purposes through two wage and hour laws is an unnecessary duplication, it would be advisable for Congress to repeal the Walsh-Healy Act. To provide for those infrequent cases where the materials supplied under government contracts might not be introduced into interstate commerce, a stipulation in the Fair Labor Standards Act to the effect that its minimum wage and other standards of labor conditions shall apply to manufacturers supplying materials under public contract would accomplish these purposes just as effectively and would eliminate duplication and administrative difficulty as well.

POSTAL SANCTIONS: A STUDY OF THE SUMMARY USE OF ADMINISTRATIVE POWER

To protect the general public from certain undesirable activities, Congress has delegated to the Postmaster General responsibility for regulating and supervising the flow of material through the channels of the United States mail.[1] Power to carry out this responsibility rests in statu-

1. The Constitution empowers Congress to legislate concerning post offices and post roads. U.S. CONST. art. I, § 8, cl. 3. Initially, Congress considered this power limited strictly to providing for a physical expansion of the embryonic department and its services necessary to meet the needs of a rapidly growing nation. RICH, THE HISTORY OF THE UNITED STATES POST OFFICE TO THE YEAR 1829, at 68-90 (1924). Even at this stage the potential danger to free circulation of intelligence implicit in the power to control use of the mails was a matter of congressional concern. There was strong suspicion that the postal service had been used as a tool in an attempt to obstruct the adoption of the Constitution. RICH, *op. cit. supra* at 65, 114-15. General distrust in the use of administrative power, coupled with a firm belief that the regulation of mail content was not within the power of Congress, led to the defeat of President Jackson's proposal to prohibit incendiary abolitionist publications from the mails. S. Doc. No. 118, 24th Cong., 1st Sess. 1-4 (1836). For debates on the issues, see 12 CONG. DEB. 26-34, 1123-34, 1722-36 (1836). The Post Office Department, however, chose to circumscribe use of the mails on its own initiative, with the approval of the Attorney General. Yazoo City Post Office Case (1857), 8 OPS. ATT'Y GEN. 489 (1853-1857); Case of Emory & Co. (1860), 9 OPS. ATT'Y GEN. 454 (1857-1860). While this action met with criticism sufficient to initiate a congressional inquiry, it was continued with the approval of both houses of Congress. H.R. MISC. Doc. No. 16, 37th Cong., 3d Sess. 1 (1863); S. Doc. No. 19, 37th Cong., 3d Sess. 1 (1863).

The exigencies of the Civil War apparently dulled the keen edge of opposition shown a generation earlier to controlling expression by regulating use of the mails, for the Reconstruction Congress had little difficulty in adopting a statute prohibiting the transmission of obscenity through the mails. 13 STAT. 507 (1865). A flood of similar legislation followed. 15 STAT. 196 (1868) (lottery); 17 STAT. 283 (1872) (codifying existing postal laws, prohibiting use of the mails to defraud, mailing matter physically dangerous to the postal service, obscene matter, material or information concerned with contraception, and lottery information and equipment); 25 STAT. 496 (1888) (defamatory matter); 39 STAT. 1069 (1917) (liquor advertising) (later repealed by 48 STAT. 316 (1934); Securities Act, 48 STAT. 84 (1933), 15 U.S.C. § 77q (1952); Securities and Exchange Act, 48 STAT. 885 (1934), 15 U.S.C. § 78e (1952); Public Utility Holding Company Act, 49 STAT. 812 (1935), 15 U.S.C. § 79d (2) (1952) (use of the mails by persons not registered under these acts).

tory provisions for the application of two administrative sanctions. By use of the first, the Postmaster General may declare material "unmailable" which on its face is defamatory,[2] obscene,[3] or in perpetration of a lottery or fraudulent enterprise,[4] and refuse to allow it entry into the mails. The second sanction is not necessarily directed toward objectionable mail, but toward the addressee who is conducting certain proscribed activities through the postal facilities; the Postmaster General may "upon evidence satisfactory to him" refuse delivery to one using the mails to further fraudulent activities,[5] distribute obscene materials,[6] or furnish lottery information or equipment.[7] Such mail is stamped "Fraudulent" and returned to the sender.[8] Unfortunately, the statutes creating these powers contain no hint of the procedures to be followed in their administration. The Postmaster General has inferred from the absence of statutory provision for procedures a license to apply these sanctions without offering an opportunity for formal administrative hearing and adjudication.[9] Broad legal problems arise when the right to free access

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The constitutionality of this legislation has been seriously questioned. See, *e.g.*, dissents of Justices Holmes and Brandeis in U.S. *ex rel.* Milwaukee v. Burleson, 255 U.S. 407, 417, 436 (1921) and Leach v. Carlile, 258 U.S. 138, 140 (1922). But the Supreme Court has consistently refused to hold it invalid. Donaldson v. Read Magazine, 333 U.S. 178 (1947). The best discussion of the general constitutional issues involved in this legislation is Deutsch, *Freedom of Press and of the Mails,* 36 MICH. L. REV. 703 (1938). Also see ROGERS, THE POSTAL POWERS OF CONGRESS (Johns Hopkins University Studies in Historical and Political Science, ser. 34, no. 2, 1916).

2. 18 U.S.C. § 1718 (1952); 39 C.F.R. § 14.4 (Supp. 1954).

3. 18 U.S.C. § 1461 (1952), as amended, Pub. L. No. 95, 84th Cong., 1st Sess. § 190 (June 28, 1955).

