Before the President's Commission on the United States Postal Service

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On behalf of the Free Speech Coalition, Inc., I want to extend our appreciation for the opportunity to submit these written comments for the Commission's consideration as it prepares its report to the President regarding the United States Postal Service.

The Free Speech Coalition, Inc. ("FSC"), founded in 1993, is a nonprofit, nonpartisan group of ideologically diverse nonprofit organizations, and the for-profit firms which help such organizations raise funds and implement programs. FSC is tax-exempt under Section 501(c)(4) of the Internal Revenue Code ("IRC"). Our purpose is to protect First Amendment rights through the reduction or elimination of excessive regulatory burdens which have been placed on the exercise of those rights. (The education and litigation sister organization of FSC is the Free Speech Defense and Education Fund, Inc. ("FSDEF"), established in 1995.) FSDEF is tax-exempt under IRC Section 501(c)(3). It seeks to protect human and civil rights secured by law, study and research such rights, and educate its members, the public, and government officials concerning such rights by various means, including publishing papers, conducting educational programs, and supporting public interest litigation.

Among the issues to be considered by this Commission is the "most appropriate governance and oversight structure for the Postal Service." We wish to bring two important matters relating to this issue to the attention of the Commission.

I. **Postal Service Claim of Judicial Non-reviewability of its Administrative Decisions**

One of the major aspects of governance has to do with accountability – in this case how the Postal Service is held accountable for the exercise of its significant powers in compliance with federal law. The position taken in court by the Postal Service in two recent cases is startling, in that it reveals that the Postal Service believes that it is the final authority with respect to most of its administrative decisions, and refuses to have those decisions reviewed by anyone, even by a federal court.

Two illustrative cases are Aid Association for Lutherans v. U.S. Postal Service (No. 01-5449) ("AAL") and American Bar Endowment v. U.S. Postal Service (No. 01-5450) ("ABE"), both now pending before the U.S. Court of Appeals for the District of Columbia Circuit. (Oral argument is scheduled for tomorrow, February 13, 2003.) Both cases involve challenges to the Postal Service's refusal to allow the mailing of certain organizational materials related to insurance at Standard nonprofit rates by AAL and ABE, which are organizations otherwise entitled to nonprofit rates. The Postal Service argued that the federal

district court judge had no jurisdiction to review its actions. The trial judge ruled against the Postal Service.[1]

On appeal, the Postal Service continues to deny the authority of the federal courts to review its administrative rulings. The language of the Postal Service is unmistakable: "There is no right to review [Postal Service regulations]." USPS Brief at 20. Elaborating the point, the brief continues:

> There is no statute specifically conferring a right to judicial review of regulations issued by the Postal Service. Thus, any right to review must be under the APA. Congress, however, expressly precluded APA review in 39 U.S.C. 410(a), which provides:
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> > (a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service. [39 U.S.C. 410 (a) (emphasis added). Chapters 5 and 7 of title 5 are the provisions of the APA dealing with "administrative Procedure" (chapter 5) and "Judicial Review" (chapter 7). Postal Service Brief at 20-21.]

The situation is particularly egregious because all of these claimed powers are exercised against the backdrop of the Postal Service's congressional mandate to generate sufficient income to be self sustaining. Because of the Postal Service's self-interest in the outcome of

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[1] Substantively, the suits involve a dispute over the Postal Service's regulations implementing 39 U.S.C. 3626(j)(1)(B). That statute prohibits the application of nonprofit rates to mailings related to insurance unless "the coverage provided by the policy is not generally otherwise available." The Postal Service's definition of "generally otherwise available" includes the offerings of AAL and ABE, while the organizations contend that their offerings are not available otherwise and were not intended by Congress to be subject to the statutory preclusion.

appeals from its decisions, it is far from a disinterested party. When a government agency makes quasi-judicial decisions about a subject matter in which it has a financial interest, the procedure involves a denial of procedural due process to the non-governmental party (AAL and ABE in this case). The Postal Service's position and the legal justification for the conclusion that this position results in a denial of procedural due process guaranteed by the U.S. Constitution are described in much greater detail in the an amicus brief filed by FSDEF in support of AAL, which is attached hereto.[2]

The Postal Service's recent brief makes clear the Postal Service's institutional belief that it is not accountable to anyone in its administrative decisions, and is wholly exempt from judicial review of its actions and regulations, even when plaintiffs alleged that the Postal Service violated their constitutionally-guaranteed rights. We urge this Commission to make it clear that this position of the Postal Service is unacceptable, and, if necessary, recommend changes to the Postal Reorganization Act to ensure that the decisions of the Postal Service are, in fact, reviewable in federal court.

II. The Danger of Granting Governmental Powers to an Agency Not Under the Authority of the President of the United States

One of the greatest concerns of the Free Speech Coalition concerning the Postal Service has to do with its having been granted significant governmental powers when it is not a true executive branch agency. The Postal Service is defined in the Postal Reorganization Act as

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[2] This amicus brief is available at: http://www.lawandfreedom.com/site/nonprofit/AAL%20Brief.pdf.

"an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. section 201. It has been over 30 years since passage of the Postal Reorganization Act and the true meaning of this statement has yet to be discerned.

The Governors of the Postal Service are appointed by the President and confirmed by the Senate, but the Postmaster-General and Deputy Postmaster-General are not, both being selected by the Governors. Yet the Postmaster-General and Deputy Postmaster-General both sit on the Board of Governors and exercise executive authority as officers of the federal government, and they are not directly removable by the President of the United States.

