the franking privilege, 39 U.S.C. 3210, 3211, 3212 and 3213, defendant has and will continue to communicate without costs of postage with all of his present constituents as well as with voters in those towns of the newly formed Congressional district which defendant seeks to, but does not currently represent. Such impermissible communication, plaintiff contends, unfairly enhances defendant's election chances by affording defendant broad access to the electorate without having to pay for postage. Although plaintiff claims that he is thereby injured, the harm alleged to be suffered by him as the opposition candidate is not only a personal one, but also rather a harm to the detriment of the voters whom plaintiff seeks to represent. But the fact that plaintiff may not be asserting only his own personal right in this matter does not necessarily bar him from standing. See *Bullock* v. *Carter*, 40 U.S.L.W. 4211 (U.S. Feb. 24, 1972). As the candidate of a major political party whose campaign is allegedly disadvantaged by the opponent's use of the frank in alleged violation of the statutory standard, plaintiff sufficiently demonstrates the necessary qualification for standing, i.e., the requisite adversity of interest and strong personal stake in the outcome of the litigation. Thus, the Court is insured that it will be presented with concrete rather than abstract propositions of law. Association of Data Processing Service *Organizations* v. *Camp*, 397 U.S. 150 (1970); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

Plaintiff has also alleged (in paragraph 15 of his complaint) a violation of his civil rights and his right to run for office. This claim rises to the level of the constitutional claim asserted by the plaintiffs in Bullock v. Carter, supra, in which the Supreme Court assumed that the plaintiffs who were candidates for political office had standing to challenge the constitutionality of an election practice which placed them at a severe disadvantage vis-

a-vis other candidates. Plaintiff thus has standing to assert that defendant's use of the franking privilege violates plaintiff's constitutional rights.

Plaintiff finally asserts the right to challenge defendant's receipt of government publications allegedly in violation of Federal statutes such as 44 U.S.C. 732 (complaint, paragraphs 5 and 6), which regulate the distribution of government publications among members of Congress. As to this last claim, plaintiff does not possess the strong personal stake sufficient to warrant standing. Plaintiff has not shown in what manner he will be demonstrably injured by virtue of the fact that Congressman Helstoski may have received more than his authorized allotment of government publications from the Government Printing Office. The injury which plaintiff alleges, and which he has standing to assert, derives from the distribution of materials by defendant, not from the manner in which such materials were received by him.

Plaintiff has not asserted taxpayer status in his complaint. The effect of plaintiff's possible status as a taxpayer on standing with respect to the relief sought has therefore not been considered.

Justiciability. Having determined that this Court has jurisdiction over the subject matter of plaintiff's complaint insofar as it relates to the distribution of materials under the Congressional frank, I must now determine

> "Whether the claim presented and the relief sought are of the type which admit of judicial resolution," and
>
> "Whether the structure of the Federal Government renders the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution."

Powell v. *McCormack,* 395 U.S. 486, 516, 517 (1969).

Under the standards set forth in *Baker* v. *Carr, supra,* at 198, the claim presented admits of judicial resolution. First, the duty asserted, that which consists in proper use of the frank, can be judicially identified. Since the duty here is prescribed by statute, its identification involves merely statutory interpretation and construction, a task traditionally within the province and competence of the courts. Second, a breach of that duty can be

judicially determined. Having established the general standard of frankability, the Court can, with respect to the mailings alleged, determine by its fact-finding process which mail is not frankable. Finally, the right asserted, that of plaintiff to be free from the deleterious effects of defendant's alleged abuse of the frank is susceptible to judicial protection. As was the situation in *J. I. Case Co.* v. *Borak,* 377 U.S. 426,433 (1964), the existence of a general right of civil action here under 39 U.S.C. 1339 can give rise to a private right of action with appropriate remedies that serve to deter abuse of the federally-created privilege. See *Hoellen* v. *Annunzio,* Civ. No. 1302–72 (D. Ill. 1972); *Rising* v. *Brown,* 313 F. Supp 824 (C.D. Calif. 1968). Effective relief can be rendered here in the form of damages or injunctive relief. The Speech and Debate Clause which affords immunity to certain kinds of Congressional conduct, does not apply here and will not bar relief against the defendant, if otherwise appropriate. *United States* v. *Brewster,* 40 U.S.L.W. 4996 (U.S. June 29, 1972); *Powell* v. *McCormack, Hoellen* v. *Annunzio, supra.*

Under the second prong of inquiry as to justiciability, I find that no political question is involved. Again the standards set forth in *Baker* v. *Carr,* supra, at 217, are controlling. The resolution of what constitutes permissibly franked mail does not involve a basic question as to the structure of the government or the interplay of its branches. At stake is simply the propriety of the individual actions of a Congressman, a considerably lesser "political" involvement than was the case in *Powell* v. *McCormack,* supra, in which the Supreme Court rejected the notion of nonjusticiability on political question grounds. At any rate, any possibility of interference with interbranch regulation of the frank that may at one time have existed has since ceased to exist by virtue of the current express policy of the U.S. Postal Service not to be involved in "determinations as to what is or is not the 'official business' of a Member of Congress." Letter of August 12, 1971, from David A. Nelson, Senior Assistant Postmaster General and General Counsel to Thaddeus J. Dulski, Chairman, Committee on Post Office and Civil Service, in Subcommittee on Postal Service of the Committee on Post Office and Civil Service, Laws and

Regulations Regarding use of the Congressional Frank 6, 7 (1971).

Finally, I reject defendant's contention that ("The ascertainment as to what is official business and how that business is to be conducted by duly elected Congressman is, within broad limits, a matter which is exclusively reserved to the legislative branch of government.") not only does this last contention of defendant ignore the fact that it is the Court's role and not that of the Congress to interpret legislation, but also it ignores the fact that the appropriate Congressional Committee has not sought to exercise any official control over the matter. In his letter to his House Colleagues, Morris K. Udall, Chairman of the Postal Service Subcommittee of the House Post Office and Civil Service Committee acknowledges that opinions he is rendering as to the scope of the frank are only to be general guidelines: "I emphasize that in some cases there is doubt and that these are my own informed judgments on legality and propriety." Letter in Id. at 1. As a matter of fact Udall suggests the very situation that has here occurred—that "an opponent or an interested citizen could seek injunctive relief in the U.S. courts and ask for an interpretation of pertinent law or regulation." Congress has not in fact created any internal policing mechanism by which relief can be afforded to those, such as the plaintiff, who allege injury by virtue of defendant's violation of the franking privilege.

I do not decide today whether or not the existence of such an internal policing method would have any effect on the disposition of the Court as to justiciability.

On the merits, I consider first plaintiff's contention that defendant violated federal law in distributing government documents, those described in Group I in my findings of fact, specifically, the Yearbook of Agriculture, "Capitol, Symbol of Freedom," and the "Consumer Product Information Index." Distribution of public documents printed by order of Congress is authorized by 39 U.S.C. 3211 which provides in pertinent part: Members of Congress, until the thirtieth day of June following the expiration of their respective terms of office, may send and receive as franked mail all public documents printed by order of Congress.

This statute has its genesis in the Act of June 12, 1895, Section 85, ch. 23, 28 Stat. 622 which provided, in pertinent part: Representatives may send and receive through the mail all public documents printed by order of Congress and the name of the Representative shall be written thereon, with the proper designation of the office he holds. Members of Congress shall have the privilege of sending free through the mails, and under their frank, any mail matter to any Government official or to any person upon official or departmental business.

Section 85 was part of a comprehensive Act providing for the public printing, binding and distribution of public documents. The first paragraph alone is relevant for preparation purposes. It is intended to confer the franking privilege upon Congressmen and others for distribution of public documents. Prior to the passage of this Act, it appeared that Congressmen could receive public documents from the various departments responsible for their publication, but could not distribute them to libraries or constituents except at their own expense. See 16 Op. Atty. Gen. 511 (1880); 17 Op. Atty. Gen. 264 (1882). As a result, large stockpiles of valuable Government documents appeared to have accumulated in the Congressional basement. The granting of the frank to Congress for the purpose of distributing such documents to the public at large was seen as necessary to clear out this burgeoning inventory and thereby to bring to the public the benefit of information contained in the documents. House Debates on H.R. 2650, 53rd Cong., 1st Sess., 25 Cong. Rec. 1463 (Sept. 13, 1893); 25 Cong. Rec. 2626 (Oct. 17, 1893); 25 Cong. Rec. 2667 (Oct. 18, 1893); 53rd Cong. 3rd Sess., 27 Cong. Rec. 34, 35 (Dec 4, 1894.)

Subsequent amendments to the 1895 Act did not change its substance. By the Act of June 18, 1934, ch, 606, § 2, 48 Stat. 1018, the franking privilege was extended to Resident Commissioners in Congress, and the date of expiration of the privilege was extended from December 1 to June 30 following the expiration of the respective terms of Office of the Congressmen and other officials encompassed under the Act.

Then again in 1958, Congress extended the franking privilege for public documents to the Secretary of the Senate. Act of July 25, 1958, P.L. 85–560, S3 (a) 72 Stat. 420. The legislative history, as far as can be ascertained,

indicates no substantive change whatsoever as to the scope of the public document franking privilege. 1968 U.S. Code and Cong. Adm. News 3155 (1968). In 1960, S85 of the 1895 Act as amended in 1934 and 1958 was codified as 39 U.S.C. § 4162. Act of Sept. 2, 1960, P. L. No. 86–682, 74 Stat. 758. Although the precise wording of the provision was modified, there was no intent to change the provision's meaning. 1960 U.S. Code & Cong. Adm. News, 86th Cong., 2d Sess. at 863–67. For example because "members of Congress" was defined in 39 U.S.C. § 4151 to include Senators, Representatives, Delegates and Resident Commissioners, explicit reference to these persons was omitted. Also omitted, but without explanation, was the provision requiring the persons sending out public documents under the frank to write their name and office upon the documents. In view of the explicit statement in the Report from the Committee of the Judiciary concerning the codification of this provision that anything departing from existing law was precluded from consideration in the bill, Id. at 865, by omitting the language, Congress could not have explicitly intended to extinguish the "name and office" requirement.

The final amendment to the public documents franking provision occurred in the Postal Reorganization Act of 1970, Act of Aug. 12, 1970, P.L. 91–375, Section 66, 84 Stat. 719, in which the franking privilege was further extended to the Sergeant at Arms of the House of Representatives. Again the legislative history reveals no substantive change as to the scope of the public document franking privilege. See 116 Cong. Rec. 20445 (June 18, 1970) (House Debate on H.R. 17070); see also 1970 U.S. Code & Cong. Adm. News 3469.

The final version of the public document franking provision as it now appears in 39 U.S.C. S3211 is thus identical with the original statute of 1895 as respects public documents sent out by Congressmen during their terms. Since no change in substance or Congressional intent has occurred since the original enactment, the original Congressional intent and purpose behind the statute is controlling.

The Government publications, "The Yearbook of Agriculture" and "Capitol, Symbol of Freedom" distributed by defendant clearly come within the purview of the 1895 Act, and thus within the scope of 39 U.S.C. 3211.

Each has been printed by express Congressional authorization and thus comes within the category of "public documents printed by order of Congress."

I have been unable to ascertain the specific authorizations for each of the editions of the publications sought to be enjoined. However, I find that the appearance upon each government publication of a government document number is prima facie evidence that each is a government document authorized by Congress.

As to the Consumer Product Information Index, it appears that this document was printed by Executive Order. It may well be that the Executive has been empowered by Congress to effectuate the printing of this publication, but I so far have been unable to discover the source of the Executive's authority here nor have counsel offered me information in this regard. However, in view of the fact that I find today that the 50,000 copies of the Index printed by Executive order and alloted to defendant have already been distributed and in view of the disposition I shall reach as to possible damages, I need not and do not decide whether distribution of documents printed by order of the Executive comes within the scope of 39 U.S.C. 3211. Definitely not included, however, under Section 3211 is the 156,000 copies of the Consumer Product Information bulletin which defendant had reprinted from the Government Publication, at his own expense, and which he is in the process of distributing by mass mailing throughout his district and throughout the municipalities which are in the district in which he is presently a candidate. I find that since these particular documents were not printed "by order of Congress", but rather at defendant's own expense and initiative, they cannot be distributed under authority of 39 U.S. Sec. 3211. Although it may be argued that distribution of such unauthorized reprints which contain the identical information as authorized government publications serves the broader purpose of informing the public, this view does not accord with the restricted scope given to the public document franking privilege by the framers of S85 of the 1895 Act. Whether or not such reprints may be frankable under another section of the franking statutes is a matter which will be taken up shortly.

Plaintiff contends that even though public documents may be distributed under the frank, such distribution

must be limited to a Congressman's constituency. Plaintiff thus seeks to enjoin public documents sent to municipalities in the new district which are not in defendant's current district. I find that the 1895 Act makes no such distinction between a Congressman's constituency and any other persons. Thus, a Congressman can distribute section 3211 documents under his frank to any person.

