

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 UNITED STATES :

4 POSTAL SERVICE, :

5 Petitioner :

6 v. : No. 02-1290

7 FLAMINGO INDUSTRIES (USA) :

8 LTD. , ET AL. :

9 - - - - -X

10 Washington, D. C.

11 Monday, December 1, 2003

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:02 a.m

15 APPEARANCES:

16 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D. C. ; on behalf of
18 the Petitioner.

19 HAROLD J. KRENT, ESQ., Chicago, Illinois; on behalf of the
20
21 Respondents.

22
23
24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	EDWIN S. KNEEDLER, ESQ.	
4	On behalf of the Petitioner	3
5	HAROLD J. KRENT, ESQ.	
6	On behalf of the Respondents	24
7	REBUTTAL ARGUMENT OF	
8	EDWIN S. KNEEDLER, ESQ.	
9	On behalf of the Petitioner	53
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-1290, the United States Postal Service v. Flamingo Industries.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court:

The Ninth Circuit held in this case that the United States Postal Service may be sued for treble damages under the Federal antitrust laws. The court of appeals fundamentally erred in this holding. Throughout the nation's history, postal operations have been carried out by the United States Government itself, pursuant to the express authorization in article I of the Constitution, for Congress to establish post offices and post roads.

As this Court explained in the Council of Greenburgh case about 20 years ago, the furnishing of postal services has historically been regarded as a sovereign function, indeed a sovereign necessity, to promote intercourse among the states and bind the nation together. Such functions of the United States Government

1 are not regulated by the antitrust laws.

2 Indeed, more than 60 years ago, in the Cooper
3 Corporation case, this Court held that the United States
4 is not a person for purposes of the antitrust laws.
5 Although the precise question before the Court in that
6 case was whether the United States could sue as a
7 plaintiff under section 7 of the Sherman Act, the Court
8 noted that the same word, person, is used to describe who
9 may be held liable as a defendant, either in a civil
10 action or in a criminal prosecution.

11 QUESTION: Mr. Kneedler, in your view, are there
12 any instrumentalities of the United States that you think
13 could be considered a person under the Sherman Act?

14 MR. KNEEDLER: Well, I - I think that there are
15 no instrumentalities that are constituent parts of the
16 United States Government itself that could - that could be
17 held liable. The word instrumentality is used in a - in a
18 somewhat vague sense, elastic sense, and I think it would
19 be necessary to look at the particular statute to see how
20 much of a governmental character a particular entity has.

21 QUESTION: Of course, I guess the court whose
22 judgment we're reviewing thought that the change in the
23 structure of the Postal Service affected the nature of
24 that instrumentality.

25 MR. KNEEDLER: It - it - it did, but the - the

1 court of appeals was wrong on that. First of all, after
2 the - the court of - after the - this Court's Cooper
3 decision, a number of lower court decisions have held,
4 beginning with the D. C. Circuit's decision in the Sea-
5 Land case involving the Alaska Railroad, that agencies of
6 the United States or instrumentalities just like the
7 United States itself is not a person subject to the
8 antitrust laws. The Ninth Circuit didn't -

9 QUESTION: Mr. Kneedler - Mr. Kneedler, but I
10 don't think in that case there was - the question was
11 raised whether the Alaska Railroad was an agent of the
12 United States that would - would carry the immunity of the
13 United States.

14 MR. KNEEDLER: Well, the - the - it was - the
15 Court regarded it as an - as an instrumentality, and in
16 fact the - the Court there recognized that the railroad
17 and the officials of the Government responsible for
18 supervising the railroad could be sued under the APA, and
19 that, therefore, there had been a waiver of sovereign
20 immunity to that extent, and to the extent of allowing
21 injunctive relief. So the - the Court certainly focused
22 on the question that the Alaska Railroad and those
23 responsible for managing it were part of the United States
24 Government.

25 QUESTION: I didn't think it was a contested

1 issue in - in that case.

2 MR. KNEEDLER: It may not have been contested,
3 but it - but it - the Court certainly addressed that
4 question and then went on to hold that as an
5 instrumentality of the United States, the - the railroad
6 was not subject to suit under the antitrust law.

7 QUESTION: Is the Postal Service subject to the
8 Administrative Procedure Act?

9 MR. KNEEDLER: It is not. It - it - Congress
10 specifically accepted it that there's - in section 410 of
11 the act, there's a very detailed enumeration of the
12 provisions that Congress did want and did not want to be -
13 the Postal Service to be subject to. But the - the
14 important point for present purposes is that in 1970, when
15 Congress enacted the Postal Reorganization Act, it carried
16 forward the essential governmental character of the Postal
17 Service, just as it had been up until that point.

18 In fact, section 101(a) of the act says that the
19 United States - and I quote - the United States Postal
20 Service shall be operated as a basic and fundamental
21 service provided to the people by the Government of the
22 United States. And then it says, the Postal Service shall
23 have as its basic function the obligation to provide
24 postal services to bind the nation together.

