National Security Checks Are in the Mail: A First Amendment Analysis of Intelligent Mail and Sender Identification

Peter J. Dugan

I. INTRODUCTION

The tragic events of September 11, 2001 have motivated Congress and the President to pass legislation that aims to defeat terrorism and increase national security. However, the acts of terror were not limited to September 11th; they continued in American mailrooms and mailboxes in the weeks thereafter. Unknown terrorists sent deadly anthrax through the mail, killing seven innocent civilians and effectively holding millions hostage. The perpetrators of these attacks remain at large and could potentially use the mail to launch future attacks.

The anthrax attacks of 2001, in conjunction with increased concerns about the financial integrity of the United States Postal Service (“Postal Service”), have sparked debate over its current regulatory scheme. The existing framework protects sender anonymity by allowing individuals to send letters through the mail without disclosing their identities. However, as the anthrax attacks have clearly demonstrated, there is a level of risk that accompanies anonymous mailings. In response to this risk, some critics have called for reforms that would, in effect, limit the freedom to communicate anonymously through the mail.
In December 2001, President Bush issued Executive Order 13,278, which called for the Presidential Commission on the United States Postal Service ("Commission") to evaluate the Postal Service's current regulatory scheme. This order also required the Commission to submit a full report proposing reforms that would assist in the preservation of the Postal Service's universal service obligation" while minimizing the financial exposure of the American taxpayers."9

In July 2003, the Commission responded with Embracing the Future: Making the Tough Choices to Preserve Universal Service, a report which declared, "[t]he Postal Service faces a defining moment: [i]t can continue to carry out its universal service obligation via a costly and outmoded infrastructure, at extraordinary and perhaps unsustainable expense, or it can embrace new technologies, partners and private-sector strategies to ensure a bright future for the nation's mail."10 As part of this commitment to new technologies, the Commission recommended the "aggressive" pursuit of intelligent mail, a system that would destroy anonymous mailing by abandoning traditional stamped mail in favor of individualized stamps, which encrypt sender identifications onto the outside of each envelope.11 The Commission believed that requiring sender identification would have little impact on most users, since many already identify themselves and would consider this a modest requirement to ensure public safety.12

The Commission's Report successfully identified an assortment of existing Postal Service problems and recommended the pursuit of intelligent mail as a resolution to these problems. Nevertheless, the Commission erred when it recommended the aggressive pursuit of intelligent mail and sender identifications for non-commercial applications.13 In order to clarify why the Commission was mistaken, this comment will first examine intelligent mail in greater detail and analyze how the sender identification requirements, implicit within an intelligent mail system, will fit within the existing Postal Service regulatory framework. Second, it will examine the current state of First Amendment law with regard to content neutral speech restrictions and find that sender identification requirements will at first glance serve as constitutionally valid speech restrictions. Third, this comment will focus on the relationship between First Amendment speech and the broad concept of anonymity to illustrate the societal importance of anonymous communication. Fourth, this comment will explore the Supreme Court's analysis of anonymous communications in a variety of areas to illustrate that previously anonymous speech has been highly protected. These examinations lead to the conclusion that the proposed sender identification requirements will create a chilling effect on the First Amendment right to communicate anonymously. For this reason, the Supreme Court would most likely invalidate sender identification requirements for ordinary letter mail.

II. BACKGROUND

At least part of the Commission's decision to recommend the "aggressive pursuit" of intelligent mail was based on the public's familiarity with the technology involved.14 This familiarity stems from the broad use of this technology in the private sector by Postal Service competitors.15 Nevertheless, intelligent technology and sender identification requirements have never been applied to ordinary mail, despite their potential ability to increase the mail's overall security and the quality of its delivery.16 Sender identification would increase

---

11 Id. at 147.
12 Id.
13 Id. at 157 ("Chapter 7: Recommendations: Intelligent Mail: The ability of the Postal Service to track individual pieces of mail can improve internal efficiency and satisfy postal customers that the mail is delivered to the right location and on time.")
14 Id.; see also Symbol Solutions, U.S. Postal Service: Inelligent Mail (I-Mail) for Improved Security (2003) [hereinafter Symbol Solutions] [on file with author].
15 Presidential Commission Report, supra note 8, at 157. ("Technology to achieve this goal [universal service] exists today and is now being used by some of the competitors of the Postal Service. The Postal Service should work to put mail tracking technology in place on a timely and more comprehensive basis, so that it is available to all users, large and small, at an affordable price.").
16 Id. at 147.