With respect to the Agricultural Yearbooks, an additional reason exists for finding that their distribution is not in violation of the Congressional franking privilege. Contrary to the Plaintiff's contentions such publications of the Department of Agriculture, do come within 39 U.S. 3213, which provides that Agricultural Reports emanating from the Department of Agriculture may be mailed "until the thirtieth day of June following the expiration of their terms of office, as franked mail by Members of Congress."

Plaintiff's last contention is that although government documents may be distributed under the frank, defendant's inclusion of cover letters in the Agricultural Yearbooks and other publications render the mailings unfrankable under 39 U.S.C. 3211. (See e.g., Plaintiff's exhibit, P–1(a)). I find that the inclusion of such letters that serve to identify the Congressmen and explain briefly the reason for the distribution of the particular document is in accordance with the spirit of the requirement in the original statute of 1895, namely that distributors of such documents stamp their name and office upon them. Such a cover letter also is permitted under 39 U.S.C. S3210, as discussion of the statutory history of that provision will soon reveal. Since Congressional intent as revealed by the statutory history, section 3211, has not varied from that expressed in the 1895 Act, the inclusion of such letters does not disqualify defendant from sending out public documents under 39 U.S.C. S3211.

I shall next consider the propriety of defendant's distribution of materials included in Group II, i.e., the Consumer Product Information reprints, the newsletters, the voter survey questionnaires, and the Drug Brochures. Defendant contends that such distributions are authorized by 39 U.S.C. 3210 which provides in pertinent part: Members of Congress, until the thirtieth day of June following the expiration of their respective terms of office, may send as franked mail correspondence not ex-

ceeding 4 ounces in weight, upon official business to any person. At issue here is the meaning of "official business" in section number 2. To determine what Congress meant by this term, I must examine into the statutory history of section 3210.

The forerunner of section 3210 is to be found in the second paragraph of section 85 of the Act of June 12, 1895, ch. 23, 28 Stat. 622 which I cited in full earlier. That second paragraph reads: "The Vice-President, members and members-elect of and Delegates and Delegates-elect to Congress shall have the privilege of sending free through the mails, and under their frank, any mail matter to any Government official or to any person, correspondence not exceeding one ounce in weight, upon official or departmental business."

As has already been seen in the discussion of the public document franking privilege, section 85 was a part of a comprehensive Act concerning the printing, binding and distribution of public document. When originally reported to the House, the second paragraph of section 85 (then being considered as section 88 of H.R. 2560) read as follows: "The Vice-President, members and members-elect of and Delegates and Delegates-elect to Congress shall have the privilege of sending free through the mails, and under their frank, any mail matter to any Government officials." 25 Cong. Rec. 2748 (Oct. 20, 1893). On October 20, 1893, Congressman Hayes of Iowa introduced on the floor of the House an amendment to that second paragraph, adding the following: "Or to any person, correspondence, not exceeding 2 ounces in weight, upon official or departmental business."

The dialogue which followed is set forth in 25 Cong. Rec. 2748, 2749. See Appendix A. It demonstrates that in proposing the amendment, Congressman Hayes in no way intended to reinstate the formerly broad franking privilege that had been entirely revoked for members of Congress in 1873. (Act of January 31, 1873, 17 Stat. 421, ch. 82.)

Although neither party brought this dialogue of history to the Court's attention, after discovery by the Court in its own research the citations thereupon were afforded counsel for comment in supplemental briefs. The restrictive nature of this franking privilege was emphasized by the ready acceptance by Hayes of Congressman Rich-

ardson's motion to reduce the maximum weight limitation from two ounces to one. When asked how this Amendment would change the existing law under which the franking privilege of Congressmen had been restricted to a $150 stationery account, Hayes explained that formerly, Congressmen who were receiving letters or documents from departments intended to be forwarded to non-government persons, could not forward such correspondence under their own frank. See, e.g., 16 Op. Atty. Gen. 511 (1880); 17 Op. Atty. Gen. 264 (1882). The Amendment would cover that deficiency, Hayes explained, by allowing Congressmen to forward to the intended addressees all such correspondence—that is, less than one ounce in weight—under the Congressmen's own frank. The privilege accorded by the Amendment was so restricted that Hayes deemed it would not even include an independent letter addressed to a constituent in connection with the departmental business from which had originated the departmental communication in need of forwarding. However, under the amendment, a Congressman would be allowed, Hayes further explained, to enclose his own letter with the correspondence or document originating from the department.

The Amendment was then adopted by a close vote of 42 to 40, and receiving no further discussion in the House or Senate, it became a permanent part of the Act of 1895 as the end of the second paragraph of section 85.

The explanation given by Hayes as to the restrictive nature of the amendment, along with the one ounce limitation, and the specific problem to which the amendment was addressed—i.e., the inability up to that time of Congressmen to forward departmental communications to constituents under their own frank conclusively establish that the provision was by no means intended to grant a general franking privilege which would permit the distribution of unsolicited correspondence or mailings to constituents or other non-government officials on topics considered by individual Congressmen to be of general public interest.

Although it is certainly true that comments made by individual Congressmen as to the meaning of particular provisions need not necessarily be afforded any particular weight in construing a statute, statements by sponsors of provisions have traditionally been used by courts as

persuasive as to Congressional intent. See, e.g., *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290 (1959); *United States* v. *International Union*, 352 U.S. 567, 585–87 (1957); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). And of special importance are statements made by sponsors of provisions in the House where the provisions originated. See, e.g., *Steiner* v. *Mitchell*, 350 U.S. 247, 254 (1956); *United States* v. *McKesson & Robbins*, 351 U.S. 305, 313, 314 (1956).

Without deciding where the actual line of demarcation between permissible and impermissible mailings under the 1895 Act lies, I conclude that under that Act, the unsolicited mailings of other than section 3211, 3212 or 3213 documents or correspondence to other than government officials made by defendant would violate that Act. The question then remains: Has Congress changed the scope of the franking privilege in subsequent amendments and reenactments of this provision?

The first Amendment of the 1895 Act was adopted in the Post Office Appropriation Bill of 1898, Act of June 13, 1898, ch. 446, 30 Stat. 443, 444, in which the one ounce limitation was raised to two. The amendment was offered by Senator Cockrell on the Senate floor who explained: "It simply increases the weight of official matter from one ounce to two ounces. Repeatedly I and other Senators have had letters from the departments sent back because they happened to weigh a little over one ounce." Sen. Debate on H.R. 9008, May 5, 1898, 31 Cong. Rec. 4604.

The Conference Report on the Bill incorporated the proposed change in the weight maximum directly into the language of the 1895 Act, 31 Cong. Rec. 5589 (June 7, 1898), 31 Cong. Rec. 5662 (June 8, 1898), and on this basis, the Amendment passed both Houses and was enacted into law. Thus no substantive change by the 1898 amendment was effected.

The same conclusion can be drawn from the next Amendment to the second paragraph of section 85 of the 1895 Act. By the Act of April 28, 1904, ch. 1759, section 7, 33 Stat. 441, the two ounce limitation was raised to four. Except for the change in weight, the language of the 1904 provision is identical to that of the 1895 Act. Senator Lodge, the proponent of the provision on the Senate floor, explained that the two ounce limitation had become inconveniently small. He concurred with Senator

Cockrell who had had the experience of having letters in excess of two ounces returned to him only to have to divide a long piece of correspondence into two envelopes to keep within the weight limitation. The purpose of the Amendment was to remedy this inconvenience. Sen. Debate, April 5, 1904, 38 Cong. Rec. 4299.

The provision which appeared as section 7 of the 1904 Act thus incorporated the exact language of the 1895 Act except for the weight limitation. The legislative history makes clear that no change in the scope of the franking privilege was intended by the Amendment.

The next Amendment to the forerunner of section 3210 is to be found in the Act of March 2, 1917, ch. 145, section 36, 39 Stat. 963 which extended the franking privilege to the Resident Commissioner of Puerto Rico. Again, since no substantive change in the language occurred, I can infer no deviation at this point from the original intention of the Act. Defendant calls to my attention a presentation given by the Hon. Thomas B. Schall of Minnesota on July 29, 1916, published in the Appendix to the Cong. Rec. at pp. 1608–1611 in which Mr. Schall understands the franking privilege to allow information "pertaining in any way to the business of the Government" to be mailed free to any citizen. Mr. Schall's remarks, however, are not properly part of the legislative history of the provision in question. They were not even part of a legislative debate on the franking question. See 53 Cong. Rec. 11813 (July 29, 1916). I cannot give these remarks any more weight than those which represent the personal views of an individual member. Such personal views cannot be considered as part of the legislative history. See *National Woodworkers Mfrs. Ass'n.* v. *NLRB,* 386 U.S. 612, 639n. 34 (1967). So to do would permit an enactment of Congress to be subject to changes in meaning every time an individual member of Congress decided to comment thereon. An individual Congressman's views become pertinent only insofar as they are addressed to a particular provision subsequently enacted into law during a debate or other official proceedings such that an inference can be drawn that the personal views of the member of Congress as to the meaning of a particular provision constitute the construction adopted by those who vote upon the measure.

Legislative consideration to the portion of the franking privilege now under discussion appears to have been next given by Congress in 1958. Section 3(b) of the Act of July 25, 1958, Pub. L. 85–560, 72 Stat. 420 amended Section 7 of the Act of April 28, 1904, by extending the franking privilege originally created by the Act of 1895 to the Secretary of the Senate and the Sergeant at Arms of the Senate. Moreover, it provided that: "In the event of a vacancy in the office of the Secretary of the Senate or Sergeant at Arms of the Senate, such privilege may be exercised in such officer's name during the period of such vacancy by any authorized person."

This Amendment was part of a bill entitled "Business Reply Mail," H.R. 10320. No discussion as to the scope of the franking privilege appears anywhere in the legislative history. See 1958 U.S. Code and Cong. Adm. News 3155. Thus, without changing the scope of the privilege, the 1958 amendment merely extended it to two additional officials.

Thus, in 1960, when the Act of 1895 as amended in 1898, 1904, 1917, and 1958 was codified into 39 U.S.C. 4161, no change whatsoever had occurred in the scope of the franking privilege. And although section 4161 changed the language of the original Act, the 1960 codification, as I discussed earlier with respect to the codification of the Public Documents franking provision—did not purport to effect any change in the substance of the provision. See, in particular, Revision Notes, 1960 U.S. Code and Cong. Adm. News 924–26 which discusses the changes in language. Pursuant to the codification, the provision which concerns us now read, in pertinent part: "Members of . . . of Congress . . . may send as franked mail . . . correspondence, not exceeding four ounces in weight, upon official business to any person." Although this language on its face is susceptible to a variety of constructions, in view of Congress' express intent that no substantive change was intended, I find that "correspondence upon official business to any person" merely restated the meaning and intent of the original Act of 1895.

Defendant next directs my attention to remarks made apropos of legislation proposing that members of the House, but not the Senate, be permitted to avail them-

selves of the postal patron, simplified mailing address service under their frank in their respective districts. Representative Steed, for example, who proposed the provision finally enacted for 1964 (88 Stat. 818) was heard to justify postal patron mailings as facilitating, among other things, the distribution of questionnaires. 109 Cong. Rec. 24832 (Dec. 17, 1963). Such a distribution under section 4161 as I have construed it would not have been permissible since it was not within the narrow scope of the 1895 privilege. I cannot infer from the remarks of Congressman Steed, or for that matter from those at an earlier time of Congressman Weaver (Defendant's brief at 12) that Congress had changed its intent as to the scope of the franking privilege. In none of the postal patron legislation did Congress address itself to section 4161 or any other provision having to do with the scope of the franking privilege.

Thus, even if I were inclined to find that the postal patron franking history of legislation bore on this problem, I would have no guidance as to the standards to apply in extending, or for that matter, in restricting postal franking beyond the 1895 boundaries.

By passing legislation on a related matter, Congress could not and did not change its legislative intent with respect to section 4161. The franking privilege thus possessed the very narrow scope provided by the 1895 Act when in 1970, Congress passed the Postal Reorganization Act, Act of August 12, 1970, P.L. 91–375, in which appears section 3210 at 84 Stat. 719. Section 3210 of that Act, now 39 U.S.C. 3210, brought forward the language of section 4161 as respects a Congressman's franking privilege. Neither the Senate Report, No. 91–912 of June 3, 1970, nor the House Report No. 91–1104 of May 19, 1970, nor finally the Conference Report, No. 91–1363, of August 3, 1970, discusses the franking privilege. The only relevant discussion occurred on June 18, 1970, when an Amendment to section 660 of the House Bill, H.R. 17070, which eventually became section 3210 of the Act, was proposed by Congressman Henderson, Vice-Chairman of the House Post Office and Civil Service Committee, and was agreed upon by the House. The Amendment merely extended the franking privilege to the Sergeant at Arms of the House and to the Clerk of the House, Congressman Henderson explained, as "their

counterparts have in the other body." 116 Cong. Rec. 20445. Thus, the Amendment of the language of 4161 provided no substantive change. As Thaddeus Dulski, Chairman of the House Committee from which the Bill emanated, explained: "This is only corrective language. All it does is clarify the situation in the House."