25 QUESTION: So you say it carried forward the -

1 the essential governmental character. What - what does
2 that consist of? Doesn't it consist of the nature of the
3 entity, not just - just the - the tag? It can't just put
4 a tag on it and - and say it has an essentially
5 governmental character. I thought that the - that the
6 purpose of the reorganization was to make the Postal
7 Service function like a regular business.

8 MR. KNEEDLER: In - in a - in a limited sense.
9 Congress -

10 QUESTION: Well, I'll - I'll qualify it. A
11 regular business, a regular public utility -

12 MR. KNEEDLER: No, I - I -

13 QUESTION: - which has - which has certain
14 obligations, yes. They have to do universal, - universal
15 mail service, just as a telephone company has to give
16 universal telephone service. But on the other hand, the
17 rest of their operations were supposed to be business-
18 like.

19 MR. KNEEDLER: In the - in the description of -
20 of how the Postal Service was to be operated carrying
21 forward, the - the Congress repeatedly referred to the
22 Postal Service as - as a governmental function, a public
23 service to be operated in a business-like way. But what
24 Congress meant by that was to insulate the Postal Service
25 from the prior political interference that had come up by

1 imposing the duty on Congress to repeatedly raise rates
2 and - and address services.

3 QUESTION: Insulated from the Government.

4 MR. KNEEDLER: Not - but by -

5 QUESTION: You're - you're saying on the one hand
6 it's part of the Government, but on the other hand, what
7 Congress wanted to do was to insulate it from the
8 Government.

9 MR. KNEEDLER: No. By - by no means insulate it
10 from the Government. The Postal Service - the governors
11 of the Postal Service are denominated officers of the
12 United States, so the people responsible for the Postal
13 Service are officers of the United States.

14 QUESTION: Are they - are they removable by the
15 President?

16 MR. KNEEDLER: They're removable for cause.

17 QUESTION: For cause. Just like the heads of
18 independent agencies.

19 MR. KNEEDLER: Yes, but - but certainly the other
20 independent agencies like the Federal Trade Commission and
21 agencies like that are part of the United States
22 Government performing a governmental function.

23 QUESTION: Congress never said that they were
24 supposed to operate like a business, which was the purpose
25 of the Reorganization Act.

1 **MR. KNEEDLER:** Actually, in the - in the text of
2 the act itself, there - there is - there is not an express
3 directive that the Postal Service will be operated like a
4 commercial entity. What Congress had in mind was to - was
5 to rationalize the internal operations of the Postal
6 Service, but it did not change any of the fundamental ways
7 in which the Postal Service operated. It - it maintained
8 the postal monopoly, which, under the private express
9 statutes, about 80 percent of the revenues of the Postal
10 Service are - are protected by the private express -

11 **QUESTION:** It - it did - it did retain that
12 monopoly and - and the Government's position here is that
13 the Postal Service has the power to extend that monopoly
14 into fields that the Government did not specifically
15 confer upon it, right? Because the Government's position,
16 as I understand it, is not only that the Postal Service
17 can't be sued under the antitrust laws, but that the -
18 that the Postal Service is not subject to the antitrust
19 laws.

20 **MR. KNEEDLER:** It is not a person within the
21 meaning of the antitrust laws.

22 **QUESTION:** So it can - it can go ahead and extend
23 the monopoly conferred by statute beyond the - the narrow
24 context granted by Congress.

25 **MR. KNEEDLER:** That is not a - that is not a new

1 feature of the - of the Postal Service. As we point out
2 in our reply brief, quoting this Court's decision in the
3 Emergency Fleet Corporation case, there the Court pointed
4 out, with respect to the Post Office, it said the Post
5 Office has since 1872 competed with bankers through money
6 orders, it competed with savings and loan association
7 through savings accounts, which the Postal Service
8 operated -

9 QUESTION: Suppose there - suppose there were an
10 actionable violation of the antitrust laws and there was a
11 conspiracy between two private suppliers, and the Postal
12 Service, through some of its high officers, joined that
13 conspiracy. Would there be any liability, individual
14 liability, on the part of the officers of the Postal
15 Service?

16 MR. KNEEDLER: I - I'm not sure about that. The
17 Postal Service itself would not be - would not be liable,
18 and I - and I think if the - I guess it depends on what
19 one means by a - by a conspiracy as well, because if the -
20 the Postal Service has brought authority in procurement,
21 for example, to - it's exempt from some of the Federal
22 procurement statutes, but Congress granted it the
23 authority to have its own procurement arrangements. So if
24 the - if - if a - if the Postmaster General decides on a
25 particular procurement methodology that - that was alleged

1 to be anti-competitive, I don't think that could be fairly
2 characterized as a conspiracy, even -

3 QUESTION: Is the private express statute still
4 in effect?

5 MR. KNEEDLER: It is, it is, and that has - that
6 has not been changed, and the Court discussed that in the
7 California Board of Regents case and other - and other
8 decisions of this Court. Really, the - all the Ninth
9 Circuit relied upon in - in this case was the presence of
10 a sue-and-be-sued clause in the Postal Reorganization Act,
11 which simply says that the Postal Service may sue and be
12 sued in its official name.