The information rich barcode that is the foundation of Intelligent Mail also has the potential to improve significantly the security of the nation's mail stream, particularly if the Postal Service fully explores whether it is feasible to require every piece of mail to include sender iden-
the quality of delivery by allowing the Postal Service to offer new products and simultaneously provide the government with a means to easily trace letters back to their individual sender, thus increasing security.\footnote{Id; see also id. at 145 ("While some advanced capabilities are available on a limited basis, such as mail tracking, they tend to be either focused exclusively on larger mailers or they are costly and rudimentary . . . . [T]rue mail tracking is only available to larger mailers.")}

Current Postal Service regulations do not require senders to disclose their identities on the outside of their mail, and there is also no system in place to enforce such a requirement.\footnote{Id. at 150-153 (describing the various manners in which intelligent mail will eventually be able to assist the Postal Service in reaching its ultimate goal of preserving universal service).} Such administrative changes will undoubtedly necessitate a large and expensive system of identity verification that will most certainly affect the truly anonymous use of the mail.\footnote{See U.S. Postal Service Domestic Mail Manual 58, 5-10 (2003) (listing all of the requirements that an individual must include, by law, on the outside of their mail).}

A. What is Intelligent Mail?

"Intelligent [m]ail is a broad term generally used to refer to the new technology systems being developed to track postal mail."\footnote{See Presidential Commission Report, supra note 8, at xix ("The Postal Service must be freed from unnecessary and outdated statutory constraints. . . . [T]he bright future for universal postal service will require bold choices and broad national support. With it, the Postal Service can deliver the mail as never before and offer an example to other Federal institutions about reducing costs while enhancing their service to the nation.")}

It takes advantage of current barcode technology to create a link between the sender and the individual piece of mail.\footnote{Center for Democracy and Technology, CDT Statement on Intelligent Mail and the Presidential Commission Report, at http://www.cdt.org/privacy/030819intelligentmail.html (Aug. 19, 2003).} Individuals could easily track the status of any individual piece of mail by logging on to the Internet.\footnote{See President’s Commission Report, supra note 8, at xvii.} At its heart, intelligent mail is a powerful hybrid [between traditional mail and e-mail], applying leading-edge information technology to the delivery of paper correspondence in order to better assure its traceability in the event of foul play.\footnote{By placing a unique barcode on every piece of mail and investing in technologies throughout the postal network that can put that information to use to enhance customer service and reduce costs, the Postal Service can begin building a truly digital network that links postal facilities, vehicles, partners and employees not only to each other, but also via the Internet to customers and to the mail itself.}

B. How Does Intelligent Mail Work?

Intelligent mail "uses rich, machine-readable [PDF417] 2D bar codes to make each mailing piece unique through data that 'lives' with the mail piece or package itself."\footnote{Id. at 148.} Private sector mailing groups, such as Federal Express and United Parcel Service, use this type of barcode everyday.\footnote{Id. at 146.} These "2D codes give [individuals using the barcodes] the ability to attach data files to physical objects."\footnote{See Symbol Solutions, supra note 14.} Each barcode is unique and can be encrypted to disguise from the naked eye the information which it contains. However, it is important to note that this 2D technology has advanced to the extent that "[l]arge amounts of text and data can be stored securely and inexpensively when using PDF417 symbology."\footnote{Id.} Each encrypted barcode can store an assortment of sender information,\footnote{See id.} including a sender’s name,
address, geographic origin and mail class.\textsuperscript{31} Encoding is a relatively simple process that could easily be completed by "smart" stamp vending machines or postage meters.\textsuperscript{32} As a result of encoding, postal employees could monitor individual letters by using laser or image-scanning devices.\textsuperscript{33} Currently, there are no state statutes or constitutional restrictions preventing the private sector from using this technology.

Most of the amendments to the Constitution only apply to actions taken by government entities.\textsuperscript{34} "When a legislature, executive officer, or a court takes some official action . . . that action is subjected to review under the Constitution, for the official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution."\textsuperscript{35} Because the Postal Service is a federal agency and its laws and regulations are extensions of federal power, the regulations implemented by the Postal Service must not violate the rights guaranteed to individuals under the Constitution.\textsuperscript{36}

C. To What Extent Will the Postal Service Implement Intelligent Mail?

Because the plans to implement intelligent mail are in the early stages, the extent to which intelligent mail and its sender identification requirements will be implemented remains unknown.\textsuperscript{37} The sender's name and mailing address appear to be the bare minimum that the Postal Service will need to successfully implement an intelligent mail system.\textsuperscript{38} However, 2D technology has the potential to encrypt much larger amounts of information. Senders could potentially be required, for example, to disclose their Social Security numbers, places of employment, lists of family members and acquaintances, as well as biometric data.\textsuperscript{39}

The overall implementation of intelligent mail and its sender identification requirements will most likely be determined to some extent by the government's ability to retrieve and verify the personal information of senders.\textsuperscript{40} The whole intelligent mail system would be pointless if the information the government used to trace individuals could not be verified.