The House version of the bill containing this amendment was presented to the Senate for consideration and, after referral to a Conference Committee, was adopted in its present form. No other discussion of what is now section 3210 occurred.

I conclude, therefore, that 39 U.S.C. 3210 as adopted in 1970 encompassed the same franking privilege as did its precursor, 39 U.S.C. 4161, and thus embodied the narrow restrictive franking privilege of the 1895 Act. Doubtless this may come as a surprise to Congressman Helstoski and to other members of Congress who voted on Section 3210. As far back as 1916 (see Cong. Rec. 13916–13919, Sept. 6, 1916) and up until 1968, Congress had received advisory opinions from the Post Office Department as to the scope of the then section 4161 under which section 4161 had been construed as permitting all of the mailings which Congressman Helstoski has made and intends to make. See P.O.D. Publication 126, April, 1968. Also, it appears from Congressman Helstoski's testimony that large, unsolicited public mailings of newsletters and voter opinion surveys, etc., have constituted a widespread practice among members of the House for years.

But on these grounds I cannot and do not conclude that Congress in 1970 adopted a franking privilege consonant with either what might have been the current practice or with the scope expressed in the P.O.D. rulings prior to 1968. First I must point out that by 1968, the P.O.D. had ceased offering these advisory opinions, properly recognizing that "The P.O.D. is not vested with any authority by Congress to make binding determinations as to what is and what is not the 'official business' of a member of Congress." Memorandum of Dec. 26, 1968, in Law and Regulation Regarding Use of the Congressional Frank. Thus, it is fair to say that in 1970, when Congress readopted the language of section 4161 which in turn embodied the substance and scope of the Act of 1895, the individual members were not relying upon

or responding to any particular official determination as to the then scope of the franking privilege. And even if they were so relying, the legislative history is devoid of any mention of such reliance or any intent to make a change. It may be true that defendant and his co-legislators individually had in mind the scope of the franking privilege as it had been expressed by the P.O.D. when they voted on the legislation. But if they did, they did not make their state of mind or their understanding known as the official expression of intent of a legislative body.

Nor can I construe section 3210 consonant with what is evidently the current practice or usage. What "usage" would I avail myself of to construe the provision and construct a standard? Would I have to poll all the members of Congress individually and ask them what they thought they were voting for? Obviously such a procedure is within neither the competence nor practical capabilities of this Court. And even if it were, such a practice would open to question the construction and interpretation of every statute passed by every legislature.

A law must set cognizable standards so as to be able fairly to regulate conduct and afford public scrutiny. When standards are so broad or vague so as not to be understood, they are struck down as constitutionally infirm. Importing practice or usage into statutory construction would import the same kind of infirmity. If a law passed by Congress can be changed and altered, not by official legislative Act, but rather by practice or usage, no scrutiny over legislative action is ever afforded the public. Congress can legislate by legislative Act alone. It is for Congress and not for this Court to enlarge, restrict or otherwise modify Congressional franking privileges. Congress acted in 1895; in every subsequent Amendment or re-enactment of the law, up and through 1970, it did not evince an intent, in its official action, to deviate from its original intent. Nor was this intent altered in the final amendment of this section by P.L. 92–51, section 101, July 9, 1971, 85 Stat. 132 in which the franking privilege under 3210 was extended to the Legislative Counsel of the House. Again, there is no indication in the legislative history of any intention to change the scope of the privilege.

I, therefore, conclude, as a matter of law, that section 3210 as it is given meaning by the Act of 1895 prohibits

all unsolicited mailings of defendant to non-government officials that are not otherwise frankable under section 3211, 3212, or 3213. Since none of the other decisions brought to my attention which deal with the franking privilege has considered the 1895 Act and its bearing upon the statutory history, I do not feel bound to follow their reasoning. See *Hoellen* v. *Annunzio*, Civ. No. 1302–72 (N.D. Ill. 1972); *Austin* v. *Nedzi*, Civ. No. 38488 (E.D. Mich. July 17, 1972); *Rising* v. *Brown*, 313 F. Supp. 824 (D. Cal. 1970); *Straus* v. *Gilbert*, 293 F. Supp. 214, (S.D.N.Y. 1968).

I next consider the propriety of the mailings in Group III—that is, the results of the results of the Young Voter Opinion Survey, and the Declaration of Independence. These mailings, with the exception of the Declaration of Independence, are all properly within the franking privilege section 3212 which permits members of Congress to send as franked mail "The Congressional Record, or any part thereof, or speeches or reports therein contained."

I find nothing in the legislative history which prohibits defendant from copying matter that appears in the Congressional Record, printing it at his own expense, and distributing it under his frank. Unlike the public documents section, there seems to have been no intention to restrict distribution to actual editions of the Congressional Record as printed by order of Congress. In fact, the very language of the section which permits frankable distribution of parts of speeches or reports certainly does not contemplate that Congressmen tear them out of official publications. The only restrictions on such mail appear to be regulatory: "The words Congressional Record or Part of Congressional Record-Free and the signature and title, either written or printed facsimile, of the person entitled to frank it, must appear on the address side." 39 C.F.R. § 137.1 (chart).

As to the Declaration of Independence, however, which defendant desires to distribute as suitable for framing along with comments inserted in the Congressional Record, no showing has been made that these copies of the Declaration are intended as matter taken from the Congressional Record. They, therefore, are merely reprints of public documents and stand in the same stead as the Consumer Product Information reprints discussed ear-

lier. The inclusion in the mailing of introductory remarks taken from the Congressional Record does not bring the sending of the entire Declaration of Independence within the authorization of S3212.

Although defendant may thus distribute copies of the Congressional Record or any part contained therein through the mail under his frank, the question is raised whether or not such mailing may be made by postal patron mailings to areas outside the district which defendant currently represents into Area B, the municipalities which have become part of the Ninth District by virtue of Court-ordered reapportionment. This question did not arise with respect to the public documents in question, since neither the Agricultural Yearbooks nor the editions of "Capitol, Symbol of Freedom" were distributed to postal patrons' addresses.

A direct answer is provided by 39 C.F.R. 122.4(D)(2) which explicitly permits mailing under the simplified address form for a member of the House under his frank: "To customers within the district the Member or Member-elect was elected to represent; and within such other areas of the state as may be encompassed in his district under a reapportionment law."

Since the towns to which defendant has been sending and intends to send the mass-mailings of reprinted sections of the Congressional Record are within the area encompassed by the reapportioned district as so formed by Court order in April of 1972, these mass mailings are permitted by the regulation.

I turn last to the mailings included under Group IV—that is, the unsolicited mailings of the Revenue Sharing Reports and the Gun Control Surveys to state and local officials within defendant's district or within the reapportioned Ninth District. The question presented is whether these mailings under the frank are authorized by section 3210 which permits "matter, not exceeding 4 pounds in weight, upon official or departmental business, to a Government official" to be mailed under a Congressman's frank. I have already traced in great detail the statutory history of section 3210 and have determined that it does not vary substantively from section 85 of the Act of 1895. That section permitted members of Congress to send under their frank "any mail matter to any Government official." The first question that must be answered

is whether or not state and local officials are encompassed by the term "Government Officials" under this provision. The question is not free from doubt since the legislative history of the 1895 Act does not address this term specifically. But the meaning of "Government Official" is addressed in the Postal Laws and Regulations of the United States as compiled in accordance with the Act of Congress, March 3, 1891 in House Misc. Doc. No. 90 of the 52d Cong. 2d Sess. (1893), in reference to a similar, but earlier Act, the Post Office Appropriation Act of 1891, ch. 547, 26 Stat. 1081. I will attach the appropriate pages from the House Document to the Appendix of this opinion. Section 3 of that 1891 Act provided: "That the members and members-elect of Congress shall have the privilege of sending free through the mails, and under their frank, letters to any officer of the Government, when addressed officially." The Postal laws and Regulations which were operative with respect to that Act when section 85 of the 1895 Act was being considered state with reference to the 1891 Act: "The term 'Officer of Government' includes only officers of the United States, Senators, Members and Delegates in Congress." House Misc. Doc. No. 90, Supra, at 157.

There being no other pertinent discussion of the term "Government Officer" brought to my attention by counsel or by my own research, I conclude that the meaning of "Officer of the Government" attributed to the 1891 Act is the same that should be ascribed to "Government Official" in section 85 of the 1895 Act, the language of which, in pertinent part, closely tracks that of the 1891 Act. Thus defendant is not authorized by section 3210 to send the Revenue Sharing Report or the Gun Control Survey to state or local officials under his frank. This being the case, and there being no other section under which such mailings are justified, I find that defendant cannot send these mailings under his frank.

Constitutional Claims: Since I have found impermissible all of defendant's franked mailings other than those which are frankable (1) as mail to Government officials under 3210 and (2) as correspondence, documents, reports, etc., under section 3211, 3212 and 3213, it is only with respect to the permissible mailings that I need decide whether or not plaintiff's constitutional rights are violated. The question raised is whether permissible frank-

able mailings of, for example, large quantities of public documents or Congressional Record reprints to a Congressman's constituency during an election campaign might so adversely affect an opponent's chances as to provide an effective bar to candidacy of the kind that in *Bullock* v. *Carter*, 40 U.S. L.W. 4211 (U.S. Feb. 24, 1972) was struck down as Constitutionally impermissible. In *Bullock*, the Supreme Court found unconstitutional an election practice which exacted exorbitantly high candidacy registration fees that effectively barred poorer candidates from running. The facts in this case show no such bar. All mass-mailings have been found impermissible under the statute or have been completed thus mooting the Constitutional question.

Moreover, the situation in *Bullock* can be distinguished from that here. In *Bullock* the Court rejected as insubstantial the justification offered by the State for its high candidacy registration fees.

The State interest in the case at hand is not at all insubstantial. Congress has determined that the dissemination of public documents, matter appearing in the Congressional Record, and Agricultural Reports, as well as communications with Government officials, are an essential part of the political process, and has encouraged such communications by virtue of the franking privilege. I find that whatever incremental disadvantage may accrue to plaintiff here by virtue of any publicity gained by defendant through his proposed mailings, such disadvantage does not rise to the level of a violation of plaintiff's Constitutional rights.

RELIEF: Having decided that plaintiff has a private remedy under the theory enunciated by the Supreme Court in *J. I. Case* v. *Borak, supra,* which I discussed earlier, I now turn to the question of appropriate relief. Under the theory of Borak, the private action inferred at law is designed to deter violations of the statute. See *Pearlstein* v. *Scudder & German,* 429 F. 2d 1136 (2nd Cir. 1970). Deterrence can be achieved by affording the private litigant either injunctive relief and/or damages. In the present situation, I find on balance, that the deterrent effect of damages is outweighed by the resulting inequity and disruption that might ensue. I cannot, for example, turn away from the fact that defendant has acted in good faith and on the example of many others who have used

their frank for similar mailings. In fact, defendant had received advisory opinions from the House Committee on standards with respect to many of his mailings, which informed him that such mailings were permissible. The opinions were, of course, merely advisory, and have no binding force on this Court. They have not been enacted into law nor been incorporated into the code of Federal regulations. But they do point to the Congressman's good faith. This is not to say, of course, that defendant's ignorance of the law provides an excuse for its violation. I do not condone the fact that many individual members of Congress have apparently adopted a practice of franking which in my view is in violation of a statute, the substance of which they have never amended by an official Act. But I am also not unmindful of the fact that to permit damages against the defendant, and thus to open the floodgates for damage actions against large numbers of Congressmen could wreak havoc with the daily workings of the Legislative Branch. Furthermore, the real damages that have accrued are those to the taxpayer which come from abuse of the frank. Although assessment of damages at the face value of postage which defendant should have used to distribute the unsolicited material which has been impermissibly distributed under the frank would certainly serve to deter further violations of the statute, such damages would prove an unfair windfall to the plaintiff.

Having determined that the plaintiff is entitled to relief, but that the appropriate relief as revealed by the record is not to be found in damages, but rather is injunctive in character, I will sign an order in accordance with my opinion granting an injunction against impermissible mailings as found herein.

The parties will make such an order at the earliest possible time consistent with my opinion. Each party will bear its own costs. Inasmuch as the resolution of this problem required a rather extensive and detailed study of Congressional statutory and legislative history, and inasmuch as I have been obliged to deal with these issues within a relatively short period of time, I reserve the right to prepare my opinion in final and complete form.

This opinion shall constitute findings of fact and conclusions as to the law as I am obliged to make under the Federal Rules of Civil Procedure.

Each party will bear its own costs.

Mr. PORRO. There is just one fact that I think should be clarified for the record, Your Honor, I think it is a misinterpretation of testimony, and that is with regard to the reprints on those Consumer Product items, in fact it was just the cover page, the reprints were allotments of other Congressmen.

The COURT. Am I not correct that the Congressman testified that there were——

Mr. PORRO. The reprinted material, Your Honor, was the cover page, the list itself were allotments from other Congressmen. I think in your opinion, in your finding, you found that the whole item was reprinted. I do not know if it is going to make any substantial difference.

