

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1304 & 81-1381

TITLE NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,  
Petitioner, v. UNITED STATES POSTAL SERVICE ET AL.;  
and

UNITED PARCEL SERVICE OF AMERICA, INC., Petitioner  
v. UNITED STATES POSTAL SERVICE ET AL.

PLACE Washington, D. C.

DATE December 1, 1982

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   NATIONAL ASSOCIATION OF GREETING   :

4       CARD PUBLISHERS,               :

5                               Petitioner,       :

6                   v.                       No. 81-1304   :

7   UNITED STATES POSTAL SERVICE       :

8       ET AL;                               :

9   and                                       :

10   UNITED PARCEL SERVICE OF AMERICA,   :

11       INC.,                               :

12                               Petitioner,       :

13                   v.                       No. 81-1381   :

14   UNITED STATES POSTAL SERVICE ET AL.:   :

15   - - - - -x

16                                       Washington, D.C.

17                                       Wednesday, December 1, 1982

18               The above-entitled matter came on for oral  
19   argument before the Supreme Court of the United States  
20   at 10:03 o'clock a.m.

21   APPEARANCES:

22   BERNARD G. SEGAL, ESQ., Philadelphia, Pennsylvania; on  
23   behalf of the Petitioner in No. 81-1381.

24   MATTHEW S. PERLMAN, ESQ., Washington, D.C.; on behalf  
25   of the Petitioner in No. 81-1304.

26   JOHN H. GARVEY, ESQ., Office of the Solicitor General,  
27   Department of Justice, Washington, D.C.; on behalf of  
28   Respondents in both cases.

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in 81-1304, on the consolidated case,  
4 National Association of Greeting Card Publishers against  
5 the United States Postal Service.

6                    Mr. Segal, you may proceed whenever you are  
7 ready.

8                    ORAL ARGUMENT OF BERNARD G. SEGAL, ESQ.,  
9                    ON BEHALF OF PETITIONER IN 81-1381

10                  MR. SEGAL: Mr. Chief Justice, and may it  
11 please the Court, this case involves the rate-making  
12 provisions of the Postal Reorganization Act of 1970,  
13 which eliminated the Post Office Department and  
14 transferred its functions to the United States Postal  
15 Service.

16                  Since the new agency was to operate the first  
17 class letter monopoly as well as provide classes of mail  
18 competitive with enterprises in the private sector,  
19 Congress enacted unique rate-making provisions designed  
20 to prevent the Postal Service from utilizing the  
21 monopoly power, by overcharging first class mail users,  
22 and subsidizing other classes of mail.

23                  I shall discuss the statutory language which  
24 seeks to effectuate this Congressional purpose by  
25 requiring that the rates for each class of mail recover



1 the costs caused by the class. Mr. Perlman, counsel for  
2 the other Petitioner, will demonstrate that the  
3 legislative history confirms the plain meaning of the  
4 statute.

5           Initially, I note a very substantial  
6 concession made by the Postal Service in this Court.  
7 The Postal Service had participated in persuading the  
8 Second Circuit to rule that the Act does not require  
9 long-term, but calls only for short-term costing,  
10 variable costing. By virtue of this holding, the \$3  
11 billion of cost which formerly had been attributed to  
12 various classes of mail can now be shifted to the first  
13 class mail monopoly, this by virtue of the decision.

14           Now, the Postal Service, in the Solicitor  
15 General's brief in this Court, concedes that costs vary  
16 with volume in the long run, and must be attributed that  
17 way. Although four Respondents still adhere to the  
18 view, nevertheless, the language of the statute clearly  
19 compels the concession, and calls for reversal of the  
20 Second Circuit decision.

21           Despite the concession, the Postal Service  
22 still improperly limits attributable costs. The Postal  
23 Service says that attributable costs are only those  
24 costs that can be proven by statistics to vary with  
25 changes in volume, but the language of the Act contains

1 no such limitation. Section 3622(b)(3), and I read the  
2 requisite provision, that "each class of mail or type of  
3 mail service bear the direct and indirect postal costs  
4 attributable to that class or type," and that is all it  
5 says.

6 Congress did not use technical language. It  
7 employed as the key word "attributable," which the  
8 dictionary says is caused or brought about by, and it  
9 couldn't have used the more all-inclusive word, I  
10 submit. As the District of Columbia Circuit stated so  
11 well, the Commission cannot stop with statistical  
12 variability in looking for causal connections between  
13 costs and classes of mail. It must go on, as does all  
14 business, to other inferences of causation, deductive  
15 analysis, logic, common sense.

16 Section 3622(b)(3), the costing section, also  
17 couples the attributable cost requirement with a  
18 requirement that each class of mail must also bear that  
19 portion, and I am quoting, "of all other costs  
20 reasonably assignable to such class." The fact that the  
21 reasonably assignable section is in the costing  
22 subsection makes it clear that some unattributed costs  
23 must be reasonably assigned on specific cost of service  
24 principles.

25 QUESTION: What would be an example, Mr.

1 Segal, of one in that category?

2 MR. SEGAL: Well, for example, they have a  
3 contingency grant, one which provides for contingencies  
4 that might arise in the coming year. That one ought to  
5 be reasonably assigned based on the classes which cause  
6 the costs that lead to the concern of the contingency.

7 QUESTION: Mr. Segal, are there other causal  
8 costs that don't vary either directly or indirectly with  
9 the amount or weight or volume of the mail?

10 MR. SEGAL: Yes, there are, and in our  
11 judgment, for example, they will amount to about \$6  
12 billion, or 25 percent of all costs which will be  
13 apportionable to the other eight factors in 3622.

14 QUESTION: Well, generally speaking, what do  
15 those consist of, the causal costs that don't vary?

16 MR. SEGAL: The causal costs that don't --

17 QUESTION: With the volume or weight or number  
18 of pieces.

19 MR. SEGAL: Well, you might have a building  
20 which is up for 30 years without change, is a good  
21 example. The --

22 QUESTION: How about transportation costs, in  
23 your view?

24 MR. SEGAL: Well, the transportation cost is  
25 really an abomination as it is presently being -- if it

1 is hired, if they hire the equipment, then they  
2 attribute. If it is their own equipment going from  
3 place to place, then they do not. They say there that  
4 the vehicle must go regardless of the volume, and they  
5 will attribute for the sorting and then stop, and say,  
6 well, the rest of it, the truck is going anyway, and  
7 therefore we don't attribute. But that is a very big  
8 question, if I may suggest, and I have 13 minutes. .

9 QUESTION: Does United Parcel Service run its  
10 business quite differently than that?

11 MR. SEGAL: United Parcel Service does run its  
12 business quite differently. There is no cost that is  
13 not attributed to what causes the cost, or it would be a  
14 very unsound pricing situation. And the District of  
15 Columbia Circuit had them well in line. It is this new  
16 case which is causing us all of the concern.

17 The first class letter monopoly, soon to  
18 become, by the way, the nation's largest monopoly after  
19 AT&T, will provide \$13 billion of income this year, 57  
20 percent of the total revenue of the Postal Service.  
21 Much of the remaining revenues from other types of mail  
22 where they compete with business in the private sector,  
23 the governors of the Postal Service in this very case in  
24 their opinion stated, and I quote, that "the Postal  
25 Service's goal is to encourage significant increases in



1 volume in an increasingly competitive market  
2 situation."