13 There is a - there is virtually no discussion of
14 that provision in the legislative history of the act, and
15 the Ninth Circuit essentially said that because the Postal
16 Service may sue - may be sued in its official name,
17 therefore, it has - its sovereign character has been cast
18 off and it can be sued just like a private party.

19 That - that analysis is in direct conflict with
20 this Court's decision in FDIC v. Meyer, where the Court
21 reversed a similar determination with respect to the FDIC,
22 saying that the Ninth Circuit had conflated what are two
23 analytically distinct questions. The first is whether
24 there is a waiver of sovereign immunity. We do not
25 dispute that there is a waiver of sovereign immunity here

1 under the sue-and-be-sued clause. But the - the second
2 and critical question here is whether the - the
3 substantive law that the plaintiff relies upon provides an
4 avenue for relief.

5 In this case, that is the antitrust laws, and
6 Congress has never amended the antitrust laws to make an
7 agency or an entity of the United States Government
8 liable. After the decision in Cooper - Cooper
9 Corporation, Congress amended the Clayton Act to allow the
10 United States to sue as a plaintiff if it's injured in its
11 business or property, but it did not do that by changing
12 the word person. It - it explicitly provided a cause of
13 action for the United States as the United States, but it
14 did not, as the D. C. Circuit pointed out in the Sea-Land
15 case, amend the definition of person or otherwise make the
16 United States or its constituent parts subject to the
17 antitrust laws as a - as a defendant.

18 QUESTION: What happens - I'm sorry, go on.

19 QUESTION: Mr. Kneedler, is this - section 201 of
20 Title 39 says, there is established as an independent
21 establishment of the executive branch of the Government of
22 the United States the United States Post Office. Was that
23 in the statute before the reorganization or is that part
24 of the reorganization?

25 MR. KNEEDLER: That's part of the reorganization.

1 There was a Post Office Department before that was part of
2 the Cabinet, and what - what Congress wanted to do was to
3 take the post - postal operations out of the Cabinet and
4 put them under - under the Board of Governors, who are
5 officers of the United States but not part of the Cabinet.
6 And the - the phrase, establishment of the executive
7 branch, is used with respect to other undeniably Federal
8 agencies, as we point out in our - in our brief, the OPM
9 Office of Personnel Management, the Transportation Safety
10 Board.

11 And I - I think it's just intended to make
12 clearer that the Postal Service was not to be under the
13 President's direct control, and in fact there were
14 proposals to make the Postal Service a corporation, and
15 Congress emphatically rejected that. And instead, as
16 President Nixon proposed in - in submitting a proposal to
17 Congress, the Postal Service would be constituted as an
18 agency like the SEC or NASA or the Board of Governors of
19 the Federal Reserve System. All of those entities are -
20 are performing quintessentially governmental functions
21 that are not subject to the antitrust laws.

22 QUESTION: If I get into a car accident with a -
23 with a postal delivery truck, do I sue the United States
24 under the Federal tort claims?

25 MR. KNEEDLER: Yes, yes, you do. And - and -

1 it's - it's an important thing to - to be clear about in
2 the Postal Reorganization Act. Pervasively throughout
3 that statute, Congress treated the Postal Service as a
4 governmental entity. The torts are subject to the Federal
5 Tort Claims Act.

6 QUESTION: Mr. Kneedler, where does the money
7 come to pay the judgment? Is it -

8 MR. KNEEDLER: Out of the - out of the Postal
9 Service fund, but that is a fund in the Treasury. There's
10 a separate provision -

11 QUESTION: But it isn't the general judgment
12 fund?

13 MR. KNEEDLER: No - no, it's - no, it's not, but
14 - but there are other - other situations in which
15 appropriated funds from a particular agency are used to
16 reimburse the judgment fund if there's a particular
17 appropriation set aside for that purpose, so this is not a
18 unique feature of - of the - of the Postal Act.

19 But if I could also mention, torts are subject
20 to suit against the United States, but with respect to
21 contracts, Congress subjected the Postal Service to the
22 Contract Disputes Act. The Court of Claims held almost 20
23 years ago, soon after the act was passed, that the United
24 States itself could be sued under the Tucker Act based on
25 a breach of contract with the Postal Service, because of

1 the close connection between the Postal Service and the
2 United States.