The COURT. I have a very distinct recollection of what the testimony was, that does not mean, of course, that it could not be corrected, which may affect my decision, in effect I have held that what has been allotted by a Government agency to a Congressman may be mailed as a frank.

Mr. PORRO. This issue will take us a step further when the allotment is to another Congressman and Congressman B then uses that allotment.

The COURT. I do not recall testimony with respect to the 156,000 copies as coming to the Congressman from another Congressman; I recall that testimony as being that those 156,000 were printed. If you desire to take—am I incorrect in what the transcript shows?

Mr. BUDELMAN. No, Your Honor, that is my understanding, that is my understanding that the testimony does show that 50,000 were from his allotment, pursuant to the letter that was given to this Court, and that the remaining portion were the amounts he was having printed, he was specifically examined on that as to where he was going to get the funds and so forth, Your Honor.

The COURT. This is a problem, because of its importance and particularly in light of the forthcoming election, certainly the Court has attempted to take as great pains as possible in the resolution of the issue no matter

who might be unhappy or surprised by it, but if you feel, Mr. Porro, that the record needs supplementation——

Mr. PORRO. I think the record is clear, Your Honor.

The COURT. Well, that is the way I read the record. And I do not understand where you get this——

Mr. PORRO. There was much testimony, Your Honor, about the practice of taking allotments and shifting them around.

The COURT. I do not recall that with respect to the Consumer Product——

Mr. PORRO. There may have been some testimony in that regard. Quite frankly, I do not think that is going to make a major difference here, but I do want the record to be clear in that regard.

The COURT. If you feel, after you have digested an undigestible amount of material, that you must supplement the record or correct it in some respect, then I will give you the opportunity to do so, because this order, although I may not sign it today, depending upon your own and Mr. Budelman's view of what I said, does go into effect immediately: I know that the Congressman would not count it as being a violation of it, but I would not count it being a violation today even by inadvertent mailings that are not permitted.

Mr. PORRO. Your Honor, that question is moot, if there is any misunderstanding there, as to the day we were here on Friday, all of those reprints are out, all of them, I thought we said we were in the last stage on that day.

The COURT. I think the record deserves to be clear on something: When I had addressed all counsel at our last meeting I had only asked whether or not there was contemplation on the part of the Congressman to send out anything, I did not ask him to submit to a restraint, I did not indicate whether I would impose a restraint, I felt that if there had been no contemplation that he would send out anything then it would be a moot thing for the Court to get into the area of what I consider to be, in any event, a delicate area, not that I shy away from it, but a delicate area where I need not proceed. And on being assured that there was nothing in contemplation then I left the matter as it was.

This Court has imposed no restraint up to this point, it has just relied upon the word of Congressman Helstoski and Mr. Schiaffo with respect to this representation.

And I want to clear that up because I do not want any misunderstanding to be taken with respect to our last colloquy.

Mr. BUDELMAN. It is my understanding, Your Honor, that this injunction stands to the remaining ones that have not been sent out as so testified by the defendant.

Mr. PORRO. Those were out before our discussion of, I guess it was, the 29th. The Consumer Product publication is a moot question, it was when we were here before, Your Honor, and I said we would not send out any mass-mailing, so there is no misunderstanding here.

The COURT. I will sign the order as I have indicated and I would suggest that you get it to me as soon as possible in the event that either of you desire to review with respect to it in sufficient time to make it effective, practically speaking, with respect to the current election; although this is not the thrust of the opinion, because it has a thrust beyond November 7, 1972.

Thank you, gentlemen.

CERTIFICATION

Fred M. Caruso, the undersigned, deposes and states as follows: that the foregoing is a true and accurate transcript of the within proceedings taken by him in the aforementioned matter on the 10th day of October, 1972.

FRED M. CARUSO, C.S.R.,
A Notary Public of the State of New Jersey.
My Commission Expires: June 2, 1976.

SCHIAFFO *v.* HELSTOSKI

APPENDIX "A"

EXCERPT FROM VOLUME 25, CONGRESSIONAL RECORD—HOUSE, OCTOBER 20, 1893, PP. 2748, 2749

Mr. RICHARDSON of Tennessee. I offer the amendment which I send to the Clerk's desk.

The Clerk read as follows:

In lines 377 and 378 strike out the words "appointment clerk" and insert the words "superintendent of documents."

The amendment was agreed to.

The Clerk, proceeding with the reading of the bill, read as follows:

SEC. 88. The Vice-President, Senators, Representatives, and Delegates in Congress, the Secretary of the Senate, and Clerk of the House of Representatives may send and receive through the mail all public documents printed by order of Congress; and the name of the Vice-President, Senator, Representative, Delegate, Secretary of the Senate, and Clerk of the House shall be written thereon, with the proper designation of the office he holds; and the provisions of this section shall apply to each of the persons named therein until the 1st day of December following the expiration of their respective terms of office.

The Vice-President, members and members-elect of and Delegates and Delegates-elect to Congress shall have the privilege of sending free through the mails, and under their frank, any mail matter to any Government official.

Mr. HAYES. I offer the amendment which I send to the Clerk's desk.

The Clerk read as follows:

Add to section 88 the following:

"Or to any person, correspondence not exceeding 2 ounces in weight, upon official or departmental business."

Mr. HAYES. Mr. Chairman, it is well known that the franking privilege formerly existed to an almost unlimited extent, and that by reason of abuses of that privilege it was practically entirely done away with. Since then it has been allowed to send letters to Government officials, but no provision has been made for sending what we get from the Departments to the persons to whom the letters or documents are to be sent, and it is by no means universal that penalty envelopes are sent for that purpose by the Departments. It seems to me this ought to be made to cover that deficiency, and it is so worded as to guard it against abuses, limiting it to departmental and official business, and also limiting the weight to 2 ounces.

Mr. RICHARDSON of Tennessee. I can not hear the gentleman from Iowa [Mr. HAYES], and I am quite sure other gentlemen are unable to hear what he has said. I will ask the gentleman to repeat the substance of what he has said.

Mr. HAYES. Let the amendment be again read. That will explain itself.

The amendment was again read.

Mr. HAYES. I do not care about the question of weight; but I thought that would be small enough.

Mr. RICHARDSON of Tennessee. I move to strike out "two" and insert "one."

Mr. HAYES. I accept the amendment. That is entirely satisfactory.

The CHAIRMAN. The Chair understands the gentleman from Iowa to modify his amendment?

Mr. HAYES. I do.

Mr. McMILLIN. I was going to ask the gentleman where it varies from the present law? We now have the right to send letters to the heads of Departments.

Mr. HAYES. Yes; but there is no provision made in the law for sending what you get from the Departments to those for whom you make the inquiry; and the return letters are not sent in all instances. They are generally from the Pension Office, but not from the other Departments.

Mr. McMILLIN. But we have a stationery account now. That was given originally in lieu of the franking privilege, as I understand it.

Mr. HAYES. That is very true; but this does not give full franking privilege. It simply gives a very limited amount, so far as weight or bulk is concerned, and refers entirely to departmental and official business.

Mr. McMILLIN. But what I was calling the attention of the gentleman to was that when the franking privilege was abolished the present stationery account was given in lieu of that, as I have been informed, although I have not made an examination of the fact.

Mr. HAYES. There is no doubt about that.

Mr. McMILLIN. And the stationery account remains still if this amendment is adopted.

Mr. HAYES. There is no reason to change that, because this only relates to letters from the Departments; and the franking privilege was for all purposes. I do not know how true it is; but to illustrate what was said about the franking privilege, I have heard it said a dozen times that members used to send their washing home under the franking privilege. [Laughter.] Perhaps that was really meant as an illustration of the extent to which it was used.

Mr. McMILLIN. Congress cut off the washing, but gave $150 of stationery account. Now, are we to add the washing? [Laughter.]

Mr. HAYES. No; it simply applies to letters such as relate to departmental and official business; and it seems to me that there can be no objection to the amendment.

Mr. OATES. If the gentleman from Iowa will permit me. As I understand, the franking privilege was abolished by Congress because it was very much abused. It had been carried to a ridiculous extreme; then we have gone to the other extreme, and allowed $150 on stationery account.

Mr. HAYES. I think the gentleman is right in both propositions, and this is just to rectify the matter.

The CHAIRMAN. The Chair will direct the attention of the gentleman from Iowa to the reading of the amendment.

The Clerk read as follows:

> Or to any person, correspondence not exceeding an ounce in weight.

Mr. HAYES. That is as I want it.

Mr. McMILLIN. This would not include a letter addressed to a constituent in connection with that business.

Mr. HAYES. Yes, sir.

Mr. McMILLIN. It is intended only that when you get a response from a Department to inclose it in an envelope and send it to the party?

Mr. HAYES. That is the way I illustrated it; that it was governmental and official business.

Mr. SIBLEY. Would it preclude me from inclosing a letter in respect to the official and departmental business?

Mr. HAYES. I think it would not, under the ruling that was made in the case of the gentleman from Massachusetts, by the Assistant Attorney-General.

Mr. McNAGNY. He held just the other way.

Mr. HERMANN. Had the Commissioner of Pensions the right to make that rule?

Mr. HAYES. I am speaking of the ruling of the Assistant Attorney-General, in which he held that he had the right to send that letter.

Mr. HERMANN. Is it under that clause of the law that permits members of Congress to avail themselves of this particular privilege?

The CHAIRMAN. The question is on the amendment offered by the gentleman from Iowa.

The question was taken, and the Chairman announced that the noes seemed to have it.

Mr. HAYES. Division.

The committee divided, and there were—ayes 42, noes 40; so the amendment was agreed to.

SCHIAFFO *v.* HELSTOSKI

APPENDIX "B"

HOUSE OF REPRESENTATIVES, MIS. DOC. NO. 90,
52D CONGRESS, 2D SESSION.

THE POSTAL LAWS AND REGULATIONS

OF THE

UNITED STATES OF AMERICA

Compiled, Revised, and Published in Accordance With the Act of Congress Approved March 3, 1891.

Washington: Government Printing Office. 1893.

CHAPTER THIRTEEN.

OF FREE MATTER.

OF MATTER TO BE FRANKED.

Sec. 362. Congressional Documents.—That from and after the passage of this act Senators, Representatives, and Delegates in Congress, the Secretary of the Senate, and Clerk of the House of Representatives may send and receive through the mail, free, all public documents printed by order of Congress; and the name of each Senator, Representative, Delegate, Secretary of the Senate, and Clerk of the House shall be written thereon, with the proper designation of the office he holds; and the provisions of this section shall apply to each of the persons named herein until the first Monday of December following the expiration of their respective terms of office. (Act of March 3, 1879, part of § 1; 20 Stats., 356.)

Sec. 363. Congressional Record.—That from and after the passage of this act the Congressional Record, or any part thereof, or speeches or reports therein contained, shall, under the frank of a member of Congress or Dele-

gate, to be written by himself, be carried in the mail free of postage, under such regulations as the Postmaster-General may prescribe. (Act of March 3, 1875, part of § 5; 18 Stats., 343.)

Sec. 364. Seeds and Agricultural Reports.—That seeds transmitted by the Commissioner of Agriculture, or by any member of Congress or Delegate receiving seeds for distribution from said Department, together with agricultural reports emanating from that Department, and so transmitted, shall, under such regulations as the Postmaster-General shall prescribe, pass through the mails free of charge. And the provisions of this section shall apply to ex-members of Congress and ex-Delegates for the period of nine months after the expiration of their terms as members and Delegates. (Act of March 3, 1875, § 7; 18 Stats., 343.)

Sec. 365. Special Grants of Franking Privilege.—All mail matter carried to the following-named persons, or sent by them under their respective written autograph signatures, will, in pursuance of the acts respectively referred to, be conveyed free of postage during their respective natural lives, namely:

Lucretia R. Garfield, by act of December 20, 1881 (22 Stats., 1).

Julia D. Grant, widow of the late President, Ulysses S. Grant, by act of June 28, 1886 (24 Stats.).

No signature or mark is necessary to the free carriage of mail matter to either of the above-named persons. The address is sufficient.

Sec. 366. Regulations of Franking Privilege.—No matter can be transported under the franking privilege unless admissible to the mails under the provisions of chapter 11. To entitle to free carriage the word "free" should be printed or written and signed with the name and official designation, if any, of the person entitled to frank it, on the address face of the package, except in case of matter addressed to the persons named in the preceding sections. In the case of the Congressional Record the name of the Senator, member, or Delegate must be written by himself; in other cases the name may be written by anyone duly deputed by him for that purpose. A Senator, member, or Delegate who holds his certificate of election is entitled to the franking privilege from the commencement of his term.

All franked matter may be forwarded like any other, but such matter, when once delivered to the addressee, can not be remailed unless properly franked again. A bulk package of franked articles may be sent to one addressee, who, on receiving and opening the package, may place addresses on the franked articles and remail them for carriage and delivery to the respective addresses.

So far as foreign countries are involved, the "frank" is good only for articles for Canada and Mexico.

"That the members and members-elect of Congress shall have the privilege of sending free through the mails, and under their frank, letters to any officer of the Government when addressed officially." (Act of March 3, 1891, 26 Stat., 1079.)