3           That means, take just this case. Although  
4 they have had an enormous increase, virtually twice the  
5 CPI since 1971, they ask for an increase of 33 and  
6 one-third percent in the revenues of first class mail  
7 and 8.3 percent for parcel post, which competes with  
8 United Parcel Service and with thousands of others in  
9 the industry.

10           So, I need not tell you how concerned those in  
11 the industry are.

12           QUESTION: Well, you don't really care about  
13 what happens to first class mail, do you? You are  
14 worried that Parcel Post will compete more effectively  
15 with --

16           MR. SEGAL: We are worried that the more they  
17 are subsidized, Justice Rehnquist, the less they will  
18 ask for money for Parcel Post. They are using the  
19 subsidization, the excess of the money that they get for  
20 first class, to subsidize these classes which compete,  
21 and there isn't any question about that.

22           But I might say to Your Honor, that we are not  
23 the only ones concerned. Instrumentalities of the  
24 federal government are deeply concerned that the Postal  
25 Service not be permitted to take advantage of its

1 enormous letter monopoly to subsidize services, as I  
2 have just said, which compete. Thus, within the past  
3 year, the Department of Justice, through the Antitrust  
4 Division, went to court to enjoin the Postal Service  
5 from instituting an electronic mail service known as  
6 ECOM, in competition with private enterprise.

7           The Antitrust Division took this action  
8 because it said, and I quote, "ECOM would be subsidized  
9 and would pre-empt private sector activity."

10           Significantly also, just two months ago, the  
11 Committee on Government Operations of the House of  
12 Representatives published a unanimous report on the same  
13 new ECOM operation of the Postal Service in competition  
14 with private industry, a new service. This is the  
15 finding of the House Committee unanimous: "that the  
16 current ECOM rate is not compensatory, that the Postal  
17 Service has known for some time now that this is so, and  
18 therefore that ECOM is being subsidized by other Postal  
19 Services in violation of Section 3622(b)(3)." That is  
20 signed by William Baxter.

21           So that, Your Honors, we are in a situation  
22 where Congress took very specific action. It had  
23 experienced, it knew the pressures over all the years,  
24 and incidentally, from the time Parcel Post was started  
25 in 1913, the ICC had -- the Congress didn't even give

1 itself jurisdiction over that. Now that it was all to  
2 be cost oriented, they thought it was all right to  
3 permit this very competitive role to be handled, and in  
4 a succession of opinions, three panels of the District  
5 of Columbia circuit have gradually brought under control  
6 more and more this situation.

7 But the difficulty is that you have, as you  
8 have read, the desire, as I have just read to you, the  
9 desire of the governors to grow, to get bigger, and to  
10 compete in the market, and they are competing by  
11 subsidization.

12 In concluding, so I will have time for  
13 rebuttal, I submit that anything but a literal  
14 application of Section 3622(b)(3), as in the decisions  
15 of the District of Columbia circuit, would greatly  
16 increase the opportunity of the Postal Service to  
17 subsidize competitive classes of mail out of excess  
18 revenues of monopoly first class letter mail.

19 Certainly --

20 QUESTION: Mr. Segal, may I ask you just one  
21 question?

22 MR. SEGAL: Yes.

23 QUESTION: Do you have -- Can you give me an  
24 idea of what your view of the percentage of total costs  
25 that should be allocated under a proper reading of the

1 statute?

2 MR. SEGAL: That should be allocated?

3 QUESTION: In other words, if you just take  
4 short-run variable costs, you allocate maybe 50 percent  
5 of that total cost.

6 MR. SEGAL: That's right.

7 QUESTION: What is your view of the --

8 MR. SEGAL: We would believe 75 percent, and  
9 that 25 percent ought to be for the other eight factors  
10 distributed at the discretion of the agency. And I  
11 submit to Your Honors that certainly we would have the  
12 result which I have deplored if the Second Circuit  
13 decision in the Newsweek case were to be affirmed, and I  
14 respectfully urge that it be reversed.

15 CHIEF JUSTICE BURGER: Mr. Perlman.

16 ORAL ARGUMENT OF MATTHEW S. PERLMAN, ESQ.,  
17 ON BEHALF OF THE PETITIONER IN NO. 81-1304

18 MR. PERLMAN: Mr. Chief Justice, and may it  
19 please the Court, Mr. Segal has spoken to you from the  
20 point of view of the Postal Service's competitors. I  
21 speak for my client's customers, who are individual  
22 non-business first class mailers.

23 When the Postal Service unilaterally increased  
24 its rates to meet its revenue requirements, it  
25 established a 20 --



1               QUESTION: What do you mean by unilaterally  
2 increasing, Mr. Perlman?

3               MR. PERLMAN: Well, in the Rate Commission  
4 decision, the Rate Commission established a rate of 18  
5 cents, and other rates for other classes. The Postal  
6 Service put this into effect under protest, and then  
7 returned the matter to the Rate Commission for  
8 reconsideration. The Rate Commission did not change its  
9 position, and under the statute, the board of governors  
10 may unilaterally increase rates if revenues are not  
11 sufficient.

12              QUESTION: You mean unilaterally, then, the  
13 board of governors acting without consent or approval of  
14 the Rate Commission?

15              MR. PERLMAN: That is correct, sir. It  
16 established the 20-cent rate for first class, a rate of  
17 7.9 to 10.9 cents for third class advertising circulars,  
18 depending on the degree of presortation, and a rate of 9  
19 to 10 cents for Time and Newsweek, depending on the  
20 weight of the particular magazine and the advertising  
21 content.

22              Discrepancies such as this result from full  
23 attribution of those costs which are borne most heavily  
24 by first class mail, such as collection and sorting, and  
25 treatment of other costs such as transportation, which

1 -- where weight and cubage or cubic volume are important  
2 factors as institutional costs.

3           The problem is then compounded by using as a  
4 starting place for applying the other eight statutory  
5 factors a markup which is calculated as a percent of  
6 attributable costs. So, for first class mail you  
7 attribute most of the costs they incur. You don't  
8 attribute those costs that tend to be weight or cubage  
9 related, and then you apply a markup of the  
10 institutional costs as a percentage. That percentage is  
11 then adjusted by the other statutory factors.

12           QUESTION: Well, are you suggesting that there  
13 is only one way to handle these nine factors? You seem  
14 to be going through them and saying, this is the way to  
15 do this, this is the way to do that. I would have  
16 thought the board of governors would have had a good  
17 deal of discretion.

18           MR. PERLMAN: Well, I believe that there is a  
19 great deal of discretion on how the other factors are  
20 applied. What I am reporting is the way the Rate  
21 Commission is in fact doing it. We are not attacking  
22 that per se.

23           QUESTION: I see.

24           MR. PERLMAN: But we are just reporting it as  
25 a fact, but the result is that you have a very, very

1 high percentage of costs far out of proportion to  
2 weight, volume, or number of pieces that is placed on  
3 first class mail.

4 QUESTION: Mr. Perlman, there is -- at least I  
5 understand there is a widespread and long-standing  
6 popular belief that junk mail has been carried on the  
7 shoulders of all the other mail, if you know what I mean  
8 by the junk mail. Now, courts don't take judicial notice  
9 of popular belief, because it may be mythology. Do you  
10 have any comment on whether there is an accurate  
11 allocation of the cost to carry the so-called junk  
12 mail?