4. 18 U.S.C. §§ 1341, 1342 (1952); 25 STAT. 873 (1889), 39 U.S.C. § 255 (1952); 20 STAT. 360 (1879), as amended, 39 U.S.C. § 243 (1952); 39 C.F.R. § 14.5 (Supp. 1954).

5. 17 STAT. 322 (1872), as amended, 39 U.S.C. § 259 (1952).

6. 64 STAT. 451 (1950), 39 U.S.C. § 259a (1952).

7. 17 STAT. 322 (1872), as amended, 39 U.S.C. § 259 (1952); 18 U.S.C. § 1302 (1952). The Postmaster General may also forbid payment of postal money orders to any person conducting a lottery, regardless of whether use of the mails is involved. 17 STAT. 322 (1872), as amended, 39 U.S.C. § 732 (1952).

8. 17 STAT. 322 (1872), as amended, 39 U.S.C. § 259 (1952). Mail involved in the distribution of obscenity is stamped "Unlawful." 64 STAT. 451 (1950), 39 U.S.C. § 259a (1952).

9. This notion has had a checkered history within the Post Office Department. As early as 1860, despite a lack of statutory authorization, the Postmaster General felt it his duty to stop mail addressed to an alleged defrauder. Though this was done without a hearing, the Attorney General concurred. Case of Emory & Co. (1860), 9 OPS. ATT'Y GEN. 454 (1857-1860). In 1904 this opinion received judicial approval. Public Clearing House v. Coyne, 194 U.S. 497 (1904). But in 1907 a summary stop order was enjoined. Donnell Mfg. Co. v. Wyman, 156 F. 415 (C.C.E.D. Mo. 1907). A Post Office Department Manual, published in 1939, stated that the power did not exist. See U.S. POST OFFICE DEPARTMENT POSTAL DECISIONS 328 (1939), cited in Stanard v. Olesen, 78 Sup. Ct. 768, 771, 98 L. Ed. 1151 (1954). This was still the official opinion in 1940. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department,* S. Doc. No. 186, 76th Cong., 3d Sess. 22 (1940). However, 1941 found the attor-

to the mails becomes subject to summary administrative curtailment.

Impounding Unmailable Matter

Local postmasters are instructed to be on guard for objectionable publications and to impound material deposited in the mail which in their opinion is within one of the proscribed categories.[10] A sample of the suspect material is sent to the Solicitor of the Post Office Department for inspection. This sample comes under the scrutiny of personnel in the Solicitor's office, and in close cases merits an informal conference among departmental attorneys and inspectors.[11] After the mailability of the sample is determined, a letter is sent to the local postmaster advising him how to proceed. If the decision is favorable, the material is permitted entry, having suffered only a few days' delay. But if the material is determined offensive to the statutes, the local postmaster is directed to notify the mailer if the decision, and to inform him that, should he desire to contest it, he must appear before the Solicitor within fourteen days.[12] Should the mailer fail to appear by the expiration of this period, or if he has been heard and the Socilitor is still convinced of the objectionable nature of the material, the local postmaster is directed to destroy it.[13]

The sender whose material is determined to be mailable upon initial inspection has probably suffered little harm, since the decision is made by the Solicitor with dispatch and the mail is, therefore, delayed only a very few days. But the person whose mail receives an adverse initial decision is in a difficult position. His material is impounded not only prior to the

neys for the Post Office Department arguing that a fraud order could be summarily issued, and that any hearing granted respondent was merely an administrative boon. This met with little judicial favor. Pike v. Walker, 121 F.2d 37, 39 (D.C. Cir. 1941). Apparently the threat of the Administrative Procedure Act put the Department on its good behavior, and therefore no evidence of the use of summary sanctions appears until after the departmental hearings were held subject to the Act. Cates v. Haderlein, 342 U.S. 804, *reversing* 189 F.2d 369 (7th Cir. 1951) which had held the A.P.A. not applicable to Post Office proceedings. See Cutler, *The Post Office Department and the Administrative Procedure Act*, 47 Nw. U.L. Rev. 72 (1952). As a result, the Department has sought to avoid the delay and expense involved in the A.P.A. procedures by holding no hearings at all in certain cases. H.R. Rep. No. 2510, 82d Cong., 2d Sess. 94 (1952). The courts have held (1) that a hearing must be had prior to application of the postal sanctions, and (2) that this hearing must follow the A.P.A. It is a strange logic which argues the legality of summary sanctions from this.

10. H.R. Rep. No. 2510, 82d Cong., 2d Sess. 94, 96 (1952). The most recent revision of the Department's published regulations contains no hint that matter deposited in the mails may suffer this treatment. 39 C.F.R. § 48 (Supp. 1954). Yet the practice has apparently not changed. DeGrazia, *Obscenity and the Mail*, 20 Law & Contemp. Prob. 609 (1955); N.Y. Times, Sept. 10, 1955, p. 15, col. 5; N.Y. Times, Oct. 8, 1955, p. 20, col. 1. Compare 39 C.F.R. § 36.7 (1949).

11. H.R. Rep. No. 2510, 82d Cong., 2d Sess. 94 (1952).

12. *Ibid.*

13. *Ibid.*

initial decision, but also during the period allowed him for defense. In view of the fact that the notification of unmailability contains no specific grounds for the order,[14] the person subject to the sanction has hardly been allowed sufficient opportunity to prepare an adequate brief. Not only is he kept ignorant of the particular manner in which his material is alleged to have offended the statutes, he is allowed only a brief period in which to prepare his defense, and apparently must suffer the expense of a trip to Washington in order to present it.[15] Yet, even should the respondent overcome these difficulties, he has gained only the hollow comfort of an informal conference with the Solicitor. Neither a formal hearing nor any of the attendant benefits are his.[16] Moreover, the Postal Department frankly admits that it applies this sanction primarily in borderline cases, where the Attorney General refuses to institute criminal proceedings because the facts do not fit the substantive criminal standards.[17] With no firm substantive standards to refer to, it is difficult to

14. *Ibid.*; DeGrazia, *supra* note 10, at 609.