In carrying out this enactment, which is now operative, the following rules must be observed:

1. The privilege conferred applies to members of both branches of Congress—Senators, Representatives, and Delegates—including not only those who have taken their seats as such, but those who have been elected, have received their certificates of election, and hold the *prima facie* right to seats. Senators and Representatives whose terms have expired are not entitled to the benefits of this act.

2. Letters to be entitled to free transmission under the act must in every case be addressed to a Government official—not necessarily at Washington, but anywhere in the United States—whose office title must be given in the superscription of the latter, either with or without his name. For example, "Brigadier-General Samuel B. Holabird, Quartermaster-General, U.S.A., Washington, D.C.;" "Postmaster, New York, N.Y.;" "Hon. David M. Key, U.S. District Judge, Chattanooga, Tenn." The term "officer of Government" includes only officers of United States, Senators, Members, and Delegates in Congress.

3. The name of the franking Senator, Representative, or Delegate, written or impressed, must appear on the envelope of the letter, in connection with the initial of his office, and preceded by the word "Free." For example, "Free—John R. Smith, U.S.S.;" or "Free—Richard Roe, M.C."

4. The term "letters" as used in this law means such communications as are denominated in the laws mail matter of the first class.

Hoellen* v. *Annunzio

Civil Action No. 72 C 1302 (N.D. Ill.)

Brief.—This action was brought against Representative Frank Annunzio by his opponent in this fall's congressional contest in Illinois' new Eleventh District, John J. Hoellen. The new congressional districts were established by the apportionment judgment of the U.S. District Court for the Northern District of Illinois, which judgment was entered on September 20, 1971.

Plaintiff alleges that Mr. Annunzio, as the present representative to the 92nd Congress of Illinois' Seventh District, has misused his congressional franking privilege for certain mailings into the new district. These allegations were based upon three mailings to the district, which plaintiff contends were not "upon official business" within the meaning of Section 3210 of Title 39, United States Code, relating to "Official Correspondence of . . . Members of Congress."

The mailings in contention were (1) some 300 copies of the House document, "The Capitol"; (2) approximately 200 news releases, only a small number of which went to local papers in the new district; and (3) some 100,000 questionnaires, part of a mailing which included 34,000 questionnaires to Mr. Annunzio's constituents in his present congressional district, all of which were addressed to named individuals and none of which were "Postal Patron" mailings.

Plaintiff withdrew his contention that the mailing of the House document under the frank was improper.

Briefs were filed with the U.S. District Court for the Northern District of Illinois by Mr. Annunzio, and, *amicus curiae*, by the Committee on Administration of the House of Representatives.

Status.—The decision of the district court, granting plaintiff an injunction against defendant's use of the frank on mailings to residents of the Eleventh District "until such time as defendant is a duly elected Member-elect or Member of Congress representing that district" was announced by Judge Philip W. Tone on September 15, 1972. Excepted from the injunction were mailings "to media representatives, community leaders, or other persons within that district or elsewhere upon official business."

The court looked first to its jurisdiction to hear the case, deciding that the "political question doctrine" did not preclude jurisdiction under the Supreme Court decisions in *Baker* v. *Carr* [369 U.S. 186 (1962)] and *Powell* v. *McCormack* [395 U.S. 486 (1969)].

Next considered was whether jurisdiction of the court was barred by the legislative immunity doctrine of congressional immunity from suit under Article I, section 6 of the Constitution—the well-known Speech or Debate Clause. Although no brief before the court specifically raised the Speech or Debate Clause immunity, the court considered the effect of this immunity on its having jurisdiction of the action.

Judge Tone concluded that the recent Supreme Court decision in *United States* v. *Brewster* [——U.S.——, 92 S. Ct. 2531 (1972)] was dispositive of this issue.

> In holding that the Speech or Debate Clause did not immunize Senator Brewster from prosecution on federal bribery charges, the Supreme Court distinguished between Congressional conduct which is clearly part of the legislative process—such as voting, speaking on the floor or conducting a legislative hearing—and conduct which is incidentally related to the legislative process. The Court, 92 S. Ct. at 2537, confined the protections of the Clause to the former and specifically included the conduct with which we are concerned in the instant case in the latter:
>
> > It is well known, of course, that Members of Congress engage in many activities other than the purely legislative activities protected by the Speech and [sic] Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters however appropriate, have the protection afforded by the Speech or Debate Clause.

In light of this language, there can be no doubt that the activities at issue in this case, sending out documents and questionnaires to constituents and others, while "entirely legitimate activities" related to the legislative process, are not "purely legislative activities" protected by the Speech or De-

> bate Clause. Therefore, no doctrine of legislative immunity precludes judicial inquiry into the legality of Congressman Annunzio's use of the frank in this case, *even if that inquiry necessitates a consideration of his motives in making the mailings.* [*Hoellen* v. *Annunzio* (N.D. Ill. Sept. 15, 1972.)]

In going to the merits of the case, Judge Tone concluded that the press releases were "upon official business," commenting that "[a]lthough some of these addresses may have been within the Eleventh Congressional District, that district was not the target of the mailings" and "that the press releases contained his picture does not render their subject matter less official."

Conceding that questionnaires of the type challenged by plaintiff in the action were "regarded as official business by the postal authorities when they assumed authority to determine frankability," Judge Tone separated the mailings of the questionnaire—as between those sent to Mr. Annunzio's present congressional district and those that were sent into the district in which he is a candidate for Congress—and stated that whether these mailings were "upon official business" depended "not only upon . . . contents but upon the purpose for which it is sent, which may be inferred from the circumstances."

As a result, that part of the questionnaire mailing that went to the Seventh District was held to be official business, while the remainder of the mailing was not. Judge Tone's conclusion was stated as follows:

> It is true that the statute contains no geographical limitation on the destination to which franked mail can be sent. But what is mailed to "any person" must be "upon official business," and in determining whether the business of the mailing was "official" the Court cannot close its eyes to the obvious inferences which can be drawn from the persons and the locale to which the franked mail was sent, in addition to what is contained within the four corners of the mailing itself.

The decision has been appealed.

The full text of Judge Tone's opinion follows.

United States District Court for Northern District of Illinois, Eastern Division

(Civil Action No. 72 C 1302)

JOHN J. HOELLEN AND HUGH H. CARMICHAEL, INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS SIMILARLY SITUATED, PLAINTIFFS

v.

FRANK ANNUNZIO, DEFENDANT

MEMORANDUM OF DECISION

PHILIP W. TONE, *District Judge.*

This is an action challenging the use of the franking privilege by a Member of Congress for certain mailings which are alleged not to have been "upon official business" within the meaning of 39 U.S.C. § 3210. The case proceeded to trial before the court without a jury on an amended complaint seeking injunctive relief.

Congressman Frank Annunzio, the defendant, was elected in 1970 in the then Seventh Congressional District. He is now the Democratic candidate for Member of Congress in the new Eleventh Congressional District.[1] There is no overlap between the two districts. The plaintiff is Congressman Annunzio's Republican opponent in the Eleventh Congressional District, John J. Hoellen.[2]

In May 1972 the defendant used his franking privilege to mail 134,000 printed questionnaires asking for opinions on various public issues. Approximately 34,000 were addressed to persons who were his constituents in the old

[*This decision is summarized at pp. 48–50,* supra.]

[1] Established by the apportionment judgment of the United States District Court for the Northern District of Illinois entered September 20, 1971.

[2] A claim for an accounting asserted in the original complaint by a second plaintiff who sued as a citizen, voter and taxpayer was dismissed on motion on the ground that the plaintiff lacked standing. Only injunctive relief is sought in the amended complaint.

Seventh District, in which he is the incumbent Congressman, and approximately 100,000 were addressed to persons in the new Eleventh District, where he is a candidate. Printed on one side of the questionnaire are a picture of the Capitol, a picture of Congressman Annunzio, and in large type, "Congressman Frank Annunzio Asks Your Opinion!" Then follows a letter, with the salutation, "Dear Friend," signed by Congressman Annunzio, urging the addressee to fill out the questionnaire. The dateline shows "May 1972" and "Vol. 1, No. 1." The questionnaire portion is printed on the reverse side.

The names and addresses for the mailing were obtained from voter registration sheets. The mailing to the Eleventh District was to addressees in what defendant described as the six major wards in that district. The mailing to the Seventh District was to addressees in parts of each of three of the wards in that district.

Although Congressman Annunzio is in his fourth term, he has never before mailed a questionnaire. Shortly after the mailing he asked the opinion of Congressman Morris K. Udall, Chairman of the Subcommittee on Postal Service of the House Committee on Post Office and Civil Service as to the propriety of the mailing. Congressman Udall replied by a letter, received in evidence, in which he reviewed the contents of the questionnaire, noted that it is similar to those "mailed daily by hundreds of Members of Congress" and concluded that the questionnaire could properly be sent as franked mail. It does not clearly appear that the question of whether the mailing could be made to the district in which Congressman Annunzio was only a candidate was expressly presented to Congressman Udall, but his letter did state:

> "Legally speaking, a member of Congress can send 'official business' (which your questionnaire is) anywhere in the United States."

In April the defendant used his franking privilege to mail some 300 copies of a brochure entitled, "The Capitol," which had been printed as a House of Representatives document pursuant to the authority of a Congressional resolution. Some—the evidence does not indicate how many—were mailed to persons in the Eleventh District. The plaintiff has withdrawn his contention that this

mailing was improper. 39 U.S.C. § 4162 expressly permits sending any public document printed by order of Congress as franked mail, without restriction as to addressee or purpose.

The other three mailings complained of were made in July 1972 after the filing of this action. They consisted of news releases, approximately 200 of which were sent to news services and newspapers throughout the country, including neighborhood newspapers in the Eleventh District, and to community leaders who would presumably be interested in the subjects of the releases, some of whom were in that district. One release dealt with a reduction in Government crime insurance policy rates by the Department of Housing and Urban Development made at the suggestion of Congressman Annunzio; the second announced House passage of a "Copernicus Day" resolution; and the third announced introduction by the Congressman of a resolution for a "National Sokol U.S.A. Day." Each of the releases carried Congressman Annunzio's picture.

A memorandum has been submitted to the Court by the Committee on House Administration of the United States House of Representatives as *amicus curiae*, pointing out "a congressional intention that the [franking] privilege not be unlimited," but further urging that "in general, the regulation of the privilege is a congressional and not a judicial matter," that "the federal courts should adopt an attitude of restraint in passing upon usages by Members of Congress of the franking privilege," that "the Court should not in any event adopt an approach which will subject Congressmen to detailed inquiries regarding their motives and purposes in the conduct of their offices," and that injunctive relief against further franked mailings "would be improper and would impair proper utilization of the franking privilege." I am sympathetic with the concerns expressed by the Committee, and yet as I view the law I have a duty to assume jurisdiction, interpret the statute as it applies to the facts before me, and decide the case.

Postal Statutes and Regulations

The privilege of sending franked mail is conferred on Members of Congress by 39 U.S.C. § 3210, *et seq.* That

section permits them, and other named public officials, to "send as franked mail—

> "(1) matter not exceeding 4 pounds in weight, upon official or departmental business, to a Government official; and
>
> "(2) correspondence, not exceeding 4 ounces in weight, upon official business to any person."

Other provisions of Title 39 authorize Members of Congress to use the franking privilege to send any public document, any part of the Congressional record, and seeds and agricultural reports emanating from the Department of Agriculture, without restriction as to purpose or addressee (§§ 3211, 3212, 3213); authorize a former President to send all his domestic mail as franked mail (§ 3214); and allow the surviving spouse of a Member of Congress to send correspondence relating to his death as franked mail for 180 days after his death (§ 3218). A person entitled to use the frank is prohibited from lending it or permitting its use by or for the benefit of any committee, organization, or association except a Congressional committee (§ 3215). Payment of the postage on franked mail to the Postal Service from public funds is provided for (§ 3216).

Postal Service regulations repeat the restriction that "official correspondence transmitted under frank of . . . Members . . . of Congress . . . must be on official or departmental business." 39 C.F.R. § 137.14. The regulations also provide,

> "Official mail of any kind must not be detained even though there are indications of abuse of official mailing privileges. It must be promptly dispatched and delivered to the addresses. Reports of the indicated abuse must be submitted to the Bureau of Finance and Administration, Office of Mail Classification." 39 C.F.R. § 137.91.

Another provision of the regulations provides that Members and Members-elect of the House, unlike Senators, may address mail sent under the franking privilege for delivery to postal patrons (*i.e.*, not addressed to the recipient by name and post office address) within his district. 39 C.F.R. § 122.442. That provision is not involved here. All the mailings were to named addressees.

Hoellen v. *Annunzio*

Enforcement by the Post Office

Until recently the Post Office Department exercised some supervision over the use of the frank by Members of Congress. Until 1968, the Department took the position that it was "required to determine whether mail has been sent improperly under the frank," and when it found improper use of the frank the Department was "charged with responsibility for collecting the postage which should have been paid." The Congressional Franking Privilege, POD Publication 126 (April 1968), p. 1. When, in the opinion of the General Counsel of the Post Office Department, the frank was improperly used, the Department requested payment of postage, although it took no action to collect. The General Counsel also rendered advisory opinions to members of Congress and members of the public, upon request, as to whether given material could properly be sent as franked mail.