13 MR. PERLMAN: Your Honor, that is why we are  
14 here in this court. That is what we are complaining  
15 about. We believe that that --

16 QUESTION: Well, your attack seemed to be, or  
17 your point seemed to be focused more on first class.

18 MR. PERLMAN: Well, we believe, as Mr. Segal  
19 stated, that second, third, and fourth class mail are  
20 undercharged, and that the difference is made up from  
21 first class. We are here urging lower first class  
22 rates, and we are not attacking revenue requirements, so  
23 the result of that is higher rates for second, third,  
24 and fourth class mail.

25 QUESTION: Does your client for first class

1 mail have a first class mail interest?

2 MR. PERLMAN: That is correct. My clients are  
3 interested in low first class rates for first class  
4 mailers.

5 QUESTION: And Mr. Segal's clients are  
6 competitors with second, third, and fourth class, I take  
7 it.

8 MR. PERLMAN: That's -- well, they are  
9 competitors with fourth class mail.

10 QUESTION: Fourth class.

11 QUESTION: They want high parcel post rates.

12 MR. PERLMAN: That's correct.

13 QUESTION: Mr. Perlman, I was a little  
14 confused as to whether you were concerned with the  
15 degree of proof required presently by the Commission or  
16 with the underlying concepts employed. There was some  
17 confusion as I went through the briefs in my mind about  
18 whether the complaint you were making was really one  
19 concerning the precision of proof of variability  
20 required by the Commission, or one that went further  
21 into the principles involved under the statute.

22 MR. PERLMAN: Justice O'Connor, the two really  
23 merge. The Rate Commission has taken the position, as  
24 the Postal Service has, that a cost cannot be attributed  
25 if it does not vary with volume. Now, the Rate



1 Commission has used language, particularly in its early  
2 decisions, which indicated that it might consider other  
3 methodologies, but it never has, and in effect if you  
4 cannot prove it varies with volume, it is simply treated  
5 as an institutional cost.

6           The result is that the Postal Service, which  
7 is really the only party able to do the variability  
8 studies, has attributed a relatively small percentage of  
9 the costs of operating the Postal Service. In the early  
10 proceedings, it was half. Then dropped to 45 percent.  
11 Now, with long-term variable costs considered, it is up  
12 around 65 percent.

13           QUESTION: But perhaps that is an outgrowth of  
14 their perception of the degree of proof that is required  
15 more than it is a difference on what the statute  
16 requires.

17           MR. PERLMAN: Well, I think they have  
18 articulated, and the Second Circuit has certainly  
19 articulated it by quoting the statement of Congressman  
20 Udall and interpreting the statute to mean only costs  
21 that vary with volume. We think that is incorrect, but  
22 we are urging the Court to apply the plain language of  
23 the statute and require, as the D.C. Circuit did, all  
24 reasonable inferences of cost causation, whether the  
25 cost is one that varies with volume or not.

1           We believe that this is what the Act requires,  
2 and I would like to go into a little bit why we think  
3 the Act requires it.

4           It is very simple. Direct and indirect costs,  
5 the words of the statute cover all costs. The cost is  
6 either direct or it is indirect. As Mr. Segal stated,  
7 the word "attribute," chosen by the Conference Committee  
8 and came out of the Senate bill, has no technical  
9 meaning. The Postal Service attempts to counter this by  
10 legislative history. They give a definition of a  
11 phrase, "costs demonstrably related," which was used by  
12 the Kaple Commission, which recommended establishing the  
13 Postal Service, and was used again in the House bill.

14           Now, a variety of definitions were given to  
15 that phrase. We point in our brief to the various  
16 definitions. One set of definitions clearly is the one  
17 the Postal Service is relying on, but other definitions  
18 were used. But assuming for the moment that the Postal  
19 Service is correct, that that meaning of the House words  
20 and the House bill had a technical meaning, the  
21 Conference Committee rejected those words. They did not  
22 take the words of art and put them into the bill. They  
23 took words from the Senate bill, "attributable and  
24 assignable," with no technical meanings.

25           And we think if they really meant volume

1 variable cost, it would have been very easy for Congress  
2 to say that. Now, Respondents take the position that  
3 the House was tough on costing and the Senate wasn't,  
4 and they based that on the fact that there was no  
5 explicit rate floor in the Senate bill. The Senate bill  
6 said, you will consider costs with a list of factors,  
7 but didn't state explicitly that there was a rate  
8 floor.

9           Now, that was corrected in conference. In the  
10 Conference Committee, the word "requirement" was added  
11 and the concept of a rate floor was made explicit. We  
12 think it was implicit in the Senate bill. But to  
13 indicate that the House was really taking the lenient  
14 attitude on cost, we have to look at another section of  
15 the bill. Section 1201(d) of the House bill provided  
16 that if the various statutory factors produced too much  
17 hardship, the governors could ignore them.

18           Now, that was dropped in the Senate bill, in  
19 the conference. It was not in the Senate bill. It was  
20 dropped. And we think that is an indication by Congress  
21 that attribution was to be required and all means of  
22 attribution were to be used.

23           The legislative history in the Senate is  
24 replete with concerns that first class was used as a  
25 coverup, it was used for the financial shortcomings of

1 the Postal Service. That is the phrase of Chairman  
2 McGee. And the Senate was concerned that this  
3 historical practice not be continued when it wasn't cost  
4 justified.

5           Now, Congressman Udall, who was the sponsor of  
6 the bill on the House side, was a supporter of  
7 cross-subsidization. He was a conferee. And after the  
8 conference, and after the Senate had voted, he made a  
9 speech, and it was also -- similar language was in the  
10 statement of the House managers, which attempted to  
11 define what "attributable" meant, and it said that the  
12 House view was accepted, even though its language was  
13 changed. He said it was costs that varied in the short  
14 run. The Postal Service has now conceded that as  
15 incorrect, but they attempt to explain it away.

16           Congressman Udall did not explain why the  
17 language was changed. He didn't explain why 1201(d) and  
18 its escape hatch was dropped. We suggest that  
19 Congressman Udall lost in the conference, and was simply  
20 attempting to make some -- plant some legislative  
21 history that would throw doubt on what the Conference  
22 Committee did.

23           QUESTION: Mr. Perlman, do you think that  
24 Section 101(a), which provides that the costs of  
25 establishing and maintaining the Postal Service shall



1 not be apportioned to impair the overall value of such  
2 service to the people is an indicator of some sort of  
3 discretion in the Commission over and above the  
4 expression in the statute which you have addressed in  
5 your petition?

6 MR. PERLMAN: Well, we don't think so. We  
7 think that there is the requirement in (d)(3) which must  
8 be met. That is certainly something to be taken into  
9 consideration in apportioning the other 25 percent,  
10 roughly \$5 billion of costs that we concede are  
11 institutional costs.

12 There has been no suggestion that any  
13 conceivable rate is really going to impair the value of  
14 mail. All classes are basically inelastic, and --

15 QUESTION: Can I ask you, Mr. Perlman, a  
16 question? I take it that the government's concession on  
17 long-range variable cost doesn't satisfy you.

18 MR. PERLMAN: That is correct, sir.

19 QUESTION: And my question really is whether  
20 we should deal with this case at all in the light of the  
21 government's concession, because if the government --  
22 the case would come out differently in some respects in  
23 the Second Circuit if they had decided based on what the  
24 government's position now is.

25 MR. PERLMAN: Well, we think that is a

1 significant but only a part of the case. The D.C.  
2 Circuit and Administrative Law Judge Winner require --  
3 were talking about very -- substantially greater  
4 attribution which we think is required.