15. It has been held that a resident of California was denied due process by requiring him to trek to Washington to present his case in a formal fraud order hearing. Jeffries v. Olesen, 121 F.Supp. 463 (S.D.Cal. 1954). That case was based on the failure of the Post Office Department to abide by its own regulations providing for local hearings. In the instant situation no such regulations exist, but a similar result might be expected.

16. The "hearing" is before the Solicitor, who has already decided the issue of mailability, and thus casts himself in the role of prosecutor, judge, and jury. If the Administrative Procedure Act, 60 STAT. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1952), were controlling, the respondent would be guaranteed certain procedural safeguards, specifically: (1) Complaint stating the facts in a manner sufficient to enable respondent to make an answer. 39 C.F.R. § 201.4 (Supp. 1954); (2) Representation by counsel. 39 C.F.R. § 201.7 (Supp. 1954); (3) Opportunity for continuances and extensions. 39 C.F.R. § 201.13 (Supp. 1954); (4) Opportunity to file depositions. 39 C.F.R. §§ 201.14(6), 201.19 (Supp. 1954); (5) Hearing before an examiner independent of the Post Office Department. 39 C.F.R. § 201.14(a) (Supp. 1954); (6) Applieation of rules of evidence governing civil proceedings in United States courts. 39 C.F.R. § 201.16(a) (Supp. 1954); (7) Opportunity to obtain an official transcript of the record. 39 C.F.R. § 201.20 (Supp. 1954); (8) Opportunity to present proposed findings of fact and conclusions of law. 39 C.F.R. § 201.22(a) (Supp. 1954); (9) Opportunity to appeal. 39 C.F.R. § 201.24 (Supp. 1954).

Whether these provisions offer more than nominal protection against arbitrary administrative action is debatable. The basic trouble lies in the substantive standards underlying the Department's action. See DeGrazia, *supra* note 10, at 614-20; compare Cutler, *supra* note 9.

17. "[W]e build up the case to a point where we have sufficient evidence to present to the United States attorney or if we feel from our past experience that the United States attorney will not authorize prosecution we will refer to the Solicitor for an unlawful order." Testimony of Mr. Simon (Post Office Department Inspector) before the Select Committee of the House of Representatives on Current Pornographic Materials, H.R. REP. No. 2510, 82d Cong., 2d Sess. 91 (1952).

"In mentioning borderline . . . I think that is the group that, without any doubt, gives us the most complaint, gives us the most trouble, because the real pornographic material is not specifically advertised, as we mentioned before, but the man who floods the mails with these ads, he is dealing many times with an article that he knows is going to cause a lot of trouble, I mean trouble in deciding on it, and very difficult of a crimi-

see on what ground the respondent can argue for the reversal of the decision.

While there appears to be no right of administrative or judicial appeal from the Solicitor's determination, the sender may petition for injunctive relief from the initial impounding order.[18] Certainly he is likely to suffer irreparable injury by delay. Publishers of newspapers, periodicals, and circulars, the group most likely to fall victim to the interdiction, are also the most vulnerable to its application and may well suffer severe financial loss by delay of their product's delivery. Failure of material to arrive promptly may render the sender liable to his distributor for breach of contract.[19] Potential damage in the loss of public good will, with the concomitant cancellation of subscriptions and drop in newsstand sales, is incalculable.

Interim Stoppage of Incoming Mail

Normally, activities subject to interim stoppage come to the attention of the Postal Department through informal complaints of private parties.[20] An investigation, usually thorough and painstaking, follows receipt of the complaint, and the report of the investigating officer, together with his recommendations, is reviewed by the Chief Postal Inspector, the

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nal prosecution, and those are the things, I think, all the way along, that we are having our great trouble with.

"We have no trouble with prosecution on things that are definitely obscene, but it is this material that is this way and that way that is very, very difficult to prosecute." Testimony of Mr. Keefe (Director of Mail Fraud Investigations), *id.* at 95.

18. This was the mode of attack made by Confidential Magazine on the recent "withdraw from dispatch" order against the November issue. N.Y. Times, Sept. 10, 1955, p. 15, col. 5. Although the district court decreed that the order be lifted, the ultimate effect of the decision is not clear, because the publishers were directed to submit advance copies of the next edition to the Post Office Department for scrutiny. N.Y. Times, Oct. 8, 1955, p. 20, col. 1. It has been intimated that by working on the Department's fear of an adverse decision holding it powerless to use this sanction, the mere filing of a petition for injunctive relief may lead the Postmaster General to revoke this order. DeGrazia, *supra* note 10, at 609 n. 8. But this theory assumes that the Department will bow to judicial decision on the legality of its practices. By refusing Confidential Magazine access to the mails, the Post Office Department ignored the holding of Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945) that this action was a violation of due process.

19. Statement of counsel for Confidential Magazine, Associated Press Dispatch, Oct. 8, 1955; N.Y. Times, Sept. 10, 1955, p. 15, col. 5. Confidential Magazine distributes over 1,000,000 copies bi-monthly through the mails. Huge financial loss would inevitably follow deprivation of this privilege.

20. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department,* S. Doc. No. 186, 76th Cong., 3d Sess. 18 (1940); Miles and O'Brien, *Practice and Procedure in Mail Fraud Cases,* 6 FED. B.J. 119-20 (1945).

head attorney in the Postal Fraud Section, and the Solicitor.[21] Should these officials decide that the report warrants administrative action against the suspect, the Department issues a formal complaint, informing the alleged offender that proceedings are underway against him.[22] A formal hearing, consistent with the requirements of the Administrative Procedure Act, follows.[23]

Until recently, the Postal Department was content to delay the order stopping respondent's mail until final administrative disposition of the case had been made on the merits.[24] The more recent practice, however, has been to issue, simultaneously with the formal complaint, an order to the local postmaster directing him to impound all mail addressed to the offender until the final administrative determination.[25] In effect, this stops the suspect activities *pendente lite*. Should the outcome of the formal hearing be favorable to the respondent, the impounding order is lifted and the accumulated mail delivered. An unfavorable decision results in the impounded material and all subsequent incoming mail being stamped "Fraudulent" and returned to the sender.[26]

The party whose mail is impounded *pendente lite* is not, however, left completely impotent while his mail accumulates in the vaults of the local post office. He may seek a remedy through the federal courts,[27] or he may bargain for a compromise through administrative channels. The

21. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department*, S. Doc. No. 186, 76th Cong., 3d Sess. 18-19 (1940). It is, however, doubtful that these officials can give more than cursory treatment to the report of investigation, in light of their other duties and the huge number of investigations that are carried out yearly. In fiscal 1951, there were 6,687 mail fraud investigations and 6,197 unmailability investigations, POSTMASTER GEN. ANN. REP. 197 (1951); in 1952, 6,150 mail fraud and 5,637 unmailability, POSTMASTER GEN. ANN. REP. 240 (1952); in 1953, 5,633 mail fraud and 5,580 other prohibited mailings, POSTMASTER GEN. ANN. REP. 110 (1953). Later reports omit this information.

22. The complaint informs respondent of the charges against him only in a very general way. Although the Department receives frequent requests for bills of particulars, these are always denied on the grounds that respondent already has wind that the Department objects to certain of his activities, and that this is sufficient notice. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department*, S. Doc. No. 186, 76th Cong., 3d Sess. 19 & n. 73. See also Bonica v. Olesen, 126 F.Supp. 398, 399 (S.D.Cal. 1954) where a respondent whose films had been banned from the mails requested information as to the specific parts which were considered objectionable, in order that they might be deleted. This was refused.

23. See note 9 *supra*.

24. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department*, S. Doc. No. 186, 76th Cong., 3d Sess. 21-23 (1940); see note 9 *supra*.

25. See Stanard v. Olesen, 74 Sup. Ct. 768, 98 L.Ed. 1151 (1954); Williams v. Petty, 4 PIKE & FISCHER AD. L. DEC. (2d ser.) 203 (E.D. Okla. 1954); Barel v. Fiske, 4 PIKE & FISCHER AD. L. DEC. (2d ser.) 207 (S.D.N.Y. 1954). See note 9 *supra*.

26. See note 8 *supra*.

27. See note 31 *infra*.

Postal Department provides machinery for lifting the interim impounding order, by permitting the victim to file an affidavit of "voluntary discontinuance," which stipulates that the offensive activities have ceased and will not be revived.[28] The stop order is then lifted, and the respondent once again may receive mail deliveries, but the mail held prior to this time is returned to the sender. It is not in this case branded "Fraudulent," but bears the more temperate imprint "Out of Business."[29] A voluntary discontinuance terminates all proceedings against the alleged offender, but should he resume his activities in violation of his affidavit, he apparently loses the right to a formal hearing, and the Postmaster General may issue a final stop order forthwith.[30] To avail himself of administrative relief, therefore, respondent must either cease his activities without having received a final decision on the question of their legality, or accept the interim interdiction in order to get a final administrative determination of the case.

It is not clear from decisions in the district courts whether a party who wishes to continue his business pending final administrative action is entitled to injunctive relief from the interim stop order.[31] Clearly, if the Postmaster General's action in summarily impounding mail prior to hearing is illegal, the victim of the order is entitled to injunctive relief.

28. 39 C.F.R. § 201.11(b) (Supp. 1954); POSTMASTER GEN. ANN. REP. 89 (1951); Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department*, S. Doc. No. 186, 76th Cong., 3d Sess. 20 (1940).

29. *Id.* at 21.

30. *Id.* at 20; Rood v. Goodman, 83 F.2d 28 (5th Cir. 1936).

31. Donnell Mfg. Co. v. Wyman, 156 F.415 (C.C.E.D.Mo. 1907); Myers v. Cheeseman, 174 F.783 (6th Cir. 1909) resulted in injunctions against use of the interim order pending litigation. Williams v. Petty, 4 PIKE & FISCHER AD. L. DEC. (2d ser.) 203 (E.D. Okla. 1954); Barel v. Fiske, 4 PIKE & FISCHER AD. L. DEC. (2d ser.) 207 (S.D.N.Y. 1954); Stanard v. Olesen, 121 F.Supp. 607 (S.D.Cal. 1954) refused to grant injunctive relief on the grounds that petitioner had not exhausted his administrative remedies. It is difficult to justify this position. The doctrine of exhaustion of administrative remedies should apply only to those cases where such remedies are available. Here the issue is the legality of administrative sanctions applied prior to any determination of the merits of the case. There is no provision for attacking the legality of the interim sanction through administrative channels without first submitting to its operation. There is no administrative remedy available. The wrong from which relief is sought is independent of the ultimate result of the administrative hearing and has nothing to do with the final outcome of administrative procedures. Petitioner's argument is simply that he has been deprived of access to the mails prior to any determination of guilt. He does not seek judicial review of the grounds for the order, but rather looks for a decision that the Postmaster General is totally without power to take such action prior to a formal administrative determination of the case.