III. THE UNITED STATES POSTAL SERVICE

The Postal Service has been delivering mail for 225 years.\textsuperscript{41} Since its inception, the Postal Service has grown and changed significantly in order to

\textsuperscript{31} See Presidential Commission Report, supra note 8, at 147.
\textsuperscript{32} Id.
\textsuperscript{33} Symbol Solutions, supra note 14.
\textsuperscript{34} John E. Nowak & Ronald D. Rotunda, Constitutional Law §12.1(a) (6th ed. 2000).
\textsuperscript{35} Id.
\textsuperscript{36} See Postal Reorganization Act §719, 39 U.S.C. §101(a) (2000) ("The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people.").
\textsuperscript{37} See Presidential Commission Report, supra note 8, at 150.
\textsuperscript{38} See id. ("To accomplish this task, the Commission recommends that the Postal Service continue to study the development of a single universal barcode designed for all mail pieces. This code could contain at a minimum, sender identification, class of service, meter ID (i.e. where the stamp was printed) and delivery destination.") (emphasis in original).
\textsuperscript{40} See Presidential Commission Report, supra note 8, at 144 ("Deploying such a system will require significant investment and a strategic focus that must be sustained over time. But if successfully executed, the Postal Service will reap the rewards of its most significant opportunity today to increase the value and security of the mail while reducing costs and improving overall performance.").
adequately address business and social trends.  

Congress has a history of using its power to assist the Postal Service in its efforts to modernize and remain a viable organization. The Commission’s report illustrates that the Postal Service’s regulatory framework is outdated, principally due to the fact that current Postal regulations predate both the Internet and the recent terrorist attacks. A historical review of the postal system and its regulatory scheme is necessary in order to see that a “constitutional challenge [to the sender identifications requirements of intelligent mail] be placed in its proper context.”

A. The United States Postal Service Regulatory History

When the United States Constitution was ratified in 1789, it provided Congress with the power “[t]o establish Post Offices and post Roads” and “[t]o make all Laws which shall be necessary and proper” to accomplish this task. Over time, this power vested in Congress has been construed to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.

The role of the Postal Service was again redefined when Congress passed the Postal Act of 1792, which allowed newspapers to be sent through the mail at low rates to promote the spread of information. Around this time, the Postal Service experienced tremendous growth in both volume and coverage. The “[a]nnual revenues increased from less than $40 million in 1790 to close to $200 million in 1829.” However, like the Postal Service today, the Postal Department, as it was called at that time, continued to experience problems of increased costs and competition. In response to this competition, Congress passed the Postal Act of 1845, which established the Postal Service’s officially sanctioned monopoly on letter mail.

In 1970, “to deal with the problems of increasing deficits and shortcomings in the overall management and efficiency of the Post Office, Congress passed the Postal Reorganization Act of 1970” (“Reorganization Act”). Under the Reorganization Act, Congress established a completely new statutory and regulatory scheme that would govern the Postal Service and redefine the Postal Service as a semi-independent agency, instead of a “regular, tax-supported, agency of the federal government.”

B. The United States Postal Service Regulatory Scheme

The Reorganization Act designated the Postal Service as a federal agency. The statute says “[t]he United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people.” Congress further directed the Postal Service to “plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees” and “to maintain an efficient system of collection, storing, and delivery of the mail nationwide.”

Although, the Postal Service is technically a fed-
eral agency, the Reorganization Act freed the Postal Service of its obligation to always operate as such and, to an extent, severed the relationship between the Postal Service and the federal government. This transformed the Postal Service into a semi-independent government organization that raises funds through the sale of postal products, not through congressional appropriations. However, the Postal Service’s ability to fund itself is limited by a mandate rendering it “revenue-neutral,” meaning that it must aim to break even, not to turn a profit.

Although the Postal Service must adhere to this break-even mandate, it functions more like an independent business than one might suspect. The Postal Service is authorized to assume a variety of non-traditional governmental attributes, including broad power to adopt, amend, and repeal its own regulations; sue in its own name, buy, sell, and lease property; and “enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures.” Despite these non-traditional attributes, the Postal Service continues to receive the perks of a federal agency, namely, exemption from federal taxation, the ability to borrow money at discounted rates, and the right to “condemn and acquire private property under governmental rights of eminent domain.”

Pursuant to this authority, the Postal Service may create rules and regulations and publish them in the Domestic Mail Manual (“DMM”), which has been incorporated by reference into the Code of Federal Regulations. Section A010 of the DMM covers Standard Addressing Formats, which describe the “required elements of a complete address and proper placement of delivery and return addresses.” Currently, the Standard Addressing Formats, as included in the DMM do not require any senders to disclose their identities; however, this may soon change. On October 21, 2003, the Postal Service issued a proposed rule in the Federal Register entitled, “Sender-Identified Mail: Enhanced Requirement for Discount Rate Mailings.” The Postal Service is making this proposal “because sender identification of all discount rate mailings would serve as a tool in identifying the senders of a large portion of the mailstream” and “could facilitate investigations into the origin of suspicious mail.” The proposal also says that “[r]equiring sender identification for discount rate mail is an initial step on the road to intelligent mail.” The proposed rule cites the Commission’s Report, as well as two congressional committee recommendations that encourage sender identification and exploring the “feasibility of using unique, traceable identifiers applied by the creator of the mailpiece.”