5 CHIEF JUSTICE BURGER: Mr. Garvey?

6 ORAL ARGUMENT OF JOHN H. GARVEY, ESQ.,  
7 ON BEHALF OF RESPONDENT IN BOTH CASES

8 MR. GARVEY: Mr. Chief Justice, and may it  
9 please the Court, let me begin by allaying Justice  
10 White's concern about the government's concession in  
11 this case. As a matter of fact before the Postal Rate  
12 Commission in this case, the Postal Service attributed  
13 approximately 13 percent of the services -- of the costs  
14 of the Postal Service as long-run variable costs, and  
15 took the position before the Rate Commission, as it has  
16 in each of the prior two general rate proceedings, that  
17 long-run variable costs are attributable.

18 In the Second Circuit, what the government's  
19 -- what the Postal Service's brief said in making the  
20 point that indirect costs are attributable by cost  
21 variation, they quoted the House conferees' report and  
22 said Congress did make quite plain that short-term cost  
23 variability, quoting from the conferee's report, "was  
24 the method prescribed for identifying direct and  
25 indirect attributable costs."

1           The court of appeals, contrary to the  
2 suggestion of UPS, did not hold that only short-term  
3 variable costs are attributable. As a matter of fact,  
4 in the -- at Page 24 of the court of appeals' opinion,  
5 it said this: "The Commission," speaking of the Kaple  
6 Commission, on which the bill was -- on whose labors the  
7 bill was in large part based, "The Commission suggested  
8 that discrimination in rates would not occur as long as  
9 each class covered as a minimum the long-run variable  
10 costs ascribable to it, the full added cost demonstrably  
11 related to that class."

12           And then the court goes on to say, "This  
13 suggestion was embodied in the administration's bill,  
14 H.R. 11750, and the subsequent House bill," which the  
15 court then goes on to say is the language adopted by the  
16 conference.

17           QUESTION: Is your position in your brief here  
18 perfectly consistent with what the Second Circuit held?

19           MR. GARVEY: I believe it is.

20           There are two references in the Second  
21 Circuit's opinion to short-run variability. The  
22 references are a quotation of the House conferees'  
23 report which did in fact use the term "costs which vary  
24 over the short term" in response to line -- on Page 25.  
25 On Page 27, they say, again, that, "As to the level of

1 attribution required, we conclude that the definition of  
2 that term in the Conference Committee report is  
3 controlling," speaking of the definition which addressed  
4 variability with volume and which addressed attribution  
5 of specific fixed costs.

6 I think that it is only the most tortured  
7 reading of the court of appeals opinion which can limit  
8 it to short-run variable costs.

9 QUESTION: What do you have to say, Mr.  
10 Garvey, about that general proposition, whether myth or  
11 reality, that upper class mails have been carrying the  
12 junk mail to people's doors at the expense of the upper  
13 class mails?

14 MR. GARVEY: The Postal Reorganization Act was  
15 designed to eliminate or to preclude in the future if it  
16 had not happened in the past that sort of discrimination  
17 against not only third -- not only first class mail, but  
18 other classes of mail as well. 3622(b)(3); the  
19 provision in the statute which is at issue in this case,  
20 says that each class of mail shall bear -- as a minimum,  
21 sets a rate floor which each class must pay, what it  
22 calls the long-run -- what the Kaple Commission called  
23 the long-run variable costs, what the House bill called  
24 demonstrably related costs, what the Senate report  
25 called incremental costs, and the reason for requiring



1 each class of mail to pay those kinds of costs was that  
2 that's necessary to avoid what is a subsidy in the true  
3 economic sense.

4           In the real economic sense, a subsidy exists  
5 when Class A would actually be better if Class B did not  
6 exist. So, for example, if, the example the Kaple  
7 Commission gave was, if you have a machine that is just  
8 used for sorting parcels, and first class mail were  
9 required to pick up some of the cost of purchasing that  
10 machine, then first class mail would actually be worse  
11 off if fourth class mail were served then if it were  
12 not.

13           With respect to the kinds of mail that you are  
14 concerned about, bulk mail in third class is introduced  
15 into the postal system already presorted by zip code.  
16 It doesn't need to be cancelled because it hasn't got a  
17 stamp on it. It is already in sacks, and it is brought  
18 to the Post Office in that fashion.

19           First class mail, the kind that is sent from  
20 one household to another, the kind that the Greeting  
21 Card Publishers are concerned with in this case, is  
22 collected by the Post Office from collection boxes. It  
23 is then brought to the Post Office facility, where it is  
24 cancelled, and then sorted according to zip code, and  
25 then it is sent to a destination where it is again

1 sorted according to the last two digits of the zip code.

2 All of those kinds of expenses are eliminated  
3 by presortation and the lack of need for cancellation  
4 and presacking of third class mail, so that it is really  
5 comparing apples and oranges to say that third class  
6 mail may cost ten cents and first class mail may cost 20  
7 cents.

8 For one thing, the statute requires that third  
9 class mail bear all the costs that are attributable to  
10 that class. For another thing, the Act permits the  
11 Postal Service to apportion the institutional costs  
12 above that minimum in accordance with the statutory  
13 factors set out by the Act.

14 Justice O'Connor and Justice Rehnquist have  
15 suggested that it looks to them from reading the Act as  
16 though the Postal Rate Commission was probably left with  
17 considerable discretion in apportioning the costs of the  
18 Postal Service which were institutional costs above  
19 these long-run variable costs. In fact, what the Act  
20 says in Section 3522(b) is that in setting rates, the  
21 Postal Rate Commission is to implement a number of  
22 policies which Congress gave to the Commission as  
23 specific directives in setting costs of mail.

24 The statute says that the Postal Rate  
25 Commission shall make the rates fair and equitable, that

1 it shall consider the value of service rendered to each  
2 class of mail, that each class shall bear its  
3 attributable cost, that the Rate Commission shall  
4 consider the effect on the general public, on business  
5 mail users, on --

6 QUESTION: Mr. Garvey, I think you said the  
7 statute says that the Commission shall make the rates  
8 fair and equitable. Are you referring to Subsection 1  
9 where it says the establishment and maintenance of a  
10 fair and equitable schedule?

11 MR. GARVEY: Yes.

12 QUESTION: Do you think that refers to  
13 schedule of rates?

14 MR. GARVEY: Yes, that's correct. In addition  
15 to the five factors I have mentioned, 3622(b) goes on to  
16 say that the Commission shall consider the scientific,  
17 cultural, informational, educational value of the mail.

18 QUESTION: Mr. Garvey, do you disagree with  
19 what I thought both courts accepted as a premise, that  
20 the cost factor, whatever it may be, has to be given  
21 priority?

22 MR. GARVEY: No, we do not.

23 QUESTION: You don't disagree with that?

24 MR. GARVEY: No, we do not. 3622(b) begins  
25 with -- (b)(3) begins with the statement --

1 QUESTION: Of requirement.

2 MR. GARVEY: -- that it is a requirement  
3 that --

4 QUESTION: Does that then -- does that not  
5 necessarily mean that we must know the scope of (b)(3)  
6 before we reach the other factors?

7 MR. GARVEY: Yes, it does. And --

8 QUESTION: And what is your view -- let me  
9 just get it -- as to what is the scope? You said 13  
10 percent of the costs are long-run variable costs under  
11 the Second Circuit holding, as I understood you.