The Department changed its position in 1968. It decided that the official business limitation of the statute was after all not "a directive to the Executive Branch, [but] is really more of a guideline for the conduct of [Congress's] own members." Noting that Congress "nowhere expressly enjoins the Post Office Department to police the behavior of individual Members of Congress in their use of their franking privilege," the Department concluded that its "involvement" had reached "the point at which the mailings of a substantial number of Congressmen are being questioned on a continuing basis," and that continuation of the practice would "find the Executive Branch becoming increasingly involved in the conduct of the official duties of the Congress, even to the point of engaging in censorship." Accordingly, the practice of requesting payment from Congressmen who were found to have misused their franking privilege was discontinued, although advisory opinions were still furnished on request. Memorandum of Timothy J. May, General Counsel, Post Office Department, dated December 26, 1968, printed in Law and Regulations Regarding Use of the Congressional Frank, Committee Print No. 14, 92d Cong., 1st Sess. (1971), pp. 5–6.

In August 1971 the U.S. Postal Service, which had just taken over from the former Post Office Department under the Postal Reorganization Act of 1970, announced

that it would not continue its predecessor's practice of rendering advisory opinions on the franking privilege. The new agency, it was said, was to be removed from the "political arena," and "determinations as to what is or is not the 'official business' of a Member of Congress . . . frequently have, or appear to have, political overtones" and are "more properly within the province of Congress itself." Letter of David A. Nelson, Senior Assistant Postmaster General and General Counsel, U.S. Postal Service, dated August 12, 1971, printed *id.*, at pp. 6–7.

In a memorandum to his colleagues in the House in late 1971, Congressman Udall, the House Postal Service Subcommittee Chairman, stated that each member must decide what is frankable, stated with reference to individually addressed letters that "What constitutes official business must be decided by the Member," and offered some general rules as to postal patron mass mailings. He then stated that there was no enforcement machinery to enforce the rules he had suggested as to postal patron mailings but that conceivably an opponent or interested citizen could

> "(a) Seek injunctive relief in the U.S. Courts and ask for an interpretation of pertinent law or regulation.
>
> "(b) File a complaint with the House Committee on Standards of Official Conduct, which presumably could make determinations and enforce them with the sanctions it has available." (*Id.* at pp. 1–2.)

Jurisdiction

The complaint plainly sets forth a claim arising under a postal statute of the United States, 39 U.S.C. § 3210. The claim is within the federal judicial power defined in Article II, § 2. *Baker* v. *Carr*, 369 U.S. 186 (1962), *Powell* v. *McCormack* [sic], 395 U.S. 486 (1969). The statute itself neither provides nor proscribes a private right of action and the legislative history seems to be similarly barren of indication whether Congress intended the courts to entertain a private action. Congressman Udall's memorandum of late 1971 referred to above is at least some indication that Congress anticipated that an aggrieved private party could resort to the courts for injunctive relief for a violation of federal regulations emanating from

Title 39. When faced with a similar lack of direct evidence of Congressional intent, the Supreme Court has found an implied private right of action in the absence of an effective alternative remedy available to a citizen aggrieved by a violation of a statute. *J. I. Case* v. *Borak*, 377 U.S. 426, 432 (1964), *Allen* v. *State Board of Elections*, 393 U.S. 544, 556–557 (1969). Here, too, there is no effective alternative remedy, since the Postal Service has abandoned the field and Congress is hardly equipped to afford a remedy (*see United States* v. *Brewster*, —— U.S. ——, 92 S. Ct. 2531, 2540 (1972)), especially when relief must be granted immediately to be effective. Under these circumstances, we may safely rely on the broad language of the jurisdictional statute, 28 U.S.C. § 1339,[3] to hold that Congress has assigned to the district courts power to hear a private action under 39 U.S.C. § 3210. *See Rising* v. *Brown*, 313 F. Supp. 824 (C.D. Cal. 1970). Whether this Court should refuse to exercise that power because of the delicate "political" nature of the questions presented, or because principles of Congressional immunity would foreclose an adequate consideration of them, is discussed below.

Plaintiff, as the opposing candidate in the forthcoming election, has standing to assert the claim that the defendant is misusing the franking privilege to advance his candidacy in violation of the statute, since he has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues." *Baker* v. *Carr*, *supra*, 369 U.S. at 204; *Rising* v. *Brown*, *supra*, 313 F. Supp. 824 (C.D. Cal. 1970).

Defendant contends that plaintiff's complaint presents a "political question" and is therefore nonjusticiable. The test to be used to determine whether the separation of powers makes a claim a "political question" was set out in *Baker* v. *Carr*, *supra*, 369 U.S. at 217, and reaffirmed in *Powell* v. *McCormick* [sic], *supra*, 395 U.S. at 518–519:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue

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

> to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."

There is no provision of the Constitution which commits the determination of whether the frank has been misused to the Legislative Branch. Nor does the defendant indicate precisely which of the other considerations outlined above makes the plaintiff's claim "political." Rather, his argument seems to rest generally on the comity owed the Legislative Branch by the Judiciary and on the contention that it would be intruding upon the legislative function for this Court to determine what the duties of a Member of Congress are with regard to the franking privilege.

In *Powell,* the Supreme Court was faced with essentially the same argument. The defendants there contended that "a potentially embarrassing confrontation between coordinate branches" would result if the Court were to decide whether Congress was required to seat Powell if he met the qualifications for office contained in the Constitution. The Court replied, 395 U.S. at 548–549:

> "But . . . a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due [a] coordinate [branch] of government,' nor does it involve an 'initial policy determination of a kind clearly for non-judicial discretion'."

In the instant case, plaintiff asks this Court to make a determination just as traditional as the interpretation of the Constitution—the interpretation of an Act of Congress. To construe the words, "official business," in 39 U.S.C. § 3210 is no more of an intrusion upon the prerogatives of the Legislative Branch—in the absence of a specific statutory direction not to construe the statute—than the more typical statutory construction, not involving the obligations of Congressmen, in which the courts engage as a matter of course. The mere fact that this statute purports to regulate the conduct of Members of Congress does not, without more, take it outside the bounds of proper judicial scrutiny. For this Court to construe this statute no more involves a lack of respect due the Congress, or a policy determination of a kind clearly for non-judicial discretion, or a possibility of embarrassment from divergent pronouncements by various departments of the Federal Government on the question plaintiff propounds to us, than the construction of a statute not involving the conduct of Congressmen. Here, as in any other case, if the Congress believes we have misjudged its intention on either the reach of the statute, its application to Members of Congress or its enforceability in the district courts, it can, subject to constitutional requirements, change the law. The courts would then be bound to effectuate its intention regarding any of these matters. *United States* v. *Brewster, supra.*[4]

It remains for us to inquire whether there is any basis for our refusing to accept jurisdiction other than the political question doctrine. The fountainhead of the principle of Congressional immunity from suit is the Speech or Debate Clause of the Constitution, Article I, § 6, which is not raised specifically by the defendant or the House of Representatives Committee on House Administration in its *amicus curiae* brief. We must nevertheless inquire whether that clause bars this action against a Member of

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[4] In *Brewster*, the Supreme Court in effect construed the reach of the federal laws against bribery and found that they were meant to be applied in the Courts against Members of Congress. The Court also observed that if it was misjudging the intention of Congress, Congress could change the law: "If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws . . . ." 92 S. Ct. at 2543.

Congress or precludes us from granting injunctive relief.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other place." The Supreme Court had held in cases preceding *Powell* and *Brewster* that the protection of the Clause was confined to Members acting in the sphere of "legitimate legislative activity. . . . The Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove*, 341 U.S. 367, 376–77 (1951).

The issue is whether the alleged conduct complained of here, the use or misuse of the frank, is within the penumbra of the Clause's protection. Stated another way, the question is whether the use of the franking privilege to communicate with the public is within that sphere of direct legislative activity for which a Congressman's motivation is immunized from judicial inquiry.[5] For the gravamen of the plaintiff's complaint here is that Congressman Annunzio sent out the mailings in question for political purposes, *i.e.*, to aid in his campaign for reelection, rather than for legislative purposes, *i.e.*, to inform the public about legislative matters or to inform himself of the public's views on legislative matters. Plaintiff plainly asks us to inquire into the motive with which the defendant Congressman acted. If the activity—the mailings under the frank—is within the sphere protected by the Speech or Debate Clause, a motivational inquiry would be foreclosed by that clause; and this Court would be unable to entertain the complaint.

The *Brewster* decision is decisive of this issue. In holding that the Speech or Debate Clause did not immunize Senator Brewster from prosecution on federal bribery charges, the Supreme Court distinguished between Congressional conduct which is clearly part of the legislative

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[5] That the Speech or Debate Clause forbids both the Executive and Judicial Branches of the Government from questioning the motivation of legislators for "legitimate legislative activity" is no longer in doubt. The foreclosure of a motivational inquiry was one of the most important objectives of the framers in devising the Speech or Debate Clause. *See Tenney* v. *Brandhove*, *supra*, at 377. But what is at issue is the nature of the Congressional activity to which the protections of the clause attach and thus for which a Member's motivation will not be questioned.

process—such as voting, speaking on the floor or conducting a legislative hearing—and conduct which is incidentally related to the legislative process. The Court, 92 S. Ct. at 2537, confined the protections of the Clause to the former and specifically included the conduct with which we are concerned in the instant case in the latter:

> "It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called 'news letters' to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause."

In light of this language, there can be no doubt that the activities at issue in this case, sending out documents and questionnaires to constituents and others, while "entirely legitimate activities" related to the legislative process, are not "purely legislative activities" protected by the Speech or Debate Clause. Therefore no doctrine of legislative immunity precludes judicial inquiry into the legality of Congressman Annunzio's use of the frank in this case, even if that inquiry necessitates a consideration of his motives in making the mailings.

Finally, with regard to injunctive relief, it follows *a fortiori* from the holding in *Brewster* that if conduct by a Member of Congress which is outside the sphere of purely legislative activity is not immunized from criminal prosecution, then conduct in that category is not immunized from injunctive relief. The issuance of an injunction should be governed in this case by the same

equitable principles that govern the issuance of an injunction in the usual case.

The Merits

The three press releases can be disposed of briefly. All deal with official matters and were sent to some 200 representatives of the media and community leaders in various localities. Although some of these addressees may have been within the Eleventh Congressional District, that district was not the target of the mailings. It seems fairly clear that Congressman Annunzio could properly determine that these mailings were "upon official business." The fact that the press releases contained his picture does not render their subject matter less official. Mailing them as franked mail did not violate § 3210.

The questionnaires present a different problem. Plaintiff first contends that the mailing of the questionnaires as franked mail to any person, even constituents in the Seventh Congressional District, was a violation of the statute. He points to the picture of the Congressman and to what he calls the public relations features of the document. The evidence shows that the mailing of questionnaires, reports of results of questionnaires, and newsletters is common practice among both Senators and Members of the House. Invariably such material contains a picture of the sender and his name in large type. There are many samples of such mailings in evidence, and a number of these are very similar to the one in the case at bar. All but three of these samples show on their face that they were addressed to the sender's constituents. Communications of this type, even though they contained a picture of the Member of Congress, were regarded as official business by the postal authorities when they assumed authority to determine frankability. The Congressional Franking Privilege, *supra,* pp. 1–3. "Questionnaires are within 'official business' when they cover subjects which are official business." *Id.*, at p. 2.

Whether a mailing is "upon official business" depends not only upon its contents but upon the purpose for which it is sent, which may be inferred from the circumstances. Clearly Congressman Annunzio had the right to send the questionnaire as franked mail to his constituents in the Seventh District. It was within the proper

exercise of the duties of his office to consider, and hence to solicit, the views of his constituents on matters of public importance that were, or were likely to be, before the Congress. The mailing of the 34,000 questionnaires into the Seventh Congressional District as franked mail was proper.

The 100,000 mailing into the Eleventh Congressional District, in which he was not a representative but a candidate, stands on a different footing. There is no doubt of a Congressman's right to solicit by questionnaire the opinions of citizens outside his own district, if that is in fact what he is doing. He represents the interests of all citizens, not merely his constituents, and he may properly inform himself of the views of citizens outside his district. The difficulty here is that Congressman Annunzio's mailing outside his district cannot reasonably be viewed as an effort to so inform himself. That mailing, which was three times the volume of the mailing to his own district, was made to the residents of the six major wards in the district in which he was a candidate and which he did not yet represent, and to no one else. The only reasonable inference that can be drawn is that the mailing into the Eleventh District was for the purpose of advancing his candidacy, and that therefore it was not "upon official business."

Defendant argues that Congress and the Postal Service have specifically limited the franking of postal patron mail to the Congressman's constituents but have not so limited the franking of individually addressed mail. But Congress has required that franked mail, no matter how or to whom it is addressed, must be "upon official business."