“Although 39 U.S.C. §401(2) allows [the Postal Service] to ‘adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives’ of the Postal Reorganization Act,” the Postal Service is not required to create rules and regulations that require sender identification. In the past, courts have applied a reasonableness standard to regulations implemented by the Postal Service. According to Rockville Reminder Inc. v. United States Postal Service, a regulation or administrative practice is ordinarily valid unless it is unreasonable or plainly inconsistent with the statute. Therefore, if the Postal Service amends the DMM to implement intelligent mail, it could be challenged as unreasonable and not necessary to accomplishing its mission.

IV. FIRST AMENDMENT LAW

Sender identification restricts an individual’s ability to communicate anonymously. However, the ability to communicate anonymously is not ex-
pressly protected by the Constitution. The language of the First Amendment states, in part, "Congress shall make no law . . . prohibiting . . . or abridging the freedom of speech," a right that has been analyzed in a variety of different contexts and forums.

The first step in a proper First Amendment analysis is to determine whether sender identification requirements restrict speech protected by the First Amendment. This determination will ultimately influence whether the analysis shall continue. If sender identification requirements on letter mail do not restrict protected speech, then the analysis is complete and there is no First Amendment violation. However, if sender identification requirements are found to restrict protected speech, the next step is to determine whether the restriction is content based or content neutral. This determination, like the earlier step, will affect the analysis by triggering a particular line of Supreme Court precedent.

In addition to these analyses, it is important to note that a restriction on speech, regardless of whether a restriction is content based or content neutral, can violate the First Amendment for being overly broad or unconstitutionally vague. Moreover, it is also important to note that sender identification requirements threaten the protected right to anonymous free speech, a subcategory of speech that has been given special protections by the Supreme Court. For this reason, it is necessary to examine how the Supreme Court has treated anonymous communication in other mediums such as hand-billing, political speech, and canvassing.

A. Sender Identification: Does it Meet the Initial Threshold of Constituting Speech?

The initial threshold for First Amendment analysis is to determine whether or not the government is restricting speech. To meet this threshold, one must examine "whether the government has done anything to put the First Amendment in play." If the answer is yes, then the First Amendment has been triggered and further analysis will be required. However, if the government has not put the First Amendment "in play," then it may be entitled to summary judgment on the issue as a matter of law.

The Supreme Court has broadly interpreted First Amendment "speech" to include a variety of activities. The issue in the instant matter is whether the Postal Service's implementation of the sender identification requirements implicit within an intelligent mail system will restrict speech. The content in mail necessarily involves written materials, which is recognized as speech. Therefore, by restricting the ability to communicate through the mail, the government puts the First Amendment "in play." Justice Holmes concluded as much when he said, "[t]he United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as part of free speech as the right to use our tongues."

B. Sender Identification: A Content Based or Content Neutral Restriction on Speech?

Despite the First Amendment's language, the
mere fact that the government is restricting speech is not by itself sufficient for there to be a violation of the First Amendment. To make such a determination, one must consider whether the government is restricting speech based on its content. Categorizing the restriction as content based or content neutral is crucial because it ultimately determines the line of cases that will be used to settle the issue.

Although the legislation pertaining to intelligent mail has not yet been written, the Commission's report hints that for intelligent mail to be successful, it must ultimately be universally applied. The universal application of sender identification would constitute a content neutral speech restriction because the restriction would apply to all mail and would not be based on its content.

In United States v. O'Brien, the Supreme Court addressed content neutral speech restrictions. The case involved a Vietnam War protester that was convicted under a federal statute for knowingly destroying his draft card. The defendant publicly burned his draft card to demonstrate his opposition to the war. In deciding this case, Justice Warren established a test for content neutral restrictions on speech:

> it [is] clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of the interest.

The O'Brien test, as announced, was broad in scope and provided a fairly low burden for the government. However, the Supreme Court would later narrow the O'Brien test in Ward v. Rock Against Racism.

In Ward, the Court revisited content neutral speech restrictions when it evaluated the constitutionality of a New York City regulation that required bandshell performances in Central Park to use city furnished sound systems and independent sound technicians. Rock Against Racism contested the validity of the city's regulation on First Amendment grounds, arguing that the regulation was a content based restriction through which "the city . . . [sought] to assert artistic control over performers at the bandshell by enforcing a bureaucratically determined, value-laden conception of good sound." The Court, denying the content based argument, addressed the issue by applying a more narrow content neutral speech restriction test.

The Ward Court announced a three pronged analysis for content neutral speech restrictions. In order for a restriction on speech to pass constitutional muster, it must be "justified without reference to the content of the regulated speech" and be "narrowly tailored to serve a significant government interest." Additionally, a content neutral restriction on speech must also allow for "ample alternative channels for communication of information."

The first prong of the Ward test requires determination of "whether the government has adopted a regulation of speech because of the disagreement with the message it conveys." To make such a finding, the analysis must focus on the government's purpose for imposing the speech restriction. Justice Kennedy, writing for the majority, deemed the government's purpose for creating the restriction to be the controlling consideration.