12 MR. GARVEY: Well, no, what I said was that in  
13 this general rate proceeding before the Postal Rate  
14 Commission of the costs which were attributed in the  
15 Postal Service's proposal, 13 percent were what are  
16 called long-run variable costs. I said that in order to  
17 indicate that the Postal Service has not taken the  
18 position in this proceeding, nor in the prior  
19 proceeding, nor in the proceeding before that, that it  
20 is only short-term variable costs that are --

21 QUESTION: What is the total -- What is the  
22 percentage of total costs that short-run variable costs  
23 reflect? Does the record tell us? As a general  
24 matter.

25 MR. GARVEY: What the Postal Service -- the



1 amount of attribution that the Postal Service proposed  
2 before the Commission in this proceeding was 59.3  
3 percent of the total costs of the Postal Service.

4 QUESTION: Which included the 13 percent  
5 long-run.

6 MR. GARVEY: Yes, that's correct.

7 QUESTION: So you subtract 13 from 59, and you  
8 get the -- answered my question. Is that right?

9 MR. GARVEY: I suspect, although I am always  
10 nervous about doing subtraction with those rates.

11 (General laughter.)

12 QUESTION: What else is there in the variable  
13 cost factor that you think is correctly there other than  
14 the 46 percent and the 13 percent that should properly  
15 be there?

16 MR. GARVEY: I'm sorry. I don't think I  
17 understand the question.

18 QUESTION: What do you think the term "costs"  
19 includes? Let me ask you that. What are the proper  
20 statutory components of the concept?

21 MR. GARVEY: I think it is perfectly clear  
22 from the report of the Kaple Commission, from the House  
23 conferees' statement, and from the indications in the  
24 Senate report that what Congress had in mind attributing  
25 by way of costs were, first of all, those costs that are

1 specific to a particular class of mail. The example  
2 that the Kaple Commission gave, again, was a machine  
3 that you only use for sorting parcels, even though the  
4 cost of that might be a capital cost. The Kaple  
5 Commission said that it ought to be attributed to fourth  
6 class mail because it was used for that sort of mail.

7 QUESTION: Then that is an example of  
8 something that is neither a short-run nor a long-run  
9 variable cost. Is that correct?

10 MR. GARVEY: Strictly speaking, I think it  
11 would be a variable cost over the long run. Those kinds  
12 of machines, I think, might last about 15 years, and  
13 your volume predictions over 15 years might require you  
14 to acquire more of those machines, so that in a sense  
15 they are, although the Kaple Commission, having a more  
16 limited horizon of what long-run variable costs were --  
17 they suggested five years, I believe -- said that in  
18 that time frame that something like a parcel sorter  
19 would be a specific fixed rather than variable cost.

20 QUESTION: Is that kind of equipment within  
21 your definition of volume variable cost?

22 MR. GARVEY: No, that sort of equipment,  
23 again, it depends on the length of the time period that  
24 you are going to look at in defining variations, but  
25 that sort of --

1               QUESTION: Well, I thought your brief took the  
2 position that the subsection we are talking about only  
3 required as a rate floor the volume variable costs  
4 attributable to a class.

5               MR. GARVEY: I hope not, because we also  
6 believe, as the Kaple Commission stated and as the House  
7 conferees' report said, that the kinds of costs which  
8 the Postal Service is required to attribute are costs  
9 which -- let me quote to you from the House conferees'  
10 report. After the conference was over, what the House  
11 conferees had to say about 3622(b)(3) was this.

12              "Provision in the conference substitute with  
13 respect to costs attributable to a class of mail or type  
14 of mail service establishes a floor for each class of  
15 mail equal to costs which consist of those costs, both  
16 direct and indirect, that vary over the short term in  
17 response to changes in volume of a particular class or,  
18 even though fixed rather than variable, are the  
19 consequence of providing the specific service involved."

20              QUESTION: You think they were wrong in saying  
21 short-term. They didn't mean that?

22              MR. GARVEY: I'm not sure that it's fair to  
23 say that they were wrong in speaking of short-term.  
24 That provision was drafted for the conference by  
25 Assistant Postmaster General Hargrove, by the general

1 counsel for the Post Office Department and by the  
2 general counsel for the -- by the counsel for the  
3 Senate, the Senate which had said that only incremental  
4 costs are attributable.

5           And Assistant Postmaster General Hargrove  
6 testified in hearings before the Subcommittee, the Rate  
7 Subcommittee in the House that the phrase "demonstrably  
8 related costs," the phrase used in the House bill, had  
9 precisely the same meaning that was given to  
10 attributable costs in the House conferees' report. In  
11 his testimony before the Subcommittee, Assistant  
12 Postmaster General Hargrove said that in the revenue and  
13 cost analysis about which he was testifying, what the  
14 Postal Service was doing was attributing costs over the  
15 shorter run, and then went on to say that postal  
16 ratemaking, being a continuous process, can take the  
17 longer-run variations into account as it goes along.

18           That suggests that the meaning of short as he  
19 used it and perhaps as the House conferees used it meant  
20 the amount of time between one rate proceeding and the  
21 next.

22           QUESTION: Mr. Garvey, you have answered  
23 several questions about short-term costs and  
24 volume-variable costs. Is it the government's position  
25 that those terms are simply words of art which allow of



1 only one meaning, either something is a short-term cost  
2 or it isn't, or that the postal authorities have some  
3 discretion in administering the Act to define those  
4 costs perhaps in a way different than someone else  
5 might?

6 MR. GARVEY: The question in this case is  
7 really how far the Postal Service and the Commission are  
8 required to go in discovering what kinds of costs are  
9 caused by particular classes of mail, and the Postal  
10 Service does not take the position that it has to be  
11 proven by empirical studies to vary with volume to a  
12 specific percentage.

13 But what the Postal Service and the Commission  
14 do have in mind is that volume variation, and when I say  
15 volume variation, I mean variation with the number of  
16 pieces, or with the weight, or with the cubic dimensions  
17 of the mail, is the way to identify the causes of common  
18 costs.

19 For example, if you have a lot of different  
20 classes being sorted at the mail facility, and according  
21 to zip code, and stamped, and that sort of thing, if you  
22 have 100 letters to sort according to zip code and to  
23 stamp, it is going to take approximately twice as long  
24 as it would take to sort and cancel 50 letters.

25 Those kinds of costs amounted to about five

1 billion costs in this general rate proceeding, and the  
2 Postal Service attributed 100 percent of those costs to  
3 the various classes of mail. What the Petitioners are  
4 contending in this case is that what they call cost of  
5 service principles ought to be used to distribute  
6 various joint costs among the various classes of mail.

7           For example, when the postman goes around his  
8 route with a bag full of mail, if he has 100 letters in  
9 his bag, it is not going to take him any longer to go  
10 around the route than it would if he had 50 letters in  
11 the bag. It may take him more time if he has got to  
12 make more stops, but those costs are attributive. Just  
13 the cost of going around the route itself, though, is  
14 one the Postal Service treats as a fixed cost. Or, the  
15 cost of collecting mail from collection boxes. It takes  
16 approximately the same amount of time to collect 100 --

17           QUESTION: Well, what if in the example you  
18 just gave of the postman going around the letter route  
19 and the Post Office saying it shouldn't be attributed --

20           MR. GARVEY: Yes.

21           QUESTION: -- because it is a fixed cost, as  
22 you call it, supposing there was -- someone else comes  
23 in and says, well, under my theory of accounting, that  
24 is not a fixed cost, and the court were to conclude,  
25 well, you could go either way on this thing. You know,

1 the protesters have something to say for them, but on  
2 the other hand, the Postal Service seems to have  
3 something to say, too. Is that the kind of decision  
4 that a court ought to defer to the Postal Commission  
5 on?