Mr. Justice Douglas, recently presented with the issue of the legality of summary postal sanctions while sitting in chambers, refused to enjoin the use of the interim order because a petition seeking identical relief was pending in the Court of Appeals. As a decree favorable to the petitioner would make the question moot, he felt that he should not act so as to preclude a decision on the point by the Court of Appeals. Stanard v. Olesen, 74 Sup. Ct. 768, 98 L.Ed. 1151 (1954).

He may suffer irreparable injury in the continuation of the order. Many types of legitimate enterprises depend on rapid mail communications for their existence. Stopping the flow of mail to a business for even a short period of time may well lead to its commercial atrophy, yet the procedures involved in arriving at a final administrative disposition of the case are time-consuming, and the interim order may last for months.[32] Although the courts have recognized the plight of the petitioner as sufficiently grave to warrant judicial attention, they have generally refused to grant relief, holding that the Postmaster General has the legal authority to impound mail *pendente lite,* and that the consequences of his use of the power fall outside the scope of judicial scrutiny.[33] This provision not only affirms the right of the Postal Department to employ summary sanctions; it further implies that this right is subject to no legal circumscription.

Legality of Summary Postal Sanctions

Although the question of the legality of the summary use of the administrative sanctions has recently been before the courts, it has, unfortunately, received no clear-cut judicial answer.[34] It is difficult to find

32. Testimony of Solicitor Frank, H.R. REP. No. 2510, 82d Cong., 2d Sess. 92 (1952) (several months to get a final stop order under the A.P.A. procedures); Stanard v. Olesen, 74 Sup. Ct. 768, 98 L.Ed. 1151 (1954) (about three months).

33. See cases cited note 31 *supra.*

34. The difficulties involved in obtaining a decision by an appellate court on this question are illustrated by the tortuous litigation surrounding a recent case. The victim of a summary order impounding her incoming mail petitioned the federal district court for a decree ordering the local postmaster to deliver her mail until the final administrative order was issued by the Postmaster General. This was denied on the grounds that she had not exhausted her administrative remedies. Stanard v. Olesen, 121 F.Supp. 607 (S.D.Cal. 1954); see note 31 *supra.* An appeal was docketed, No. 14361, 9th Cir., filed April 12, 1954, but the victim also petitioned Mr. Justice Douglas in his capacity as Circuit Justice for relief from the interim administrative order pending decision on the appeal. This was denied. Stanard v. Olesen, 74 Sup. Ct. 768, 98 L.Ed. 1151 (1954). Before the appeal was heard, a final administrative stop order was issued by the Post Office Department. The final order was then attacked by a petition for injunction, but, as the District Judge indicated that there might be a jurisdictional question because of the pendency of the appeal in the first action, that appeal was dismissed. Letter from Stanley Fleishman, counsel for petitioner in Stanard v. Olesen, *supra,* to the *Indiana Law Journal,* Nov. 28, 1955. The issue of the legality of the interim order was then consolidated with the issue of the sufficiency of the final order. Although the lower court held for petitioner in both issues, Stanard v. Olesen, Docket No. 16866 PH, S.D.Cal., Aug. 13, 1954, on appeal by the Post Office Department the court refrained from passing on the question of the legality of the interim order, and affirmed on the ground that the final order was invalid. Stanard v. Olesen, Docket No. 14546, 9th Cir., Oct. 26, 1955.

An action recently filed in the district court testing the legality of summary impounding of "nonmailable" matter was dismissed on the Post Office Department's representation that mail would not be delayed in the future without first being granted a hearing. Letter from Stanley Fleishman, counsel for petitioner in Stanard v. Olesen, *supra,* to the *Indiana Law Journal,* Sept. 7, 1955. The action taken by the Postmaster General against Confidential Magazine, in refusing that publication entry to the

justification for their summary use. There is no statutory authority for the Post Office Department to impound mail without a hearing and before there has been any final determination of illegality.[35] Until quite recently, the Department considered itself without such power.[36] The history of recent legislative proposals to specifically grant these powers to the Postmaster General surely indicates that Congress considered them not to be pre-existent.[37] The Supreme Court has indicated that the demands of due process, in conjunction with the Administrative Procedure Act, require a full and formal hearing before postal sanctions may be applied.[38] As there is no express authority for the employment of sanctions prior to hearing and final determination of illegality, the courts, if they are to uphold this power, must read into the statutes provision for it. Powerful arguments exist against taking this step. Legislation is not a proper function of the courts.[39] Furthermore, use of these sanctions skirts dangerously close to the infliction of punishment without due process of law, protection against which is a guarantee of the fifth and sixth amendments of the Constitution, and the area of activity to which the sanctions apply is tangent to areas protected by the guarantees of the first amendment.[40] Congress has broad power to legislate concerning use of

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mails without notice or hearing, seems to indicate a lapse of departmental memory. See note 18 *supra*.

35. See notes 2-8 *supra*; see note 57 *infra*. "If this power exists, it is an implied one. For I find no statutory authority of the Post Office Department to impound mail *without a hearing and before there has been any final determination of illegal activity.*" Stanard v. Olesen, 74 Sup. Ct. 768, 771, 98 L.Ed. 1151, 1153 (1954).

36. See note 9 *supra*. At one time the Post Office Department was reluctant to utilize this sanction because of the harmful effect to the respondent's business. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department*, S. Doc. No. 186, 76th Cong., 3d Sess. 23 n. 85.