3 The Postal Service could be sued in district
4 court in its own name under the sue-and-be-sued clause for
5 breach of contract, but the Court of Claims held that -
6 that the United States itself can be sued, and therefore
7 is responsible for the contracts of - of the Postal
8 Service, and it -

9 QUESTION: Could the United States sue - bring an
10 antitrust suit as plaintiff on behalf of the Postal
11 Service?

12 MR. KNEEDLER: We - we believe it could. It
13 would - it would be brought in its own name, but - but the
14 United States - if the Postal Service, just like any other
15 entity, purchased goods, for example, and was a victim of
16 - of a - of a - of an antitrust violation, the United
17 States would be able to sue and - and collect treble
18 damages. That was the purpose of the Cooper Corporation
19 case, where there was a procurement of tires by a number
20 of different Federal agencies, and Congress authorized the
21 United States to bring a suit to recover for the injuries
22 sustained to Federal agencies generally in that situation.

23 QUESTION: Under this sue-and-be-sued clause, is
24 it your position that there must always be a Federal
25 statute authorizing the suit before the post office has

1 any substantive liability?

2 MR. KNEEDLER: As a general rule, yes. There -
3 before the Federal Tort Claims Act was passed though, it
4 was assumed that tort claims could be brought against
5 Federal entities that had sue-and-be-sued clauses,
6 although a lot of those were private corporations that
7 were instrumentalities, not - not Federal agencies. And
8 also with respect -

9 QUESTION: So the sue-and-be-sued clause does
10 have some substantive force in some other cases?

11 MR. KNEEDLER: It's - it's been - it's unclear
12 because back when they were first put in the - in the
13 statutes, the - the separation of a - the existence of a
14 waiver of sovereign immunity and the existence of a cause
15 of action were - were not separated the way they are
16 today. For example, under the - under the Tucker Act, a
17 plaintiff can bring a breach of contract action against
18 the United States, even though there's no statute that
19 specifically provides a cause of action for breach of
20 contract. It's thought that - that the reference to
21 contracts in the Tucker Act is a sufficient basis for
22 that, and we -

23 QUESTION: Does the Post Office have the power of
24 eminent domain?

25 MR. KNEEDLER: It does, it does, and it has - it

1 - it carries forward the power to investigate postal
2 offenses, to - to - with appropriate authorization, to
3 search the mails.

4 QUESTION: There's a lot of -

5 QUESTION: What about - what about inverse
6 condemnation? Supposing the post office takes property
7 without the ability to pay for it.

8 MR. KNEEDLER: I don't know that the question has
9 arisen, but I - I would assume that a - a suit could be
10 brought against the United States under the Tucker Act on
11 the same theory that I mentioned with respect to a breach
12 of contract by the Postal Service.

13 QUESTION: Mr. Kneedler -

14 QUESTION: Don't - before we get off of eminent
15 domain, don't - don't a lot of state public utility
16 entities have the power of eminent domain?

17 MR. KNEEDLER: They - they do, and that -

18 QUESTION: So that really doesn't determine what
19 -

20 MR. KNEEDLER: Well, I - I think it's part of an
21 overall pattern.

22 QUESTION: And they're subject to the Sherman
23 Act, of course.

24 MR. KNEEDLER: Right. But it's part of an
25 overall pattern. Congress does not lightly confer the

1 right of eminent domain on - on Federal agencies, but it's
2 part of a general pattern in which the United States -
3 excuse me, in which Congress treated the Postal Service as
4 a - as a governmental entity.

5 I did want to point out one particular way that
6 illustrates the - the way in which the antitrust laws are
7 unsuitable here. The precise - this is - this is at
8 bottom a routine - a routine procurement dispute. And as
9 the Ninth Circuit held in this case, the plaintiffs here
10 had a cause of action, in fact, brought one under the
11 Administrative Disputes Resolution Act that is essentially
12 a bid protest statute.

13 And there are two features of that statute that
14 are inconsistent with antitrust liability in this setting.
15 First of all, Congress expressly provided that the
16 standard of review in such an action is the arbitrary and
17 capricious standard of the APA, meaning that the Postal
18 Service, like any other Federal agency subject to that,
19 has to have broad latitude -

20 QUESTION: It seems to me, Mr. Kneeder, this is
21 an argument that you don't have an antitrust violation
22 here, but we're concerned with the problem of whether you
23 had a classic violation, say they agreed with somebody
24 else on the prices they would charge for advertising the
25 Olympics or something like that, where you had a clear -

1 here you don't have it clear. I think it's arguable
2 whether the alleged violation - but that's not the issue
3 before us.

4 MR. KNEEDLER: Well, except - except to this
5 extent. In - in virtually every direction you turn, in
6 looking on how - on how disputes involving the Postal
7 Service are handled, you find a governmental dispute
8 resolution mechanism, and that - this was the point about
9 the -

10 QUESTION: But what about a breach of -
11 infringement of patents, for example?

12 MR. KNEEDLER: There's - there's express
13 authorization for suing the United States for -

14 QUESTION: And infringement of copyrights and so
15 forth?

16 MR. KNEEDLER: Same - same thing. Where Congress
17 has wanted to provide the United -

18 QUESTION: Supposing there was a - one of these
19 antitrust violations that involved abuses of patents in
20 order to extend a monopoly or something like that, that
21 could be a classic antitrust violation. But you say there
22 are other Federal remedies there?