6 MR. GARVEY: Absolutely. That's what this  
7 Court has said in Colorado Interstate against FPC, that  
8 this kind of ratemaking is not a matter for the slide  
9 rule. It is a question of judgment on which the courts  
10 ought to defer to the agencies. Congress in fact set up  
11 the Postal Rate Commission as an expert agency in order  
12 to resolve those kinds of questions about what causes or  
13 what costs were really caused by a particular class of  
14 mail, and what costs ought to be treated as  
15 institutional and apportioned among the various classes  
16 of mail in order to implement the policies of the Act.

17 QUESTION: Mr. Garvey, unfortunately, we tend  
18 to jump around a little bit in an argument like this.  
19 It would be helpful to me if you could tell me what the  
20 view of the Postal Service is with respect to, A, the  
21 properly included direct and indirect elements of cost,  
22 and secondly, in addition to those, what are the  
23 reasonably assignable costs that they should properly  
24 take into account? Could you describe them in any  
25 general fashion?

1           MR. GARVEY: I think it is difficult to -- I  
2 can give you examples, and I can give you the general  
3 definition of what they treat as properly attributable.

4           QUESTION: I would like examples, if you  
5 could, because it seems to me that the Commission does  
6 have a duty to obey the statute.

7           MR. GARVEY: Yes. Absolutely.

8           QUESTION: And so, of course, we have to know  
9 what the statute means and know what components the  
10 Commission thinks belong in the various categories.

11          MR. GARVEY: What the Postal Service contends  
12 are the costs that are attributable under the first part  
13 of Subsection (b)(3), as I mentioned before, are the  
14 costs that vary with the volume, number of pieces,  
15 weight, cubic dimensions of the mail, or costs that are  
16 specific to a particular class of mail, like the parcel  
17 sorter in the example that I gave.

18          Examples of the first kinds of costs that vary  
19 with the volume of mail are the kinds of processing  
20 costs that I mentioned earlier, the costs of sorting  
21 letters according to zip code, the costs of cancelling  
22 letters, many of the costs of delivering mail. I said  
23 before that the cost of the postman going around his  
24 route was itself a fixed cost, but the cost of making  
25 individual stops in fact varies with the number of



1 letters to a degree of 40 percent, 50 percent, and that  
2 fraction of what the Postal Service calls access costs,  
3 the deviation to go to each house, are attributed to the  
4 various classes of mail.

5           In addition, the costs of transportation of  
6 mail on purchased transportation are attributed. When  
7 the Postal Service sends first class mail --

8           QUESTION: But am I correct that the cost of  
9 using their own vehicles is not attributed?

10           MR. GARVEY: That's correct, although it's  
11 misleading to suppose that the sort of use of the Postal  
12 Service's own vehicles is the same as the use of  
13 vehicles for purchased transportation. The latter kind  
14 is used for transportation of mail between cities. The  
15 Postal Service, by contrast, uses vehicles for  
16 delivering mail, and in that case the vehicles, the  
17 drivers' time and the vehicle maintenance is treated as  
18 variable to the same extent as the postman's time would  
19 be when he was delivering letters on his route.

20           The Postal Service also uses vehicles within  
21 cities to take mail from the main post office to the  
22 branches within the city. There may be about 100 of  
23 those in the city. And --

24           QUESTION: Let me just interrupt you, if I  
25 may, on the vehicle cost again. It is the view of the

1 Postal Service that not only that is not a direct or an  
2 indirect cost attributable to different classes, but  
3 also it is a cost which is not reasonably assignable to  
4 any one class.

5 MR. GARVEY: It is the Postal Service's  
6 position that the phrase "reasonably assignable" which  
7 appears in 3622(b)(3) does not mean what Petitioner UPS  
8 contends.

9 QUESTION: Well, what does it mean?

10 MR. GARVEY: That is a reference to the  
11 remainder of the provisions in 3622(b). It is an  
12 indication that once the Commission distributes the  
13 attributable cost to each class of mail, it can't stop  
14 there, that it ought also to take account of each class  
15 of mail in apportioning the various institutional  
16 costs. It was just -- that provision was put in by the  
17 Committee, and it --

18 QUESTION: By reasonably assignable, you mean  
19 with respect to all other costs other than direct and  
20 indirect. They should be assigned on the basis of  
21 judgmental factors.

22 MR. GARVEY: That's right. You take all the  
23 other costs of the Postal System, and then you assign  
24 them reasonably. It doesn't make a whole lot of sense  
25 to say that a requirement, that reasonable assignment is

1 itself a requirement that must be done according to  
2 particular characteristics. Otherwise, it is a little  
3 strange to --

4 QUESTION: Well, you would agree, I assume,  
5 that there are cost accountants who could assign vehicle  
6 costs and also route time costs other than on a strictly  
7 volume basis.

8 MR. GARVEY: Yes. That -- I don't mean to say  
9 that that method of apportioning costs is irrational.  
10 Maybe even that it is unfair.

11 QUESTION: It may even be good accounting  
12 practice.

13 MR. GARVEY: What I do -- It is not the  
14 consistent practice of all accountants. The D.C.  
15 Circuit --

16 QUESTION: No, but it may be good accounting  
17 practice for many accountants.

18 MR. GARVEY: I am not even sure that it is  
19 good accounting practice, because it tells you very  
20 little about what you want to know for purposes of  
21 ratemaking. Let me give an example. There was a study  
22 done of the cost ascertainment system, a system of fully  
23 distributed costs which the Postal Service used from  
24 1926 until the Act was passed.

25 In fact, one of the purposes of the Act was to

1 eliminate this system of fully distributed costs which  
2 the cost ascertainment system exemplified. The study  
3 that was done for the government of the cost  
4 ascertainment system was done by Ernst and Ernst, who  
5 are respected accountants, I believe, and their  
6 conclusion was that the distribution of costs among the  
7 various classes of mail according to what they called  
8 unsubstantiated hypotheses of causation is singularly  
9 unhelpful for ratemaking purposes.

10           It is something that can be done. As I said,  
11 it is not arbitrary. In a way, it is even fair. But it  
12 has very little to do with causation of the costs of  
13 mail, which is what Petitioners say is the reason for  
14 attributing these costs.

15           QUESTION: Just to clarify, your view is that  
16 reasonably assignable means reasonably assignable in  
17 accordance with factors 4 through 9 of the statute?

18           MR. GARVEY: Factors 1, 2, and 4 through 9.

19           QUESTION: Right.

20           MR. GARVEY: That's correct.

21           QUESTION: At least you say that it is not  
22 unreasonable in assigning those costs to refer to those  
23 particular factors.

24           MR. GARVEY: I believe it would not be, and I  
25 don't understand the Second Circuit's opinion to forbid



1 that sort of technique in future rate proceedings.

2 QUESTION: It may be that there is another way  
3 of assigning costs, but it is not unreasonable within  
4 the meaning of the statute to use these other factors to  
5 assign.

6 MR. GARVEY: The factors for which Petitioners  
7 are plumping in this case?

8 QUESTION: Well, no, the factors which you say  
9 the Postal Service uses in assigning costs.

10 MR. GARVEY: Absolutely not. In fact, I  
11 believe that what Congress intended in including those  
12 other factors in the Act was to have the Postal Rate  
13 Commission implement the policies which underlay those  
14 factors in its apportionment of institutional costs.