When applying this analysis to sender identification requirements, it is clear that the government's desire to implement intelligent mail stems from the need to increase the mail's overall secur-

---

86 U.S. Const. amend. I; see also Farber, supra note 78, at 21-27.
87 Farber, supra note 78, at 39.
88 See Presidential Commission Report, supra note 8, at 150 ("To accomplish this task, the Commission recommends that the Postal Service continue to study the development of a single universal barcode designed for all mail pieces.") (emphasis in original).
89 Cf. id. (noting that if sender identification requirements are to apply at all, they must be applied regardless of the mail's contents and accordingly, it will be a content neutral restriction on speech).
91 Id. at 369-71.
92 Id. at 370.
93 Id. at 377.
95 Id. at 787.
96 Id. at 792.
97 Id. at 790.
98 Id. at 796 (citing Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).
99 Id. at 802.
100 Id. at 791.
101 See id. (noting that the purpose of the government activity in question is central to the analysis).
ity and boost postal revenues—two key requirements of preserving universal service. The Commission's report does not indicate that the government is looking to implement intelligent mail because it disagrees with any particular message. Therefore, because the government's purpose is to boost postal revenue and security and not to restrict speech, the restrictions caused by intelligent mail would satisfy the first prong of the Ward analysis.

The second prong of the Ward test requires the speech restriction to be "narrowly tailored to serve a significant government interest." In this instance, the significance of the government's interest in preserving universal service is difficult to deny. The preservation of universal service has been widely touted by the Commission as significant. In fact, the Commission declared the preservation of universal service as "vital to the nation and the economy at the dawn of the 21st Century." In addition to being significant, intelligent mail is also narrowly tailored to the government's interest. The Ward Court observed that "the requirement of narrow tailoring is satisfied 'so long as the... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' Moreover, the Court indicated that it would not automatically invalidate a speech restriction because there is a "less-speech-restrictive alternative." For a regulation to be invalid, the regulation must be "substantially broader than necessary to achieve the government's interest[.]"

Although the intelligent mail regulations have not yet been written, the very nature of intelligent mail would require the inclusion of all senders. The Commission's goal of preserving universal service could not be achieved if certain individuals or groups were excluded from the sender identification requirement. A terrorist could qualify as an excepted sender and easily send biological agents through the mail. Such a system would not improve the mail's overall security—a critical element in preserving universal service. Intelligent mail, if it is to be considered effective, must be administered universally. Therefore, sender identification will be considered narrowly tailored to the government's interest because there is no less restrictive alternative available. Further, even if there was an alternative, it would have to substantially restrict speech; this would not be the case with intelligent mail because the vast majority of Americans already identify themselves on the outside of their mail.

The final prong of the Ward test requires the presence of "ample alternative channels for communication of information." Today, there exist a variety of readily-available alternative channels, ranging from e-mail and instant messaging, to fax machines and ordinary face-to-face conversations. Because these channels exist, it appears that intelligent mail and sender identification requirements will be held, at first glance, as constitutionally valid restrictions on speech.

C. Sender Identification's Interface with the Overbreadth and Vagueness Doctrines

In addition to the three-pronged Ward test, a government imposed content neutral speech restriction also can be declared invalid on the grounds that it is vague or overly broad in construction. An overbroad statute is one enacted "[m]ore broadly than necessary... that is designed to burden... activities that are not constitutionally protected, but its flaw is that, as drafted, it also includes activities protected by the First Amendment." An unconstitutionally vague statute is "[a]n unclear law, a law that does not draw

diagram, 472 U.S. 675, 689 (1985)).

Id.

Id. at 800. ("To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests.").

See PRESIDENTIAL COMMISSION REPORT, supra note 8.

Ward, 491 U.S. at 802.

See Keyishian v. Bd. of Regents of the Univ. of the State of New York, 385 U.S. 589, 604-609 (1967); FARBER, supra note 78 at 49-53.

bright lines, [and] might regulate, more than is necessary, and thus deters or chills persons from engaging in protected speech." The regulations implementing intelligent mail have not yet been written; therefore it is premature to apply the overbreadth and vagueness analysis.

V. THE RELATIONSHIP BETWEEN SPEECH AND ANONYMITY

There is undoubtedly a link between a person's speech and their identity. There is also a link between social or political change and anonymous speech. Anonymous communication can be divided into two distinct categories, pseudonymous speech and truly anonymous speech. Pseudonymous speech exists when an individual chooses to communicate through the use of a pseudonym for the purpose of masking their identity. Although these types of communications appear to be anonymous because the identity of the speaker remains unknown, they are not truly anonymous because the communication is attributed to a particular pseudonym and is to a certain degree, traceable back to its author. Truly anonymous communications cannot be attributed to anyone and are usually untraceable. Regardless of which category of anonymous speech being used, both offer "the opportunity to express the unpopular views that shape and support the direction of a democracy, anonymous speech can also be dangerous, defamatory and downright mad-dening for its targets."118