23 MR. KNEEDLER: There - there might be - there
24 might be remedies under some of the statutes mentioned
25 here. There - I mean, Congress has expressly subjected

1 the United States to suit under the Lanham Act, under the
2 copyright statute, under - under the trademark laws, under
3 the patent laws, but - and - and then there are these
4 procurement statutes that I mentioned that are applicable
5 in this particular case. But in this case as well,
6 Congress did not provide for treble damages. The only
7 monetary relief a plaintiff could get in this procurement
8 situation, as we point out in our brief under the
9 Administrative Dispute Resolution Act, is bid preparation
10 costs, not treble damages.

11 QUESTION: What if - what if the Post Office buys
12 a lot of paper from somebody and doesn't pay for it?
13 What's - what is the remedy of that person on a contract?

14 MR. KNEEDLER: There would be an alternative
15 remedies. Before the Contract Disputes Act was passed,
16 the Postal Service could have been sued itself in its own
17 name under the sue-and-be-sued clause, or in the Tuck -
18 under the Tucker Act in the - in the Court of Claims. Now
19 under the Contract Disputes Act, Congress has made that
20 statute applicable to the Postal Service just as it has to
21 other Federal entities.

22 QUESTION: And that could be - that sort of an
23 action could be brought under the Contract Disputes Act?

24 MR. KNEEDLER: Yes. And there is specifically a
25 Postal Service board of contract appeals, just there - as

1 there is a board of contract appeals in - in other
2 agencies.

3 QUESTION: Would there be an - some alternative
4 remedy to the antitrust law if the Postal Service decided
5 to use its profits from the monopoly business in effect to
6 subsidize predatory rates in the package delivery business
7 in order to put UPS out of business?

8 MR. KNEEDLER: The way - the way Congress
9 addressed that was to subject the Postal Service to the
10 jurisdiction of the Postal Rate Commission, and all -

11 QUESTION: Well, let's assume they go along with
12 it. They say, okay, we are going to eliminate UPS. Would
13 there be any alternative claim - source of remedy by UPS
14 to the antitrust laws?

15 MR. KNEEDLER: Well, I would - I would - if the -
16 a decision - it's a complicated mechanism the way the
17 Postal Rate Commission interacts with the Postal Service,
18 but there is a provision for judicial review. If the
19 Postal Service enters a final decision after - after
20 receiving the input from the Postal Rate Commission, there
21 is a provision for judicial review of that - of
22 determinations of -

23 QUESTION: What would be the -

24 MR. KNEEDLER: - rates and classifications.

25 QUESTION: What would be the substantive basis

1 for the review?

2 MR. KNEEDLER: Under - under the Postal
3 Reorganization Act, the provisions beginning in - in
4 section 3601 of the act address rate-making and
5 classification, and there are specific standards there
6 that the Postal Rate Commission and the Postal Service
7 must adhere to.

8 QUESTION: And - and would it eliminate this
9 possibility of predatory lowing - lowering rates for -

10 MR. KNEEDLER: They - they are designed to. The
11 - the - the way the - the way the act operates, it
12 specifies that each classification - first - two things:
13 one, overall, the Postal Service rates are to be set at a
14 rate so that they - the income will roughly equal
15 expenditures. And then within each class, Congress has
16 provided the direct and indirect costs of that class are
17 to be allocated to it, along with some - an appropriate
18 portion of the institutional costs, the things that are
19 difficult to - to allocate to any one - any one class.

20 QUESTION: Of course, this only becomes a real
21 problem when the Postal Service turns a profit on its
22 monopoly business, which it has not yet succeeded in
23 doing, has it?

24 MR. KNEEDLER: Well, and - and it's not - over
25 the long term, over the long term since the Postal

1 Reorganization Act, I believe that the Postal Service is
2 within about a billion dollars of breaking even. There
3 are times when it is in a deficit. There are times when
4 it is in a surplus, but the statutory goal is that it -
5 that it be roughly equal balance between - between income
6 and expenditures.

7 QUESTION: Mr. Kneedler, can I ask you a basic
8 question I just kind of forgotten that I thought I knew
9 about, but I thought the Postal Service had a monopoly of
10 the business of delivering letters and packages, and that
11 these competing services are only allowed to exist by some
12 special privilege granted by the Postal Service.

13 MR. KNEEDLER: Yes. That's true for letters, but
14 not for parcel post.

15 QUESTION: But not for parcel, I see.

16 MR. KNEEDLER: Yes. There's - there's an - the
17 Postal Service adopted an exception to the private express
18 statutes for urgent letters, which - which has allowed
19 organizations like Federal Express to carry letters for
20 urgent delivery. Absent that exception, they would - that
21 practice would be prohibited by the - by the private
22 express statutes.