37. H.R. 174, 84th Cong., 1st Sess. (1955); H.R. 569, 83d Cong., 1st Sess. (1954); H.R. REP. No. 850, 83d Cong., 1st Sess. (1954); H.R. REP. No. 1874, 82d Cong., 2d Sess. (1952); H.R. REP. No. 2510, 82d Cong., 2d Sess. (1952).

38. Cates v. Haderlein, 342 U.S. 804, *reversing* 189 F.2d 369 (7th Cir. 1951); see Cutler, *supra* note 9.

39. At least this is the traditional theory of the judicial function. See CAHILL, JUDICIAL LEGISLATION 1-18 (1952). Even a confirmed legal realist might well shudder at reading into a statute provisions treading so dangerously close to areas of individual freedoms protected by the Constitution. See Roth v. Goldman, 172 F.2d 788, 790 (2d Cir. 1949) (Judge Frank's concurring opinion).

40. "The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee. . . . I mention the constitutional implications of the problem only to emphasize that the power to impound mail should not be lightly implied." Stanard v. Olesen, 74 Sup. Ct. 768, 770-71, 98 L.Ed. 1151, 1152-53 (1954).

"[G]rave constitutional questions are raised once it is said that the use of the mails is a privilege which may be extended or withheld on any ground whatsoever." Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946).

the mails, but in so doing must not infringe on activities protected by the Bill of Rights.[41] Nor may the Postmaster General, in the employment of the power granted him by Congress, violate these guarantees.[42] The courts, therefore, should be extremely reluctant to imply a legislative delegation of such power to an administrative agency.

The arguments in favor of utilizing summary sanctions to deal with postal offenses rests on tenuous grounds of policy.[43] The Post Office Department predicts that should it be disarmed of these powers, it would become totally impotent to execute the supervisory mission assigned it by Congress,[44] and further indicates that the summary nature of the proscriptive action is its chief value.[45] If too much time is allowed to expire before the illegality of the activities of a suspect is formally determined, the offender may have already exhausted the supply of available victims

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See dissents by Justices Holmes and Brandeis in Leach v. Carlile, 258 U.S. 138, 140 (1922), and United States *ex rel.* Milwaukee v. Burleson, 255 U.S. 407, 417, 436 (1921). See Roth v. Goldman, 172 F.2d 788, 790 (2d Cir. 1949); Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945).

The problem of previous restraint on publication inherent in governmental regulation of mail content has been discussed in Deutsch, *supra* note 1; Note, 28 VA. L. REV. 634 (1942). See also Note, 52 MICH. L. REV. 575 (1954).

41. *Ex parte* Jackson, 96 U.S. 727 (1878).

42. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). See *Ex parte* Jackson, 96 U.S. 727 (1878). See the excellent historical discussion of the Supreme Court's tussle with the first amendment problems arising out of the statutory delegation of power to the Postmaster General, in Deustch, *supra* note 1. And see 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 276-366 (1947).

43. There is no doubt that use of the mails to carry out illegal activities presents unique problems in law enforcement. The mail fraud artists and pornography peddlers are hard to detect and hard to convict. The number of investigations conducted yearly by the Post Office Department indicates the breadth of the problem. See note 21 *supra*. Certainly the activities sought to be controlled touch a large section of the public. *E.g.*, in seventy-six cases of mail fraud in 1951 the victims were swindled out of $7,695,000, POSTMASTER GEN. ANN. REP. 101 (1951); in 1952 eighty-two defrauders bilked the public out of $6,800,000, POSTMASTER GEN. ANN. REP. 100 (1952). Over 5,000 complaints from the public were received concerning one California dealer, who mailed some 98,000 pieces of first class mail daily, and in nine months spent $60,000 for postage. H.R. REP. No. 2510, 82d Cong., 2d Sess. 95 (1952).

44. "If we had to hold hearings on all those, if any court should ever decide that those hearings [sic] also come under the APA, we are just hopelessly sunk, that is all; we are just lost.

"They may, but they have never taken us into court on it. We just hope that we get by as long as we can." Testimony of Solicitor Frank, before the Select Committee of the House of Representatives on Current Pornographic Materials, H.R. REP. No. 2510, 82d Cong., 2d Sess. 94 (1952).

45. Letter from the Postmaster General to the Speaker of the House of Representatives urging legislation enabling the Department to take summary action, H.R. REP. No. 1874 accompanying H.R. 5950, 82d Cong., 2d Sess. 4 (1952). See Stanard v. Olesen, 74 Sup. Ct. 768, 771, 98 L.Ed. 1151, 1153 (1954); Walker v. Popenoe, 149 F.2d 511, 514 (D.C. Cir. 1945).

and turned to other devices.[46] If offensive material is to be allowed transit in the mails while its mailability is being determined, the final ban will find itself without a subject. In either case the harm is done, the public injured. These arguments lose much of their force, however, when the nature of the Department's problem is more closely considered. If the Department has taken the time necessary for a careful investigation, the fly-by-night operator has probably reaped the bulk of his harvest even before the temporary order can be issued, and therefore holds little fear of the sanction.[47] Moreover the cases indicate that the great number of persons whose mail has been summarily impounded are not fly-by-nighters, but established businessmen whose activities have been going on for years.[48] The Post Office Department might well compensate for the time lost in formal proceedings by an increased alacrity in detection and investigation. The potential harm implicit in the use of summary sanctions is not balanced by the doubtful advantage gained by foreclosing a questionable business several weeks early.