Defendant's argument that whether matter is official business depends entirely on its contents, and that once it is determined that the matter is "official" it can be sent to anyone without geographical limitation, is based on a misplaced reliance upon the words "to any person" in clause (2) of § 3210. In the first place, those words must be read in context. Under clause (1) of § 3210 matter weighing up to 4 pounds may be sent "to a Government official," and under clause (2) matter weighing up to 4 ounces may be sent "to any person." Under either clause the mailing must be "upon official business." The words

"to any person" in clause (2) were not intended to dilute or to give content to the requirement that the mailing be "upon official business," any more than were the words "to a Government official" in clause (1). They were intended merely to designate those to whom matter weighing up to 4 ounces, as opposed to heavier matter, can be sent. The mailing must still be "upon official business" to be eligible for franking.

It is true that the statute contains no geographical limitation on the destination to which franked mail can be sent. But what is mailed to "any person" must be "upon official business," and in determining whether the business of the mailing was "official" the Court cannot close its eyes to the obvious inferences which can be drawn from the persons and the locale to which the franked mail was sent, in addition to what is contained within the four corners of the mailing itself.

An injunction will issue against the use of the frank by the defendant for mass mailings to residents of the Eleventh Congressional District, including residents whose names and addresses were taken from voter registration sheets, until such time as defendant is a duly elected Member-elect or Member of Congress representing that district. The injunction will not prohibit use of the frank for mailings to media representatives, community leaders, or other persons within that district or elsewhere upon official business.

Since defendant prevailed on certain issues and plaintiff on one, each party will bear his own costs.

This memorandum of decision will stand as findings of fact and conclusions of law as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

PHILIP W. TONE,
United States District Judge.

SEPTEMBER 15, 1972.

Lamkin* v. *Shipley

Civil Action No. CV 72–173 (E.D. Ill.)

Brief.—Plaintiff, Robert Lamkin, is a candidate for Congress in Illinois' new 22nd Congressional District, which was established for the 93rd Congress by a Federal court apportionment judgment.

The defendant named in the action is Representative George E. Shipley, who represents Illinois' 23rd Congressional District in the 92nd Congress and is a candidate for election in the new 22nd District. There is an overlap between the two districts, but not all of the residents of the new district are presently represented by Mr. Shipley.

Plaintiff alleges in his complaint that Mr. Shipley has misused the congressional franking privilege (1) by sending messages to his present constituents on the occasions of birthdays, graduations and family deaths; and (2) by mailing, to constituents and others, a newsletter containing "personal items" such as pictures of defendant and his family, all under his congressional frank.

Plaintiff seeks an injunction against future such mailings, an accounting for damages and a court order requiring reimbursement by defendant of the Federal treasury for postage costs involved.

Status.—A motion for a more definite statement of the case, or, in the alternative, to dismiss the action was filed on behalf of Representative Shipley on September 13, 1972. Plaintiff has filed an opposition to the motion to dismiss, but has not opposed the motion for a more definite statement. No further action on the case has been scheduled by the court.

Ruppert* v. *Powell

Civil Action No. 8579 (S.D. Ohio)

Brief.—This is an action by James D. Ruppert, a candidate for election to the 93rd Congress from Ohio's 8th Congressional District, seeking an injunction and damages from Representative Walter Powell, the incumbent Representative of the 8th Congressional District and candidate for re-election to the 93rd Congress, for the alleged misuse of his congressional franking privilege.

Plaintiff alleges that Mr. Powell has misused his congressional franking privilege by sending a "Progress Report from Congressman Walt Powell" to his constituents under the frank. The documents are described in plaintiff's complaint as constituting "campaign literature" in their inclusion of "photographs of defendant and his wife, quotations and editorials favorable to defendant, defendant's views on gun control legislation, amnesty, and other public issues and other matter promotive of and intended to further defendant's campaign for re-election."

According to the allegations in the complaint, plaintiff contends that more than one million such brochures have been mailed under the frank by defendant "before and since the Ohio primary election" and that plaintiff has been damaged in the amount of $50,000.00 as a result, calculated as the cost of mailing the materials at the second-class mail rate.

Plaintiff further alleges that the use of the frank as described enables defendant to avoid the restrictions on campaign expenditures provided for in the Federal Election Campaign Act of 1971 [Pub. L. 92–225, 86 Stat. 3].

Status.—A hearing on the application for preliminary injunction, set by U.S. District Court [for the Southern District of Ohio] Judge Timothy S. Hogan, was continued by him for one week to permit him an opportunity to read the decision in the case of *Schiaffo* v. *Helstoski*, discussed above.

APPENDIX

Complaints Pending Before Fair Campaign Practices Committee, Inc., In Which Congressional Franking Privilege Is Involved

CALIFORNIA

3rd Congressional District, *Rakus* v. *Moss*
18th Congressional District, *Lavery* v. *Mathias*

ILLINOIS

22nd Congressional District, *Lamkin* v. *Shipley* and *Duzan* v. *Shipley*

NEW JERSEY

3rd Congressional District, *Dowd* v. *Howard*

NEW YORK

17th Congressional District, *Belardino* v. *Murphy*
25th Congressional District, *Burns* v. *Fish*

OHIO

17th Congressional District, *Beck* v. *Ashbrook*

PENNSYLVANIA

34th Congressional District, *Kassab* v. *Johnson*

United States District Court, S.D. New York.

NATHAN STRAUS, PLAINTIFF,

v.

JACOB H. GILBERT, DEFENDANT.

No. 68 Civ. 2271.

June 11, 1968.

[293 F. Supp. 214 (1968)]

Action by candidate for party nomination for United States House of Representatives against incumbent congressman for preliminary injunction to enjoin congressman from sending free pursuant to the franking privilege certain material primarily for purpose of campaigning in party primary. The District Court, Motley, J., held that statute providing that members of Congress may send as franked mail the "Congressional Record", or any part thereof, or speeches or reports therein contained did not prohibit congressman's use of frank on material reprinted from "Congressional Record" and mailed for election campaign purposes.

Injunction denied.

1. Courts ⚿296

District Court had jurisdiction of action by candidate for seat in Congress to enjoin incumbent congressman from using franking privilege to mail certain material for purpose of campaigning in primary election to postal patrons within congressional district. 39 U.S.C.A. § 4161 et seq.; 28 U.S.C.A. § 1339.

2. Post Office ⚿15

The franking privilege is governed by acts regulating the postal service. 39 U.S.C.A. § 4161 et seq.

3. Post Office ⚿15

Statute providing that members of Congress may send as franked mail the "Congressional Record," or any part

thereof, or speeches or reports therein contained does not require exact duplication of the "Congressional Record" without variance nor does it prohibit the inserting of a covering letter nor addition of a picture of the congressman. 39 U.S.C.A. § 4163.

4. Post Office ⚿15

Statute providing that members of Congress may send as franked mail the "Congressional Record," or any part thereof, or speeches or reports therein contained did not prohibit congressman's use of frank on material reprinted from "Congressional Record" and mailed for election campaign purposes. 39 U.S.C.A. § 4163.

5. Constitutional Law ⚿70(1)

District Court cannot tell Congress what it can print in its Journal.

6. Post Office ⚿15

Statute permitting members of Congress to send as franked mail the "Congressional Record," or any part thereof does not limit mailings to the congressman's district. 39 U.S.C.A. § 4163.

7. United States ⚿12

Congressmen have responsibility to inform their constituents, and circulation of "Congressional Record" is a convenient method. 39 U.S.C.A. § 4161(2).

David Levy, New York City, for plaintiff.

John M. Foley, New York City, for defendant.

Memorandum Opinion

MOTLEY, District Judge.

Plaintiff seeks a preliminary injunction enjoining defendant, his agents, servants and/or employees from sending free pursuant to the franking privilege, 39 U.S.C. § 4161 et seq., a) any mail sent to postal patrons or residents of the 22nd Congressional District until such time as they become part of the 22nd Congressional District pursuant to state law (January 1, 1969); b) the Congressional Record unless it is reprinted exactly and without variation or additions; and c) the Congressional Record, or any part or reprint thereof, in which there has been inserted material primarily for the purpose of campaigning in the Democratic primary. The motion is denied.

Defendant is a member of Congress seeking reelection. Plaintiff is his opponent in the Democratic primary. Defendant has utilized the franking privilege to send three letters to "Postal Patron—Local, 22nd Congressional District, Bronx, New York."

Each of the three letters mailed by defendant contained a letter reprinted from the Congressional Record. In all the type has been reset to be more legible. Two of the letters also contain photographs of Congressman Gilbert. One letter, the first, contains a covering letter introducing the Congressman to the recipient and offering assistance.

[1] This court has jurisdiction over this controversy, it would appear, under 28 U.S.C. § 1339 which provides:

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

[2] The franking privilege is governed by acts regulating the postal service. Public Law 86–682, 74 Stat. 578.

Title 39 U.S.C. § 4163 provides that:

> "Members of Congress may send as franked mail the Congressional Record, or any part thereof, or speeches or reports therein contained."

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

[4, 5] Insofar as the plaintiff would have this court prohibit the use of the frank on the Congressional Record containing material inserted for campaigning purposes,

(a) the statute has no such limitation;

(b) the letters here at issue do not mention the campaign; and

(c) this court does not, and cannot, tell Congress what it can print in its Journal.

[6] Insofar as the relief sought is to limit the mailings to the "old" 22nd Congressional District,

(a) the statute has no such limit; and

(b) such a complaint would be properly made against the Postmaster, not a party here, who is presently delivering the mail outside of the present 22nd Congressional District and not against defendant. Defendant is properly addressing the letters to his constituents.

[7] Finally, "Congressmen undoubtedly have a responsibility to inform their constituents, and undoubtedly circulation of the Congressional Record is a convenient method." McGovern v. Martz, 182 F.Supp, 343, 348 (D.C.D.C. 1960). In so informing their constituents, as Gilbert did here, another statute 39 U.S.C. § 4161(2) allows this use of the frank.

This court does not feel it should intrude on a political dispute in any event. And clearly, the Congressman is not violating the statute. No injunction will issue.

So ordered.

United States District Court, C.D. California.

NELSON C. RISING, JOHN V. TUNNEY, AND FRIENDS OF JOHN V. TUNNEY, SOUTH, INC., A CALIFORNIA NON-PROFIT CORPORATION, PLAINTIFFS,

v.

GEORGE E. BROWN, JR., AND ROBERT JEANS, DEFENDANTS.

No. 70–1123.

June 1, 1970.

[313 F. Supp. 824 (1970)]

Action by congressman and his campaign aides to prohibit a second congressman from using his franking privilege to mail a piece of literature to voters. The District Court, David W. Williams, J., held that although brochure contained discussion of work of House Science and Astronautics Committee of which congressman was a member, in view of facts that brochure carried a total of 6 photographs of congressman in various speaking poses, that at least 2 panels were devoted to congressman's views and voting on war, that 300,000 copies were paid for by congressman, prepared by public relations firm which was managing his senate campaign, and stuffed in envelopes by voluntary campaign workers, that congressman chose to wait until two weeks before election date to begin mailing material and that it was not confined to persons within his congressional district but sent throughout the state, brochure was not "official business" within statute providing that members of congress may send as franked mail correspondence upon official business to any person.

Decree accordingly.

1. Post Office ⇐15

Congressman, who was candidate for United States Senate in primary election, had standing to maintain action against a second congressman, who was also a candidate, to enjoin second congressman from using that

congressman's franking privilege to mail to voters a piece of literature which allegedly was campaign material. 39 U.S.C.A. § 4161 (2).

2. Post Office ⊶15

Although brochure contained discussion of work of House Science and Astronautics Committee of which congressman was a member, in view of facts that brochure carried a total of 6 photographs of congressman in various speaking poses, that at least 2 panels were devoted to congressman's views and voting on war, that 300,000 copies were paid for by congressman, prepared by public relations firm which was managing his Senate campaign, and stuffed envolopes by volunteer campaign workers, that congressman chose to wait until two weeks before election date to begin mailing material and that it was not confined to persons within his congressional district but sent throughout the state, brochure was not "official business" within statute providing that members of Congress may send as franked mail correspondence upon official business to any person. 39 U.S.C.A. § 4161 (2).

(See publication Words and Phrases for other judicial constructions and definitions.)

3. Post Office ⊶15

Where congressman caused pamphlet alleged to be campaign material to become part of Congressional Record one day after issuance of temporary restraining order enjoining congressman from using his franking privilege to mail the literature to voters and after many thousands of the brochures had already been mailed with the use of the franking privilege, mail-out was not protected by statute providing that members of Congress may send as franked mail the Congressional Record or any part thereof. 39 U.S.C.A. § 4163.

Howard I. Friedman, Paul G. Bower, David A. Cathcart, Thomas E. Gallagher, Los Angeles, Calif., for plaintiffs.

William Matthew Byrne, U.S. Atty., Los Angeles, Cal., James R. Dooley, Asst. U.S. Atty., for Postal Office.

George E. Bodle, James H. Webster, Julius Reich, Los Angeles, Cal., for defendants.

REVISED ORDER GRANTING PRELIMINARY INJUNCTION

DAVID W. WILLIAMS, District Judge.