23 But the - the idea that the Postal Service
24 competes with non-Federal entities is not new. As I - as
25 I pointed out, the Postal Service began competing with

1 money orders before the turn of the last century, for 50
2 years have had savings deposits with up to 4 million
3 depositors that competed with savings associations, so and
4 - and it's competed - it went into the parcel post
5 business, the parcel delivery business in 1913 alongside
6 of other businesses.

7 So that - that sort of competition with private
8 businesses has - has occurred since well before the Postal
9 Reorganization Act, and nothing in the Postal
10 Reorganization Act changes the way in which that should be
11 regarded under the - under the antitrust laws.

12 If the Court has no further questions, I'd like
13 to reserve the balance of my time.

14 QUESTION: Thank you, Mr. Kneeder.

15 Mr. Krent, we'll hear from you.

16 ORAL ARGUMENT OF HAROLD J. KRENT

17 ON BEHALF OF RESPONDENTS

18 MR. KRENT: Mr. Chief Justice, and may it please
19 the Court:

20 As Justice Scalia noted, Congress launched the
21 Postal Service into the commercial world in 1970,
22 authorizing it to compete in any market of its own
23 choosing, and this new commercial entity fits comfortably
24 within the term, person, under the antitrust laws for at
25 least four distinct reasons.

1 First, this is unlike any other Federal entity
2 in the fact that the Postal Service has been authorized to
3 decide which markets it wants to compete into. It's not
4 competing in order to fulfill a specific congressional
5 mission, but rather to compete in order to break even to
6 make money.

7 Second, Congress has directed the Postal Service
8 enter these markets with scant regulatory oversight. The
9 APA, the Postal Rate Commission, the Federal acquisition
10 regulations, all do not apply when the Postal Service is
11 acting under its non-monopoly powers.

12 QUESTION: You're saying then that the Cooper
13 decision doesn't affect your argument, because the - the
14 Congress has separated the Post Office Department from the
15 - from the executive?

16 MR. KRENT: That's correct, Your Honor. And in
17 many other contexts, though, it's clear that this Court
18 has recognized that the Postal Service should be distinct
19 from the United States, the Franchise Tax opinion, the
20 Loeffler decision, and I think the other -

21 QUESTION: Well, neither of those are quite in
22 point.

23 MR. KRENT: Neither are involved in separate
24 cause of action, but both involve this Court's recognition
25 that the Postal Service is not the same as United States

1 and should be treated differently.

2 QUESTION: But what do you do with the statutory
3 language that it's an establishment of the executive
4 branch of the Government of the United States?

5 MR. KRENT: Well, I think it is an establishment
6 of the executive branch, and it keeps some kind of
7 connection to the United States, and so, for instance,
8 Congress evidently cared about the fact that, given the
9 monopoly given over letter mail, that there would be some
10 tie. I mean, the - the President cannot, can neither
11 appoint nor discharge the Postmaster General, but yet
12 there is some link between the President and the Postal
13 Service. Yet financially, the Postal Service is
14 independent.

15 QUESTION: There isn't any Postmaster General
16 anymore, is there?

17 MR. KRENT: Well, there - there is, Your Honor,
18 in terms of the individual who's so-called under the
19 statute the executive official of the - of the United
20 States, and that individual is to - is also a member of
21 the Board of Governors of the Postal Service and is to
22 direct and execute the business operations of the Postal
23 Service.

24 QUESTION: How is he selected? By the Board of
25 Governors?

1 MR. KRENT: Chosen by the Board of - yes, Your
2 Honor. And I think that, again, Evans is the separation
3 or the insulation of the Postal Service from direct
4 executive branch control. But financially, as I
5 mentioned, the debts of the Postal Service are not the
6 debts of the United States. Any kind of - of recovery
7 against the Postal Service does not come from the judgment
8 fund, it comes from the Postal Service fund. Again, these
9 two things reflect the fact that the budget, as well as
10 the overall financial structure of the Postal Service, is
11 independent.

12 And - and the fourth reason, Your Honor, of why
13 the Postal Service is a distinct entity is - is the fact
14 that there is a sue-and-be-sued clause that differentiates
15 this case from the Sea-Land case, in which there was no
16 sue-and-be-sued clause.

17 QUESTION: It doesn't differentiate though from
18 the Meyer case?

19 MR. KRENT: No, Your Honor, and indeed, we think
20 though that the - these four factors together amply
21 demonstrate that this is a - there is a congressional
22 intent that the Postal Service be considered a separate,
23 distinct entity that can qualify under the term, person,
24 in antitrust laws. And indeed, this is not an unadorned
25 sue-and-be-sued clause. Congress sat and thought about

1 the ramifications of the sue-and-be-sued clause and
2 thought about what specific limitations should be grafted
3 on to the waiver of immunity. It decided to make sure the
4 Postal Service complied with the Federal Tort Claims Act.
5 It wanted to make sure that the Postal Service, despite
6 the distinction with the United States, viewed its own -
7 had different venue - had the same venue.