A. Pseudonymous Speech

The use of pseudonymous speech as a tool to overthrow corrupt leaders can be traced back to the 18th century English essayists John Trenchard and Thomas Gordon. These men used the pseudonym Cato to attack the abuses of the administration under Sir Robert Walpole. In America, John Jay, Alexander Hamilton and James Madison wrote The Federalist Papers under the name Publius to help build support for a federal constitution. They purposefully shielded their identities to prevent themselves from being identified as advocates of particular positions otherwise, "they, rather than their arguments, would have been part of the debate over the Constitution." Using pseudonyms, the focus was on the ideas proposed and not on the author. However, pseudonymous speech can be distinguished from total or truly anonymous speech in the sense that when people use pseudonyms they are not actually anonymous but rather only pseudo-anonymous. As one student commentator noted, Most historical political examples [of anonymous communications], however, relate to communication of merely pseudo-anonymous nature. The identity of the author employing a pseudonym is usually known to at least a select few, such as an editor or publisher, and can be traced to the author if otherwise absolutely necessary. For this reason, pseudo-anonymous communication is relatively safe for society, and exceptionally valuable to the perpetuation of the ideals of free speech. Truly anonymous communication, on the other hand, is far more prone to abuse, and therefore, is ultimately more dangerous.

The anthrax attacks of 2001 confirm the danger and potential abuse that can accompany anonymous communications.

B. Truly Anonymous Speech

Truly anonymous speech, unlike pseudonymous speech, is untraceable and "only coincidence or purposeful self-exposure will bring the identity of the mystery message sender to light; the identity of a person acting in a truly anonymous manner cannot be discovered through any amount of diligence." Using truly anonymous

---

113 Id. at §16.9.
114 See Froomkin, supra note 73, at 11-12.
115 Id. at 11 (providing examples of the positive influences that anonymous communication has had on society).
116 See id. at 4; see also George F. du Pont, Note, The Criminalization of True Anonymity in Cyberspace, 7 Mich. Telecomm. Tech. L. Rev. 191, 196 (2001) ("There are two different kinds of anonymity: true anonymity and pseudo-anonymity.")
117 du Pont, supra note 116, at 196.
120 Carter, Froomkin, & Wright, supra note 119, at 29-34.
122 Id. at 12-13.
123 du Pont, supra note 116, at 200.
124 See Froomkin, supra note 73, at 4.
125 du Pont, supra note 116, at 196.
methods of communication, such as the mails, offers the sender a higher level of protection than pseudonymous speech because there is no possible manner for their identity to be uncovered.\(^\text{126}\) An individual is freer to communicate without fear of retaliation. The Supreme Court has blended the concepts of pseudonymous and truly anonymous speech.\(^\text{127}\) However, it is clear that legislatures understand the significance of truly anonymous communications as shown by their creation of statutory protections for such communications in a number of areas.\(^\text{128}\) For example, statutes allow voters to withhold their identities protects anonymity as do whistleblower protection statutes that allow a person to report misconduct without giving their name.\(^\text{129}\)

VI. SUPREME COURT REVIEW OF ANONYMOUS SPEECH

The Supreme Court has addressed anonymous speech in a variety of areas; however it has not addressed anonymous speech as it relates to sender identification. Nevertheless, the Court has demonstrated a commitment to the principle that speech and debate should be "uninhibited, robust, and wide open."\(^\text{130}\) Evidence of this commitment can be found in Court holdings which, read together, protect the ability of people to communicate anonymously.\(^\text{131}\) Here we examine the Supreme Court’s handling of anonymous speech in the areas of hand-billing, political speech, and canvassing. These holdings create a framework that can be used to analyze how the Court may respond if confronted with the issue of whether an individual has the right to communicate anonymously through the mails.

A. Anonymous Hand-billing

In 1960, the Court decided *Talley v. California*, a case which examined the constitutionality of a city ordinance that required all persons distributing handbills to identify themselves.\(^\text{132}\) The respondent, National Consumers Mobilization, was accused of violating the ordinance by distributing handbills in Los Angeles that urged readers to participate in a boycott.\(^\text{133}\)

Noting the potential effect of upholding the ordinance, Justice Black stated "there can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."\(^\text{134}\) He further referred to anonymous speech as one of the "historic weapons in the defense of liberty."\(^\text{135}\) The Court, recognizing this history as well as the fact that forcing individuals to identify themselves would deter peaceful debate, ruled that there are "times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified."\(^\text{136}\) This decision marked the beginning of the Court's jurisprudence on protection of anonymous communication.

---

\(^{126}\) *Id.* at 196; *but see id.* at 197 ("Today for a letter to be truly anonymous, the sender would have to keep the letter sterile and devoid of fingerprints or other traceable materials such as regional dirt, glue, paper, and ink.").

\(^{127}\) *See Lovell v. City of Griffin*, 303 U.S. 444 (1938) (noting that pseudonymous pamphlets have played a role in historical change); *see also Talley v. California*, 362 U.S. 60 (1960).