Although the employment of summary sanctions has a certain legal tradition,[49] it has normally been carefully restricted to areas concerned with public health and safety.[50] It is a basic tenet of Anglo-American law that illegality is never presumed, but must be proved before sanctions may be wielded against it. This proposition is held even more dear when the power of the government threatens to proscribe individual activities. Criminal law is administered with care for the rights of the individual. A presumption that the accused is innocent,[51] a heavy burden on the government to prove its case,[52] strict interpretation of punitive statutes[53] are basic legal principles designed to prevent an ingestion of private rights

46. Certain wily operators take advantage of the publicity value of an obscenity stop-order complaint, and advertise the fact that their material is considered by the government to be lewd, lascivious, and obscene. A "clean up" campaign, designed to glut the pornography market before the final stop order can be made, is instituted after the initial complaint issues. After two or three weeks, the operator has received all the business he can expect, and moves on to greener fields, supremely indifferent to the procedures grinding away in the Post Office Department. H.R. REP. No. 1874, 82d Cong., 2d Sess. 4 (1952).

47. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department,* S. Doc. No. 186, 76th Cong., 3d Sess. 19 n. 80 (1940).

48. *Ibid.* See Stanard v. Olesen, 74 Sup. Ct. 768, 98 L.Ed. 1151 (1954) (business duly recorded with the state authorities); Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945) (publishers of pamphlets containing marital advice); DeGrazia, *supra* note 10, at 609 n. 8, 618 & n. 44 (rare book dealer); N.Y. Times, Sept. 10, 1955, p. 15, col. 5 (Confidential Magazine).

49. FREUND, POLICE POWER, §§ 520-28 (1904).

50. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 196-210 (1928).

51. 1 WHARTON, CRIMINAL EVIDENCE § 72 (11th ed. 1935).

52. *Id.* at § 196.

53. HALL, CRIMINAL LAW AND PROCEDURE 4-12 (1949).

into the maw of governmental power. Yet the individual whose use of the United States mails falls victim to summary administrative interdiction is guaranteed no similar protections. Although it is true that the sanctions employed by the Post Office Department are designed to be preventive rather than punitive,[54] they may have crushing effect upon the suspect's freedom of activity and property interests. Those activities against which the Department claims the authority to employ summary action are made criminal by federal statute.[55] For the most part they are common law crimes or have been declared criminal by state legislation.[56] If these activities were on criminal trial, they would be granted elaborate substantive and procedural safeguards. Yet, despite the fact that language establishing the categories of activities subject to postal sanctions is nearly identical with that language defining their criminality,[57] the substantive standards utilized by the administrative agency are far broader than those employed by the courts.[58] This is explained in part by the re-

54. Donaldson v. Read Magazine, 333 U.S. 179, 184, 191 (1948) (dictum); Commissioner v. Heininger, 320 U.S. 467, 474 (1943) (dictum).

55. See notes 2-4 *supra*; see note 57 *infra*.

56. CLARK AND MARSHALL, CRIMES § 485 (5th ed. 1952) (obscene libel); *id.* at § 434 (libel); *id.* at § 538 (fraud); 2 WHARTON, CRIMINAL LAW § 1777 (12th ed. 1932) (lottery).

57. *E.g.*, "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department . . . shall be fined not more than $1,000 or imprisoned not more than five years or both." 18 U.S.C. § 1341 (1952).

"The Postmaster General may, upon evidence satisfactory to him . . . that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office . . . at which . . . letters . . . arrive directed to any person or company . . . to return all such mail matter to the postmaster at the office at which it was originally mailed . . . and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof. . . ." 17 STAT. 322 (1872), as amended, 39 U.S.C. § 259 (1952).

Compare 18 U.S.C. § 461 (1952) as amended by Pub. L. No. 95, 84th Cong., 1st Sess. § 190 (June 28, 1955) with 64 STAT. 451 (1950), 39 U.S.C. § 259a (1952) (obscenity); compare 18 U.S.C. § 1302 (1952) with 17 STAT. 322 (1872), as amended, 39 U.S.C. § 259 (1952) (lottery); 18 U.S.C. § 1718 (1952) (defamation).

58. The test for obscenity is whether the material as a whole tends to promote lust. United States v. One Book Called "Ulysses," 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934). The great bulk of the material proscribed by the Post Office Department does not fall into this category, as the postal officials are well aware. See note 18 *supra*; DeGrazia, *supra* note 10, at 614-20. Although the substantive definitions of fraud, lottery, and defamation as applied by the postal authorities are more nearly in accord with judicial standards, there are several instances in which the Post Office Department has clearly stepped out of bounds. Letters bearing on their cover criticism of the Mooney conviction were barred from the mails as defamatory. American Civil Liberties Union, Inc. v. Kiely, 40 F.2d 451 (2d Cir. 1930) (Injunction granted). The manufacturer of an inhaling compound which had been marketed for fifty years fell afoul of a postal fraud order, issued on the grounds that the stuff was advertised as "palliative" and "soothing." Jarvis v. Shackelton Inhaler Co., 136 F.2d 116 (6th Cir. 1943) (In-

fusal of the courts, hesitating to interfere with the efforts of the postal authorities to combat the increasing number of unsavory enterprises conducted through the mails, to review directly the standards upon which the administrative action is based.[59]

Recent decisions indicate that the use of summary sanctions by the Post Office Department may be held unlawful.[60] This is a desirable result. The practical demand for the employment of these powers does not adequately disguise the absence of legal justification for their use. Objectionable activities are amenable to controls more consistent with notions of due process and fair play.[61] Some of these controls lie dormant within the recognized powers of the Post Office Department to investigate and

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junction granted). A scheme by a merchant group to promote local business by giving prizes for matching cards sent through the mails with cards displayed on goods exhibited in various store windows was proscribed as a lottery by the Post Office Department. Garden City Chamber of Commerce, Inc., v. Wagner, 100 F.Supp. 769 (E.D.N.Y.), *aff'd*, 192 F.2d 240 (2d Cir. 1951) (Injunction granted).