15 QUESTION: You don't even need to win on  
16 that. You don't need to, I don't suppose, say that the  
17 -- that Congress required reference to these other  
18 factors in assigning costs. Even if they didn't require  
19 it, you can argue that it is not unreasonable to use  
20 those factors.

21 MR. GARVEY: Absolutely, although --

22 QUESTION: And -- At least that is a fallback  
23 position, isn't it?

24 MR. GARVEY: I am not concerned about falling  
25 back in this case, because I believe that anyone who

1 reads the report of the Senate, the report of the House  
2 conferees, and the Kaple Commission report, will find  
3 that it is perfectly clear what Congress intended to do,  
4 that Congress did not mean to limit -- to distribute  
5 costs according to the three tiers for which UPS  
6 contends in this case, that Congress in fact explicitly  
7 rejected the system of fully distributed costs for which  
8 Petitioners are contending, that Congress meant to  
9 require only as a minimum that incremental or long-run  
10 variable costs be attributed to each class of mail.

11           Petitioners contend in this case that what  
12 happened --

13           QUESTION: May I interrupt? You said only  
14 incremental or long-run variable, but one of your  
15 examples you gave me was the sorting machine, which is  
16 neither.

17           MR. GARVEY: The reason I keep slipping with  
18 respect to that sort of example is that at least in this  
19 rate proceeding, and in the ones which have preceded it,  
20 as a matter of fact, the kinds of costs which are  
21 specific to only one class of mail have been relatively  
22 minor. In fact, even the example of the parcel sorter  
23 which the Kaple Commission gave is a little bit  
24 misleading, because the parcel sorter, although there is  
25 such a thing, is also used to sort third class parcels.

1           QUESTION: No, but we are talking about  
2 concepts now. I don't know the dollars. But you have  
3 said that that is an example of a cost item that the  
4 statute requires to be assigned on the basis of cost,  
5 and then you keep saying, though, it is only long-run or  
6 variable costs and incremental costs, and your example  
7 doesn't fit your test.

8           MR. GARVEY: It is a slip of the tongue when I  
9 do that, because --

10          QUESTION: Well, but which is your view?

11          MR. GARVEY: The government's view --

12          QUESTION: Is the fixed cost required to be  
13 allocated in the example you gave?

14          MR. GARVEY: Fixed costs, if they are specific  
15 to a particular class of mail.

16          QUESTION: All right, so it is a broader  
17 category than the way you have defined it.

18          MR. GARVEY: Yes. Yes. Yes.

19          What the Petitioners contend in this case is  
20 that it was really the view of the Senate which required  
21 the full allocation of costs, which was incorporated in  
22 the Act. What the Senate report says is this.  
23 Petitioner UPS testified in hearings before the Senate,  
24 and they pushed for a system of fully distributed costs  
25 like that which governed parcel post before the Act was

1 passed. The Senate report had this to say in response  
2 to that contention.

3 "Express companies in the private sector of  
4 the economy have expressed their very keen desire to  
5 include language in the bill which would require the  
6 recovery of fully allocated costs for parcel post. The  
7 Committee rejects the suggestion on the principle that  
8 no particular cost accounting system is recommended, and  
9 no particular classification of mail is required to  
10 recover a designated portion of its costs beyond its  
11 incremental costs. That decision is for the Postal Rate  
12 Commission to determine in accordance with the general  
13 criteria enacted by law."

14 On the Committee which signed that report were  
15 Senator McGee, Senator Fong, Senator Randolph, Senator  
16 Yarborough, and Senator Bayh. Those five gentlemen who  
17 signed that report were the Senate conferees in the  
18 conference with the House.

19 If what Petitioners contend is correct, they  
20 would have us believe that those five conferees who  
21 signed that report saying that only incremental costs  
22 should be attributed, that full allocation of costs was  
23 specifically rejected, changed their position and  
24 somehow succeeded in persuading the House as well to  
25 change its position, and to require full allocation of



1 costs, or 75 percent allocation of costs under  
2 Subsection (b)(3) as they contend here, or 80 to 90  
3 percent of allocation of costs, as the Greeting Card  
4 Publishers contended before the Postal Rate Commission  
5 in this proceeding.

6 QUESTION: What is your view of the proper  
7 percentage that should be allocated?

8 MR. GARVEY: It is difficult to say what the  
9 proper percentage is, because it depends on studies  
10 which the Postal Service is continually making to  
11 identify costs. The percentage which the Postal Service  
12 identified in this case was 59.3 percent of the total  
13 revenue requirement. The Postal Rate Commission itself  
14 in this case attributed 64 percent of the total cost,  
15 and then, according to the principles of service-related  
16 cost, assigned another approximately 9 or 10 percent of  
17 the costs of the postal system.

18 So that what was actually done by the  
19 Commission was an attribution and assignment of 74  
20 percent of the costs.

21 Let me just summarize briefly. What the  
22 Postal Reorganization Act requires is that the Postal  
23 Service and the Postal Rate Commission in setting rates  
24 for the various classes of mail engage in essentially a  
25 two-step process. The first of those steps is the

1 requirement that each class of mail bear the direct and  
2 indirect costs attributable to that class of mail, which  
3 include both specific fixed costs and costs that vary  
4 with volume over the long run.

5           After that sort of attribution is done,  
6 3622(b)(3) goes on to say that the Postal Service should  
7 assign all of the other costs of the Postal Service in  
8 some reasonable fashion, and what Congress had in mind  
9 in structuring that sort of assignment of the remaining  
10 costs were the policies embodied in 3622(b)(1), (b)(2),  
11 and (b)(4) through (9), the last of which is any other  
12 factors which the Commission considers relevant.

13           Thank you.

14           QUESTION: May I ask one more question before  
15 you sit down? Does the service think that the  
16 allocation of service-related costs was proper?

17           MR. GARVEY: The service believes that the  
18 allocation of service-related costs is not proper,  
19 although the service believes that it is not forbidden  
20 by the Act. The reason the service is concerned about  
21 the allocation of service-related costs is that for one  
22 thing the principles of causation which would be the  
23 reason for tracing those kinds of costs are somewhat  
24 diminished by the fact that Congress has now said that  
25 even if there aren't preferential classes of mail, the

1 service is still required to adhere to the same delivery  
2 system, and what is more, even if they were caused by  
3 the preferential classes of mail, there is no denying  
4 that other classes of mail are delivered six days a week  
5 along with the preferential classes, so that they would  
6 be getting a free ride if those costs were only charged  
7 to first and second class mail.

8           On the other hand, the Postal Service  
9 concedes, as the court of appeals held and as the  
10 Commission believes in this case, that there are  
11 similarities between service-related costs and what in  
12 utility ratemaking generally are called peak load costs  
13 or there are also similarities between service-related  
14 costs and the kinds of specific fixed costs with which  
15 you have been concerned, and those similarities suggest  
16 that that question about the proper distribution of  
17 service-related costs is perhaps one which ought to be  
18 left to the expert judgment of the Postal Rate  
19 Commission and in a proper case the Postal Service.