\(^{128}\) *See Public Company Accounting Reform and Investor Protection Act of 2002*, §301, Pub. L. No. 104, 116 Stat. 745 (2002), to be codified as various provisions of §10A of the Securities Exchange Act of 1934 (popularly known as the Sarbanes-Oxley Act) (instructing the SEC to direct the national securities exchanges to require each listed company’s audit committee to establish formal procedures for addressing complaints related to auditing matters, including an anonymous channel for these complaints).

\(^{129}\) *Id.*


\(^{132}\) The city ordinance said:

No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following: (a) The person who printed, wrote, compiled or manufactured the same; (b) The person who caused the same to be distributed; provided, however that in the case of fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon.

\(^{133}\) *Id.* at 61.

\(^{134}\) *Id.* at 64.

\(^{135}\) *Id.* at 62 (quoting *Lovell v. City of Griffin*, 303 U.S. 444 (1938)) ("These [pamphlets and leaflets] indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest.").

\(^{136}\) *Id.* at 65.
B. Anonymous Political Speech

In McIntyre v. Ohio Elections Commission, the Supreme Court faced the issue of "whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process." Under the facts of the case, the group distributed leaflets which expressed her opposition to a proposed school tax levy; some of the leaflets identified the petitioner as the author, while others were simply signed "CONCERNED PARENTS AND TAX PAYERS." The State argued that the statute protected two important and legitimate state interests: preventing fraudulent and libelous statements and providing the electorate with relevant information. Justice Stevens, writing for the Court, dismissed this argument by addressing the history of anonymous speech. He stated that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." He further observed that the statute in question constituted a restriction on political speech:

And the Court overturned the statute, noting that "[w]hen a law burdens core political speech, we apply 'exact scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." By striking down the statute, the Court reinforces its commitment to open debate and sets a precedent that secures an individual's right to remain anonymous while communicating their political views, despite the fact that anonymous communications can be used as a way to harm others.

C. Anonymous Canvassing

The Supreme Court addressed anonymous speech in the form of canvassing in Watchtower Bible v. Village of Stratton. The issue before the Court was whether "a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violates the First Amendment accorded to anonymous pamphleteering or discourse." Watchtower Bible and Tract Society of New York, Inc., the petitioner, organized and coordinated the national canvassing of neighborhoods by Jehovah's Witnesses. The group argued that requiring its' members to obtain permits and identify themselves before they could be allowed to canvass was a violation of the First Amendment. The Village contended that the ordinance served...
three interests: preventing fraud, preventing crime, and protecting the privacy of residents.\textsuperscript{149}

While addressing the issue of anonymity, the Court pointed out that many people support causes anonymously and that "[t]he requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in surrender of that anonymity."\textsuperscript{150} The Court did, however, acknowledge that individuals who canvass neighborhoods do, to a degree, give up their anonymity by revealing their faces. However, the Court believed that this disclosure alone was not enough to dispense with the group's interest in maintaining their anonymity.\textsuperscript{151} The Court found that, "in the Village, strangers to the resident certainly maintain their anonymity, and the ordinance may [impact a person's speech in such a way as to] preclude such persons from canvassing unpopular causes."\textsuperscript{152} However, the Court admittedly stated that such preclusion might be justified in particular circumstances, such as a state interest in protecting a ballot-initiative process or preventing fraudulent commercial transactions.\textsuperscript{153} Nevertheless, the Court held the ordinance as invalid on the grounds that it encompassed too many acts of free speech, including those considered unpopular, and that the statute was not narrowly tailored to the special needs of the state.\textsuperscript{154}

VII. THE SUPREME COURT WILL HOLD SENDER IDENTIFICATION REQUIREMENTS AS APPLIED TO PERSONAL MAIL AS AN INVALID RESTRICTION ON SPEECH: THE CASE FOR ANONYMITY

Intelligent mail and sender identification threaten the ability of individuals to remain anonymous when sending letters through the mail. After September 11th and the subsequent anthrax attacks, the United States government vigorously increased its commitment to fighting terrorism.\textsuperscript{155} This commitment is evidenced by such actions as the creation of the Department of Homeland Security and the rapid passage of the USA Patriot Act.\textsuperscript{156} This legislative activism to prevent terrorism should not be extended to the Postal Service. The Supreme Court will not uphold these requirements on the grounds that such restrictions will have a chilling effect upon speech rights, most notably the right to political speech that occupies the core of the protection of the First Amendment.\textsuperscript{157}

We began our constitutional analysis of sender identification requirements by applying them to the traditional content-neutral based test developed by the Supreme Court in Ward v. Rock Against Racism.\textsuperscript{158} The analysis at first glance appeared to show that restrictions are constitutionally valid. However, what makes sender identification requirements unique is that they pertain to anonymous speech, and therefore our analysis must be more extensive.

There is undoubtedly a connection between free speech and anonymity. This connection is older than our nation and has played a major role in the ratification of the Constitution.\textsuperscript{159} However, this connection between must be viewed in two contexts: pseudonymous speech and truly anonymous speech. The significance of these individual types of anonymous speech can be supported by their historical significance and practical application.