The curious tendency of the post office to extend the grasp of its power is illustrated by the recent curbs on deliveries of Soviet periodicals. See Note, 68 HARV. L. REV. 1393 (1955).

"We believe that the post office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds.'" (Judge Arnold, denying the contention that the Postmaster General may revoke the second class mailing privilege of a publication on the grounds that it was morally improper) Esquire v. Walker, 151 F.2d 49, 55 (D.C. Cir. 1945), *aff'd sub nom.* Hannegan v. Esquire, 327 U.S. 146 (1946).

59. A variety of criteria have been used to establish the scope of judicial review of the Postmaster General's administrative activities. Farley v. Heininger, 105 F.2d 79 (D.C. Cir.), *cert. denied*, 308 U.S. 587 (1939) (arbitrary action of the Postmaster General); Aycock v. O'Brien, 28 F.2d 817 (9th Cir. 1928) (whether fair hearing was held); National Conference on Legalizing Lotteries v. Farley, 96 F.2d 861 (D.C. Cir.), *cert. denied*, 305 U.S. 624 (1938) (whether decision was palpably wrong); Leach v. Carlile, 258 U.S. 138 (1922) (whether decision was based on substantial evidence). This language appears to mean only that there is a presumption in favor of the validity of the administrative action. The first tentative step toward judicial review of the substance of a decision of the Postmaster General, American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), was in effect quickly withdrawn. See Public Clearing House v. Coyne, 194 U.S. 497 (1904). Although the court has fond memories of its initial effort, it has not seen fit to try again. See Reilly v. Pinkus, 338 U.S. 269 (1949).

60. "I, therefore, strongly incline to the view that the interim order from which the petitioner seeks relief is invalid." Stanard v. Olesen, 74 Sup. Ct. 768, 771-72, 98 L.Ed. 1151, 1153 (1954).

"[T]he proposition urged by the Postmaster General and accepted by the court below [that a fraud order may be issued summarily] is too far reaching to be admitted until specifically recognized and declared by the Supreme Court." Pike v. Walker, 121 F.2d 37, 39 (D.C. Cir. 1941) (Injunction denied on other grounds). See note 18 *supra*.

61. A judicial process, similar to that resulting in a temporary restraining order, requiring the Department to show a prima facie case before issuing the order, has been suggested. Monograph of the Attorney General's Committee on Administrative Procedure, *Post Office Department*, S. Doc. No. 186, 76th Cong., 3d Sess. 21-23 (1940). Problems in the improvement of Post Office Department procedures in general are posed in 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 331-66 (1947).

hold formal hearings. Simply the knowledge that their activities are under investigation would tend to deter the bulk of unwitting offenders from further violations. The fear of formal administrative proceedings, with their attendant publicity, and the possibility of eventual loss of mail privileges should be sufficient to discourage the respectable businessman from persisting in borderline activities. Should the individual decide to risk an unfavorable outcome of the administrative hearing, he would do so with the confidence that his rights are protected by the provisions of the Administrative Procedure Act.[62] Whereas the hardened offenders and fly-by-night operators are not likely to be impressed by the threat of administrative action, the imminence of, and subjection to, criminal prosecution may alarm this breed of offender into terminating activities.[63] It would seem, therefore, that there is little to lose by denying the power of the Postmaster General to summarily withhold the privilege of access to the mails. The bulk of cases can be dealt with by pressures implicit in formal hearing procedures. Close liaison between postal inspectors and government prosecutors should lead to effective control of the criminal residue.

Conclusion

Grave threats to personal rights are implicit in the power of an administrative agency to apply summary sanctions. For this reason, they should be employed reluctantly, and only in those situations where extreme danger to the public urgently demands swift action. Whether the activities against which postal sanctions have been summarily applied are of this nature is a question for legislative or judicial decision. The present use of these powers by the Post Office Department is without judicial precedent or legislative authority. Clearly it is the duty of the courts to declare such usurpation of authority illegal.

STATE SEDITION LAWS: THEIR SCOPE AND MISAPPLICATION

The criminal codes of thirty-one states, Hawaii, and Alaska[1] pro-

62. See note 16 *supra.*

63. See note 57 *supra.*

1. ALA. CODE tit. 14, §§ 19-20 (1953); ALASKA COMP. LAWS ANN. §§ 65-11-1-65-11-2 (1949); ARK. STAT. § 41-4107 (1947); COLO. STAT. ANN. c. 40 Art. 23 § 7 (1935); CONN. GEN. STAT. §§ 8346-47 (1949); DEL. CODE ANN. tit. 11, § 862 (1953); FLA. STAT. §§ 779.05, 876.22-.31 (1953); GA. CODE § 26-901a (1953); HAWAII REV. LAWS § 11001 (1945); ILL. REV. STAT. c. 37, §§ 527-29 (1951); IND. ANN. STAT. § 10-1302 (Burns 1933); IOWA CODE ANN. §§ 689.4-.9 (1949); KAN. GEN. STAT. § 21.306 (1949); KY. REV. STAT. § 432.030 (1953); LA. REV. STAT. § 53:207 (1950); MD. ANN. CODE GEN.