The Postal Service seeks freedom to compete in the marketplace as a competitive enterprise. Yet it seeks to preserve the totality of its statutory monopolies – both over letter mail and over access to the mailbox. It is not really an executive agency of the federal government accountable to the President of the United States (and, as seen in Section I above, it does not want to be accountable to federal courts), but, when it suits its purposes, the Service seeks to obtain and exercise governmental powers.

In 1999 the Free Speech Coalition submitted Comments to the Senate Committee on Governmental Affairs' Permanent Subcommittee on Investigations with respect to S. 335 (the "Deceptive Mail Prevention and Enforcement Act"). That bill, which became law, granted broad powers to the Postal Service, including the power to levy fines on mailers which the Postal Service determined violated 39 U.S.C. section 3005. These fines may be levied on both

commercial and nonprofit mailers which the Postal Service believes uttered false statements in mailings. A copy of the FSC Comments is attached hereto.[3]

Prior to the 1999 amendments to 39 U.S.C. section 3012, the Postal Service enjoyed significant investigative and enforcement powers in connection with the accomplishment of the Service's duties regarding the mail, but such powers at least were somewhat limited in order to keep certain checks and balances on the Service's ability to ignore the judicial system in its potential disputes with the mailing public. For example, the Postal Service did not have the power to assess fines in the first instance with respect to nonmailable matter, although it had the authority to investigate such mailings, undertake processes to stop such mailings, and assess fines with respect to future prohibited conduct following an administrative law hearing. The 1999 amendments to section 3012, which were enacted because of the anti-sweepstakes fervor that swept Congress at that time, upset that balance. This law gave the Postal Service the discretionary power and ability to levy punitive fines of millions of dollars on first-time putative "offenders," in any case in which the Postal Service determined that a particular type of mailing was misleading under section 3005. That kind of power, by which an agency can be tempted to enlarge its own coffers by targeting those who cannot afford to defend themselves, and then intimidating, steamrolling, and disabling most any person or business marketing a product not favored by the Postal Service, or a nonprofit organization making a claim the Postal Service disapproves of, is inappropriate, particularly in a quasi-governmental

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[3] This testimony is available at: http://www.lawandfreedom.com/site/postal/s335test.html.

organization that claims to want to be treated like a business competitor with respect to its non-monopoly offerings.

For many organizations, particularly small ones, depending upon the mail for the funds they need to operate, after-the-fact exoneration from wrongdoing would be of little value because of the economic ruin caused by the Postal Service's preemptive stop mail power, even assuming they had the temerity to defend themselves against the Service's threat of punitive fines.[4]

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[4] An historical example reveals the danger of entrusting to the Postal Service, or any agency of government, the right to determine what mail is mailable based on the content of that mail.

In 1835 citizens of Charleston, South Carolina, broke into the post office and burned anti-slavery papers sent by the Anti-slavery Society. Citing fear of widespread attacks on the mail, the local postmaster refused all anti-slavery mailings and requested guidance from the postmaster general. The postmaster general concluded that he did not have the legal authority to issue an order prohibiting the mailing of anti-slavery material. However, he would not order that the material be delivered.

> By no act or direction of mine, official or private, could I be induced to aid knowingly in giving circulation to papers of this description, directly or indirectly. We owe an obligation to the laws, but we owe a higher one to the communities in which we live; and if the former be perverted to destroy the latter, it is patriotism to disregard them. Entertaining these views I cannot sanction and will not condemn the steps you have taken. Your justification must be looked for in the character of the papers detained and the circumstances by which you are surrounded. [August 4, 1835 Letter from Amos Kendall, Postmaster-General, to Alfred Huger, Charleston postmaster, quoted by W. Sherman Savage, The Controversy over the Distribution of Abolition Literature, 1830-1860 (New York: Negro Universities Press, 1968) 18.]

Additionally, the Charleston postmaster requested that the New York postmaster similarly refuse such mailings to prevent the Anti-slavery Society from making any further mass mailings. This request was more productive than the request for guidance from the postmaster general. The New York post office refused further mailings of anti-slavery materials. Eventually, postmasters throughout the south were refusing to delivery anti-slavery

A government-owned business set up by Congress to function primarily as a business enterprise ought not to have administrative, quasi-criminal powers of the type alluded to above. One reason, quite simply, is that non-governmental agencies may be influenced by financial considerations related to the operation of their enterprises, whereas government agencies should be uninfluenced by such matters. In the case of alleged misleading mailings — where the Postal Service's extensive agency-like powers to stop mail and impose fines give them virtual plenary power over their competitors — the Postal Service may be influenced by considerations of competition, business relations, customer relations, and the like. True government agencies should be impervious to such considerations.

The granting of quasi-criminal law enforcement powers to the Postal Services constitutes an improper delegation of governmental powers to a quasi-governmental organization not under the authority of the Chief Executive, the President of the United States. The combination of the statutory monopolies and the accumulation of such quasi-criminal powers within the Postal Service renders that organization capable of great abuse.

There should be a Congressional determination whether the Postal Service is to be made a government agency or made to be even more like a business. If the latter, the delegation of agency-like powers to the Postal Service should be stopped, and the Postal Service stripped of governmental powers, particularly in the realms of policy making and enforcement.

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materials and requesting guidance from the postmaster general. Id. at 22. The postmaster general continued to refuse to provide specific guidance.