The Supreme Court has addressed the issue of anonymous communications in a number of different settings. However, it appears that anonymous speech may once again come into question; this time involving the right to communicate anonymously through the mail.

With the intelligent mail proposal, senders can no longer remain truly anonymous.\textsuperscript{160} Although the sender's identity will not be visible to the cas-
ual observer, it will be encrypted on a digital stamp that can be read by the Postal Service. At first glance, this approach appears quite reasonable. The system will provide consumers with the ability to track their mail while making it difficult for a terrorist to anonymously send biological materials. However, this approach presupposes that the Postal Service will have the capability to verify the identities of all senders.

Even if the Postal Service could verify the identity of all senders, the sender identification requirements implicit within intelligent mail would terminate the ability of persons to communicate anonymously. The Supreme Court has a history of upholding the ability of individuals to exercise their First Amendment rights anonymously. We have examined the Court’s treatment of anonymous communications with regards to hand-billing, political speech, and canvassing. Together, these cases create a framework which can be used to predict how the Court would respond if confronted with the issue of whether an individual has the right to anonymously send letters.

What makes letters unique is that their contents remain a mystery until they are opened. The contents of a letter can cover any topic, including political topics. As the Court stated in McIntyre v. Ohio, “no form of speech is entitled to greater constitutional protection than Mrs. McIntyre’s [political speech].” Intelligent mail would force senders who wish to address political issues to identify themselves. The same exacting scrutiny applied by the Court in McIntyre should be applied to intelligent mail because those restrictions have the potential to restrict political speech. In the instant matter, the regulations have not yet been issued, but we infer from the Commission’s report that sender identification requirements will be applied universally and therefore will offer no outlet for persons who wish to anonymously address political issues by mailed letters.

Additionally, intelligent mail would have a chilling effect on speech. By allowing persons to send letters anonymously, the Postal Service has contributed to the free exchange of ideas. The Postal Service has allowed senders to communicate freely and without fear of threat or reprisal. According to Justice Black, forcing persons to identify themselves “would tend to restrict freedom to distribute information and therefore freedom of expression.” Requiring individuals to identify themselves on the outside of their mail will also restrict freedom of expression, including political expression which in the past has received great protection. This will lead the Court to invalidate sender identification requirements.

The Postal Service’s universal service obligation is important to the nation. However, sender identification, unless enhanced by an overarching system capable of verifying the identities of all senders, is pointless. Unless the government can make the system foolproof, there really is no point to implementing the system because it will neither contribute to security nor increase postal revenues. Further, intelligent mail will not contribute to preservation of universal service, the chief objective expressly outlined by the President’s Commission. Since intelligent mail cannot assist the Postal Service reach its goal of preserving universal service, it most certainly cannot outweigh the effect it will have on speech protected by the First Amendment.

VIII. CONCLUSION

The anthrax attacks that followed the tragic events of September 11, 2001 have caused severe criticism of the Postal Service. The brunt of this criticism has been directed at the regulations which currently govern the Postal Service. More specifically, critics have asserted that the current regulations are outdated and need to be amended to reflect the societal and technological changes that have occurred in the years since they were originally drafted—specifically the development of the Internet and the recent use of the mail as a vehicle to deliver dangerous biological agents.

The report by the President’s Commission reaffirms that the preservation of universal service is the most important goal for the Postal Service due to its vital contribution to the national economy. In order to best preserve universal service, the

150 (providing that, “to accomplish this task, the Commission recommends that the Postal Service continue to study the development of a single universal barcode designed for all mail pieces”) (emphasis in original).

161 Id. at 148.

162 McIntyre, 514 U.S. at 347.

163 See PRESIDENTIAL COMMISSION REPORT, supra note 8, at 150.

164 Talley v. California, 362 U.S. 60, 64 (1960).

165 McIntyre, 514 U.S. at 346.
Commission recommended the Postal Service aggressively pursue the development of intelligent mail, which would apply intelligent barcode technology to ordinary letter mail. In such a system, senders would have to identify themselves to the Postal Service in order for their mail to be delivered to recipients.

Intelligent mail and sender identification threaten the right to communicate anonymously. Anonymous communication has played a significant role in the nation's development. If the government were to require intelligent mail, the ability to communicate anonymously through the mail would disappear. Although the language of the First Amendment does not expressly protect anonymous speech, the right to communicate anonymously has been held as protected by the Supreme Court in a number of areas. Those cases create a framework which can be used to analyze how the Court would decide the constitutionality of intelligent mail.

The Supreme Court's jurisprudence is clear: the ability to speak anonymously is a weapon that can be used to defeat tyranny and defend liberty. By requiring individuals to identify themselves on the outside of their mail, the Postal Service will by default discourage persons from using the mail altogether. In other words, sender identification requirements will have a chilling effect on persons who normally communicate via the mails. Because intelligent mail and sender identification will affect speech and because the Supreme Court has a history of protecting the ability of persons to remain anonymous, the Court will find that the sender identifications requirements of the intelligent mail proposal will be invalid restrictions on speech protected by the First Amendment.