For the reasons explained in the first paragraph of this Court's order prepared and filed on May 27, 1970, that order is now withdrawn and this revised order is to take its place. There is no change in the end result.

Plaintiff John V. Tunney and defendant George E. Brown Jr. are congressmen from near adjoining districts in California. Both legislators are candidates for the United States Senate in the primary election set for June 2, 1970. The remaining plaintiffs are campaign aides of John V. Tunney and the remaining defendant is a campaign aide of George E. Brown, Jr. Plaintiffs obtained a temporary restraining order enjoining the defendant George E. Brown, Jr. or his campaign aides from using that congressman's franking privilege to mail a piece of literature to voters which the plaintiffs contend is campaign material. The incumbent United States Senator and at least two other persons who do not possess the franking privilege are also major candidates.

This Court has jurisdiction over the controversy under 28 U.S.C. § 1339 which provides:

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

The franking privilege is governed by acts regulating the postal service. Public Law 86–682, 74 Stat. 578.

Title 39 U.S.C. § 4161 (2) provides in part that:

> "* * * members * * * of Congress * * * may send as franked mail * * * correspondence * * * upon official business to any person. * * *"

Title 39 U.S.C. § 4163 provides that:

> "Members of Congress may send as franked mail the Congressional Record, or any part thereof, or speeches or reports therein contained."

It was agreed between the parties that 300,000 pieces of the questioned mailout were printed. It was entitled, "Congressman George Brown—Report From Washing-

ton, May, 1970." This was preceded by a franked post card mailed by Mr. Brown to persons residing throughout California in January, 1970 which said in part:

> "Dear Concerned Citizen: I am asking you, a resident of California to participate in this survey. As a member of the Science and Astronautics Committee of the United States Congress, I am interested in your opinions of these questions. This spring, our committee will be holding hearings in California on environmental pollution. I would very much appreciate the opportunity to present your views to the committee. The data collected will be made available to all California congressmen, other elected officials and the press.
>
> Sincerely yours,
>
> GEORGE BROWN,
> *Member of Congress*"

The reverse side of this card contained 9 questions and gave the recipient the opportunity of checking a "Yes" box or a "No" box and invited him to return the questionnaire to the office of Mr. Brown. The use of the frank to send the January post card is not questioned by the plaintiffs.

Mr. Brown contends that the post card brought him many replies and that the piece of literature here being assailed was his way of keeping those persons informed of the results of the survey he undertook. He claims that the January questionnaire was sent out as a part of his activities as a member of the House Science and Astronautics Committee which was investigating air pollution problems and was considering the creation of a federal agency to regulate environmental quality, off-shore oil drilling and undeveloped open spaces.

[1] Defendants claim that plaintiffs have no standing to sue and have no interest in the postal revenues or the administration of the postal laws except as members of the general public. They rely upon Massachusetts v. Mellon, Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) for the proposition that the interest of a taxpayer in the monies of the treasury does not provide standing to sue for alleged improper ex-

penditures of public funds. However, through the years, the stringent requirements of the *Mellon* case have slowly been eroded and exceptions and new characterizations of the rule have evolved.[1]

In Baker v. Carr,[2] the Supreme Court announced that a party has standing to maintain a Federal Court action to challenge the validity of the statute if he alleges:

> "(S)uch a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (369 U.S. at 204, 82 S. Ct. at 703).

As stated by plaintiffs in their reply brief:

> "* * * the question plaintiffs present to this Court is whether Congressman Brown shall be required to place a 6¢ stamp upon each envelope containing the literature attached as Exhibit C to the complaint in this action, or containing any similar literature, before that envelope is carried to California voters by the Post Office Department. The issue is not speculative; it presents a specific controversy; it involved the question whether tax dollars shall be reimbursed to the post office by the Congress of the United States for an illegal use of the franking privilege; and it raises the disturbing possibility that the primary campaign of a major political party is being influenced by misuse of public funds."

It is clear that plaintiff Tunney has such a personal stake in the outcome of the upcoming primary election wherein he and defendant Brown are rivals as to assure "concrete adverseness" within the meaning of Baker v. Carr.

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[1] *c. g.*, Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 (1962); Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946); Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932).

[2] 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[2] Turning now to the merits of the controversy, it is defendants' contention that the brochure is entitled to be mailed with the use of the franking privilege because it is official business within the meaning of 39 U.S.C. § 4161(2). The unfolded document displays 8 panels, a portion of which does indeed devote itself to a discussion of the work of the subcommittee and is concerned with environmental problems, but at least 50% of it is devoted to other matters which strongly lends itself to the suspicion that it is promotive of getting votes for the sender. It carries a total of 6 photographs of Mr. Brown in various speaking poses. One full panel is devoted to the congressman's views on Cambodia and urges that we withdraw American troops from the entire Southeast Asia area as rapidly as possible. Another panel lists "Congressman George Brown's Five Years of Voting 'No' On The War." During his campaign for the Senate the defendant has directed his appeal to the opponents of the existing United States policy in Vietnam and he has taken a strong anti-war position. His sudden departure in his brochure from the environmental interest of his subcommittee to his views on the war suggests a dual purpose. Moreover, it is significant that the 300,000 copies were paid for by Mr. Brown, prepared by the public relations firm which is managing his Senate campaign, was printed in Los Angeles and stuffed in envelopes by volunteer campaign workers in various campaign headquarters and in homes. Also of critical importance to this Court is the fact that he chose to wait until two weeks before election day to begin mailing the material and it was not confined to persons within his congressional district but sent throughout the State of California. Plaintiffs also presented evidence that many of the pieces were mailed to persons who never received the January post card. These facts support the claim that the material is not "official business" but is more closely related to campaign material.

In Post Office Department Publication #126 (April, 1968) entitled "The Congressional Franking Privilege" that department discussed what it felt was a proper use of the franking privilege:

> "Correspondence on 'Official Business' is that in which the member deals with the

> addressee as a citizen of the United States or constituent, as opposed to the relationship of personal friend, the relationship of candidate or prospective candidate and voter, or when the member writes in the capacity of a member of a political party or faction."

It went on to say:

> "Appeals for political support, references to what a member expects to do in the next Congress sent out before an election, discussion of a prior political campaign, discussion of a coming political campaign and reference to campaign opponents as such are all matters beyond the official business concept." [3]

[3] Defendants further contend that even if the mail-out is not "official business" within the meaning of § 4161, it is protected by § 4163 because the pamphlet is part of the Congressional Record. Evidence presented at the hearing indicated that on the day following the issuance of the temporary restraining order in this case Congressman Brown caused the text of the mail-out to be inserted in the Congressional Record. Defendants rely on Straus v. Gilbert, 293 F. Supp. 214 (S.D.N.Y. 1968) which states that § 4163 does not prohibit a congressman's use of the frank on material reprinted from the Congressional Record even if it were mailed for campaign purposes. The facts of the case disclose that an incumbent congress-

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[3] The publication of these guidelines must have caused some members of the Congress to criticize the Post Office Department because on December 26, 1968, Timothy J. May, its General Counsel, addressed a letter to Congressmen covering a newly issued statement of policy which explained that the department was not going to lend itself to possible censorship of congressional mail and that the "use of the franking privilege for correspondence on official business is a matter strictly between the member of Congress and his conscience." "Under these circumstances," Mr. May continued, "we therefore feel that we can provide advisory guidelines to the officials possessing a franking privilege, but that they themselves should have the responsibility for policing themselves."

Thus it seems that the Post Office Department has in no way withdrawn its earlier criteria but has adopted an understandable "hands off" policy rather than tangle with possessors of the privilege.

man, in his bid for relection, cause to be reprinted portions of his past statements in the Congressional Record and mailed it along with a covering letter to members of his newly reapportioned congressional district. This Court is not bound by that decision but it seems readily distinguishable from the case at bar. Here, the defendant caused the pamphlet to become part of the Congressional Record one day after this Court had granted a temporary restraining order and after many thousands of the brochure had already been mailed with use of the franking privilege. I do not believe that § 4163 can be interpreted as to eliminate all protections against the abuse of the frank, else a congressman could cause undisputed campaign material to be inserted into the Congressional Record for the sole purpose of allowing him to disseminate it among the people of his district or state by using the franking privilege. In instances where persons possessing the franking privilege were running for public office against persons not possessing this privilege, the former would be given a distinct and unfair advantage.

There is an understandable unwillingness on the part of the judiciary to become involved in disputes of a purely political nature, especially at election time, but the public has an overriding interest in being protected against abuses of the franking privilege especially where, as here, the size of the mailing is so large.[4] There is a showing of irreparable damage to plaintiff Tunney and a preliminary injunction is ordered enjoining the defendants pending trial of this action, from mailing or allowing to be mailed any additional of the folders exhibited to this Court by using the franking privilege.

Plaintiffs are required to prepare and lodge proposed findings not later than June 12, 1970.

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[4] The cost to the taxpayers of franked mail in 1966 and the consequent ramifications to the taxpayer can be seen from the following example given in a recent Law Review article. "—The total cost of franked mail was $7,682,000.00; total revenue, paid by lump sum appropriation to the legislative branch for that purpose was $7,248,000.00 and $164,000.00 was appropriated as a public service cost * * * leaving a deficit caused by under appropriation." Project, 41 S.Cal.L. Rev. 643, 657 at n. 115. (1968).

STATUTORY PROVISIONS ON FRANKED MAIL

UNITED STATES CODE

TITLE 39.—POSTAL SERVICE

Chapter 32.—PENALTY AND FRANKED MAIL

§ 3201. Definitions.

As used in this chapter—

(1) "penalty mail" means official mail, other than franked mail, which is authorized by law to be transmitted in the mail without prepayment of postage;

(2) "penalty cover" means envelopes, wrappers, labels, or cards used to transmit penalty mail;

(3) "frank" means the autographic or facsimile signature of persons authorized by sections 3210–3216 and 3218 of this title to transmit matter through the mail without prepayment of postage or other indicia contemplated by sections 733 and 907 of title 44;

(4) "franked mail" means mail which is transmitted in the mail under a frank; and

(5) "Members of Congress" includes Senators, Representatives, Delegates, and Resident Commissioners.

(Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 751.)

EFFECTIVE DATE

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

* * * * * * *

§ 3210. Official correspondence of Vice President and Members of Congress.

The Vice President, Members, and Members-elect of Congress, Secretary of the Senate, Sergeant at Arms of the Senate, Clerk of the House of Representatives, and

Sergeant at Arms of the House of Representatives, until the thirtieth day of June following the expiration of their respective terms of office, may send as franked mail—

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

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

In the event of a vacancy in the office of the Secretary of the Senate, Sergeant at Arms of the Senate, Clerk of the House of Representatives, or Sergeant at Arms of the House of Representatives, any authorized person may exercise this privilege in the officer's name during the period of the vacancy. (Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 754.)

EFFECTIVE DATE

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3201 of this title.

§ 3211. Public documents.

The Vice President, Members of Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, the Clerk of the House of Representatives, and the Sergeant at Arms of the House of Representatives, until the thirtieth day of June following the expiration of their respective terms of office, may send and receive as franked mail all public documents printed by order of Congress. (Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 754.)

EFFECTIVE DATE

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3201 of this title.

§ 3212. Congressional Record under frank of Members of Congress.

Members of Congress may send as franked mail the Congressional Record, or any part thereof, or speeches or reports therein contained. (Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 754.)

EFFECTIVE DATE

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3201 of this title.

§ 3213. Seeds and reports from Department of Agriculture.

Seeds and agricultural reports emanating from the Department of Agriculture may be mailed—

(1) as penalty mail by the Secretary of Agriculture; and

(2) until the thirtieth day of June following the expiration of their terms of office, as franked mail by Members of Congress.

(Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 754.)

EFFECTIVE DATE

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3201 of this title.

* * * * * * *

§ 3215. Lending or permitting use of frank unlawful.

A person entitled to use a frank may not lend it or permit its use by any committee, organization, or association, or permit its use by any person for the benefit or use of any committee, organization, or association. This section does not apply to any committee composed of Members of Congress. (Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 754.)

EFFECTIVE DATE

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3201 of this title.

§ 3216. Reimbursement for franked mailings.

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

(b) The postage on mail matter sent through the mails under the franking privilege by former Presidents shall be paid by reimbursement of the postal revenues each fiscal year out of the general funds of the Treasury in an amount equivalent to the postage which would otherwise be payable on the mail matter. (Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 754.)

EFFECTIVE DATE

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3201 of this title.

* * * * * * *

§ 3218. Franked mail for surviving spouses of Members of Congress.

Upon the death of a Member of Congress during his term of office, the surviving spouse of such Member may send, for a period not to exceed 180 days after his death,

as franked mail, correspondence relating to the death of the Member. (Pub. L. 91–375, Aug. 12, 1970, 84 Stat. 755.)

Effective Date

Section effective July 1, 1971, pursuant to Resolution No. 71–9 of the Board of Governors. See section 15(a) of Pub. L. 91–375, set out as a note preceding section 101 of this title.

Section Referred to in Other Sections

This section is referred to in section 3201 of this title.

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