8 QUESTION: But Meyer says you have to have
9 something more than a sue-and-be-sued clause, that you
10 have to show that there's a cause of action available. So
11 a sue-and-be-sued clause itself is not enough for you in
12 this case, don't you agree with that?

13 MR. KRENT: I agree, Your Honor, and indeed it's
14 the fact that the antitrust laws say that every person
15 should be subject to the anti-competitive measures, or
16 pro-competitive measures, in - in the statutes.

17 QUESTION: Well, yes, but the - that was true -
18 they said that in the Cooper case too, that person, and
19 the Cooper Court said, no, the United States is not a
20 person.

21 MR. KRENT: That's right, Your Honor, but I think
22 the Cooper case must be looked at in the structure of the
23 decision itself, because the Cooper Court was very clear
24 to limit its decision. It said that person did not equal
25 United States because of the fact that there were other

1 remedies given to the United States explicitly in the act,
2 and indeed, that that conformed to -

3 QUESTION: But certainly after the Cooper
4 decision, it was clear that the United States could not be
5 a defendant either, was it not, as well as not be a
6 plaintiff -

7 MR. KRENT: Well, it didn't matter Your Honor,
8 because there was no waiver of immunity.

9 QUESTION: Well, answer my question, will you?

10 MR. KRENT: I believe that it was clear, because
11 - but, again, I think that nobody tried to avail
12 themselves of that remedy because the United States had
13 not waived its immunity. But this Court extended the
14 notion of the - of person, and to as broad as possible,
15 including states, including foreign governments, as well
16 as associations and public corporations.

17 QUESTION: Didn't the Court say in Cooper, the
18 reason why we're not letting the United States be a person
19 as plaintiff, because if we did that it would follow like
20 the night day that they would be a person as a defendant,
21 and we certainly don't want them to be a person as a
22 defendant? So that's right in the -

23 MR. KRENT: Well, we have no quarrel -

24 QUESTION: That's right in the opinion. It's not
25 something subtle. One of the driving forces for saying

1 they couldn't be - they weren't going to read into the act
2 plaintiff status was that this Court thought that would
3 mean they would be a person for defendant status.

4 MR. KRENT: I agree that it's in the opinion,
5 Your Honor, but this Court, in Georgia v. Evans, and this
6 Court in Pfizer, made clear to cast the Cooper decision in
7 the light of the fact that it was a narrow decision,
8 predicated not specifically on that point, Your Honor, but
9 rather on the notion that there was an election of
10 remedies, the fact that the United States could sue to
11 seize property under the act, the United States could
12 pursue criminal penalties under the act, and that
13 linguistically, the United States doesn't seem to fit in
14 within the terms, an organization or association existing
15 under the law as the United States.

16 QUESTION: Well, the - what, the Postal
17 Reorganization Act was 1970? Have any other antitrust
18 suits been brought against the Postal Service in that 34
19 years?

20 MR. KRENT: Not to my knowledge, Your Honor.
21 However, the Department of Justice in 1977 and again in
22 1978, made findings suggesting that the Postal Service was
23 likely to be subject to the antitrust laws.

24 QUESTION: That's no longer the position of the
25 department, is it?

1 MR. KRENT: That's correct. It was soon after
2 the enactment of the 1970 statutes. And indeed, there are
3 other entities, such as the Tennessee Valley Authority,
4 which has been found to be a person under the antitrust
5 acts, but I think it's - the fact that this is rising,
6 this question arises under the Postal Services is no
7 surprise, because the Postal Service has a roving mandate
8 to decide to go into the business of greeting cards in
9 competition to Hallmark, to go into the fact that it can
10 sell bicycling gear, to go into the market of the package
11 industry, to go into the market of calling cards and
12 compete against AT&T.

13 There is no other Federal entity to my knowledge
14 which has this kind of roving mandate to make money from
15 Congress, and indeed, it has used this ability -

16 QUESTION: Well, it's an -

17 QUESTION: It didn't - excuse me - I didn't think
18 it had a mandate to make money. I thought the statute had
19 ordered it to break even.

20 MR. KRENT: Well, it has a statute - it - it's -
21 it's a rough balance. It's unclear whether it's supposed
22 to make a little money or lose a little money.

23 QUESTION: But it - but it's unlike most profit-
24 making institutions that are primarily engaged in trying
25 to make as much money as they can.

1 MR. KRENT: That is correct, Your Honor, but in
2 the non-postal activities, the only objective is to make
3 money. Certainly for universal service there are other
4 objectives limiting and channeling the actions of the
5 Postal Service, but with respect to selling bicycling gear
6 or selling greeting cards, the only objective the Postal
7 Service has is to make money, and it has tried to use this
8 power, and indeed, there were surpluses, as mentioned by
9 counsel for the Solicitor General, in several years. So
10 the Postal Service can be successful at least at times,
11 but other times, of course, especially after 9/11, it has
12 seen hard times.