20           CHIEF JUSTICE BURGER: Do you have anything  
21 further, Mr. Segal? You have four minutes remaining.

22           ORAL ARGUMENT OF BERNARD G. SEGAL, ESQ.,  
23 ON BEHALF OF PETITIONER IN NO. 81-1381 - REBUTTAL

24           MR. SEGAL: May it please the Court,  
25 obviously, I cannot in four minutes answer, and you will

1 have to rely on our briefs. So many statements have  
2 been made, the very last one, that we are arguing for  
3 fully distributed costs. Your Honor, my friend heard me  
4 say in response to a question by Justice Stevens, that  
5 we believe that as much as 25 percent, \$6 billion, is  
6 allocable under the other factors other than the costing  
7 factor of (b)(3).

8           It has been asked here what Congress  
9 intended. Congress was disgusted with the politics of  
10 rate fixing, had decided to get rid of it, and had  
11 decided to give it to an independent agency, but it was  
12 wise enough to know that it had to set up all kinds of  
13 safeguards, and it did it in the simplest, wisest way in  
14 3622(b)(3). It did it by the requirement of  
15 attribution, by the requirement of reasonable  
16 assignment, and then left it to the discretion.

17           Now, what has Judge Meskel done? To me, what  
18 he has done is remarkable. He has said, oh, no,  
19 short-term is enough, and that is 50 percent, but this  
20 doesn't mean that they can't do whatever they want.  
21 They can go up to 100 percent.

22           Well, I suggest to Your Honors that that was  
23 not what Congress intended. Congress intended to give  
24 the discretion to run a business within rules. Congress  
25 intended that the -- not simply that they could set a



1 rule that long-term variable costs -- it would be the  
2 only business in America that would go on that basis  
3 only, namely, long-term variable. Every business goes  
4 on the other items which I have mentioned to Your Honor.

5           So, there is no doubt, to answer the questions  
6 of Justice O'Connor and Justice Blackmun and Justice  
7 Stevens, they did intend to give discretion to the  
8 Commission. They gave a discretion to the Postal  
9 Service unheard of in the past in American life to under  
10 certain conditions fix its own rates, different from the  
11 Commission, which indeed it has done on the 20 cents,  
12 when the Commission said it should be 18 cents. But it  
13 has got to do it by rules. And it has put the rules  
14 into effect to give it control, and now Judge Meskel  
15 comes along and says, no, we only have to give them 50  
16 percent.

17           Well, if they give them 50 percent, and 50  
18 percent of all costs are in the discretion of someone  
19 whom the Department of Justice has gone to court, and I  
20 won't repeat here the language which the Department used  
21 in describing the conduct of the head of the Postal  
22 Service in that case, and the Department of Commerce has  
23 come out in despair, and now a Committee of Congress.

24           Why? Because they are not adhering to the  
25 requirements of the Act. Every year they are doing

1 better under the decisions of the District of Columbia.  
2 The Second Circuit decision, Your Honors, would catapult  
3 us back to 1971, when the District of Columbia circuit  
4 court in desperation said, here are rules, but you are  
5 not following any of them, so we can't reach a  
6 decision. All we can tell you is what to do next time.

7 Then, in the second decision, they told them  
8 what to do. And the Commission did it, but the Postal  
9 Service wouldn't do it. And so in the third case, the  
10 court got stronger, and they have come up closer.

11 Now, today, what remains?

12 QUESTION: Well, there is no reason why the  
13 Postal Service should feel obliged to follow the  
14 decision of one of eleven courts of appeals, when its  
15 actions can be reviewed in all eleven?

16 MR. SEGAL: That court has said we will never  
17 fix a rate. That is not our business. But it is our  
18 business to see that the statute is complied with. I  
19 suggest to Your Honor if you read the District of  
20 Columbia circuit opinions, you will find the most  
21 careful reluctance, the most careful --

22 QUESTION: I read them, and I didn't find any  
23 reluctance.

24 (General laughter.)

25 MR. SEGAL: Well, I must say to Your Honor

1 that in my judgment, and there is -- which I have here  
2 -- there is a specific statement, we have no power to  
3 send this back with any decision as to any rate, and  
4 what they are trying to do is to get the Postal Service  
5 to do its job, to exercise its discretion within the  
6 rules, and I suggest to this Court that it is not  
7 following the rules, and if Judge Meskel's opinion can  
8 prevail whereby only 50 percent is required, but you can  
9 go to 100 percent if you want, 120 percent, that kind of  
10 discretion certainly --

11 QUESTION: Mr. Segal, you seem to be -- you  
12 and the government read the court of appeals opinion for  
13 the Second Circuit considerably differently. Let's  
14 assume that the opinion is to be read as Mr. Garvey  
15 suggests it should be read.

16 MR. SEGAL: Well, Mr. Garvey says that it  
17 doesn't apply, the short-term. Let me read you what  
18 Judge Meskel said.

19 QUESTION: Well, but let's assume that we read  
20 it the way he reads it.

21 MR. SEGAL: You can't read it that way.

22 QUESTION: Well, I know, but --

23 MR. SEGAL: But let's assume that. Very  
24 good.

25 QUESTION: Yes. All right. Just assume it.

1 Apparently it can be read that way, because he honestly  
2 represents that that is what it means.

3 MR. SEGAL: But I have got a sentence to the  
4 contrary.

5 QUESTION: Well, that may be.

6 MR. SEGAL: All right.

7 QUESTION: But assume that is the correct  
8 reading of it. Then what? A lot of the things you say  
9 then are --

10 MR. SEGAL: Mr. Garvey --

11 QUESTION: Then you are just disagreeing with  
12 what his --

13 MR. SEGAL: Mr. Garvey hasn't said a word --

14 QUESTION: Then you would just be disagreeing  
15 with what the long-term variable costs are.

16 MR. SEGAL: Long-term variable isn't enough,  
17 Your Honor. Long-term variable will never suit the  
18 entire purpose. It requires what all business in the  
19 country does. It requires the exercise of judgment.  
20 You can't say that you are going to operate a  
21 multi-billion dollar business solely on statistics. You  
22 have to apply judgment. You have to apply discretion.  
23 You have to apply the rules which govern business. They  
24 have not done that.

25 QUESTION: Well, if we read the Second



1 Circuit's opinion the way you do, then what we have is  
2 that one of the litigants before them now in effect  
3 confesses error. Namely, the Postal Service.

4 MR. SEGAL: Justice White, there is a footnote  
5 to the brief, very remarkable, I think, of the Solicitor  
6 General, which says that the Commission now agrees with  
7 the opinion of the Second Circuit. Do you know why?  
8 Because it gives the Commission a discretion that  
9 Congress has denied it for eleven years. Because it  
10 says to the Commission, only 50 percent is required, but  
11 this doesn't mean that I am barring you from doing  
12 whatever you want.

13 CHIEF JUSTICE BURGER: Very well. Thank you,  
14 gentlemen. The case is submitted.

15 (Whereupon, at 11:10 o'clock a.m., the case in  
16 the above-entitled matter was submitted.)

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CERTIFICATION

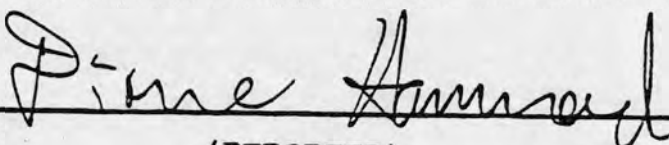
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NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, Petitioner  
v. UNITED STATES POSTAL SERVICE ET AL.; # 81-1304 and

UNITED PARCEL SERVICE OF AMERICA, INC., Petitioner v.  
UNITED STATES POSTAL SERVICE ET AL # 81-1381

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "F. H. Anderson", is written over a horizontal line.

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