13 QUESTION: But even - even when it is, I take it
14 the object of the money that it makes is essentially to
15 break even, maybe break even and a little bit more, on -
16 on the mail delivery operation, which the statute itself
17 recites as being a sovereign responsibility of the United
18 States.

19 MR. KRENT: Well, I think that's -

20 QUESTION: So, I mean, that's - that's a long way
21 from General Motors.

22 MR. KRENT: I think it - it's - there is no
23 shareholders, for instance, looking for a profit, but the
24 goal of the Postal Service in these other areas of
25 business, whether it's the package business or the

1 greeting card business, is to make money.

2 QUESTION: Well, it is to make money, but it is
3 to make money in order to subsidize a particular activity,
4 and I don't think - maybe I'm missing something - but I
5 don't think there's an indication that there's a mandate
6 there to maximize profits to in - in effect subsidize the
7 rest of the Government.

8 MR. KRENT: Not - not the rest of the Government
9 at all, because there is a segregated fund. But it is
10 there to - to make sure that any kind of losses that the
11 Postal Service may sustain in its monopoly business can be
12 overcome by profits generated in the non-monopoly
13 business.

14 QUESTION: And that monopoly business is
15 described in the statute as being the discharge of a
16 sovereign obligation of the United States, isn't it?

17 MR. KRENT: Absolutely. The - the Congress has
18 been very clear that there is a monopoly business to be -
19 to be pursued here, and the Postal Service is pursuing
20 that. But that's not what the Postal Service is only
21 about. The Postal Service is also constructed as a
22 business, and that's what this Court has recognized in
23 Franchise Tax and in Loeffler case, and according to that
24 business principles, is pursuing other tasks as well.
25 Indeed, Congress -

1 QUESTION: What is - what is the - what is the
2 organizational form of this business? It's not a
3 corporation, is it?

4 MR. KRENT: It's a corporation-like form, Your
5 Honor, and indeed -

6 QUESTION: Well, but it's not a separate
7 corporation.

8 MR. KRENT: That's correct, Your Honor. I mean,
9 the Postal Service has described itself as a corporation.

10 QUESTION: Is it - is it a partnership?

11 MR. KRENT: It's - it's a board of directors-
12 type organization with the Board of Governors serving as a
13 type of Board of Governors - as a board of directors - and
14 the Board of Governors, as mentioned earlier, chooses the
15 head or the chief executive officer of, or the Postmaster
16 General, of the Postal Service itself.

17 QUESTION: But the structure, I take it, is
18 unlike anything that one would find in - in a - in a
19 private profit-making organization.

20 MR. KRENT: That's correct.

21 QUESTION: It's not a corporation, not a
22 partnership.

23 MR. KRENT: That's correct, Your Honor.

24 QUESTION: I mean, it is - has a distinct
25 structure, but I think that the Congress that launched the

1 Postal Service in the business and suggested that the
2 Postal Rate Commission, the APA, and the Federal
3 acquisition regulations wouldn't apply, would not have
4 wanted then the Postal Service to use any kind of monopoly
5 powers to have a tying arrangement with an entity such as,
6 you know, Emery Air Freight or Federal Express, it
7 wouldn't wanted to have -

8 QUESTION: Well, why isn't this the kind of
9 policy judgment that we ought to leave to Congress to make
10 explicitly? The Post Office, as reorganized, has two
11 aspects to it, as you've pointed out effectively, but how
12 it should relate to the Antitrust Act seems to be the kind
13 of judgment that Congress should address expressly. Isn't
14 that so?

15 MR. KRENT: I think, Your Honor, that the
16 Congress has already made that judgment by suggesting that
17 the Postal Service have the right to be sue and be sued,
18 suggesting the Postal Service -

19 QUESTION: Well, I thought we had already
20 discussed that. I mean, the mere fact that there's a sue-
21 and-be-sued clause is not enough under the Meyer approach
22 to answer the question. You have to -

23 MR. KRENT: Sure.

24 QUESTION: - take another step -

25 MR. KRENT: Right. The -

1 QUESTION: - beyond that.

2 MR. KRENT: Sure, Your Honor. The question is
3 whether or not the Postal Service fits within the term,
4 person. We know under the antitrust laws, we know that
5 person can be applied to public corporations, as this
6 Court has held. We know that person can be applied to
7 states, as this Court has held. We know that person can
8 be applied to foreign governmental entities, as this Court
9 has held. So the only question is whether this person can
10 also apply to Federal governmental entities, and we think
11 that it's clear that some, but very few, governmental
12 entities would qualify under the term, person.

13 QUESTION: But you - you - you concede that
14 before the Postal Reorganization Act, the answer to the
15 question would be no?

16 MR. KRENT: Absolutely.

17 QUESTION: So you - you have to - I mean, you're
18 - you're not writing on a blank slate. You - you have to
19 find enough in the Postal Reorganization Act to change
20 that answer from no to yes, and that's really the burden.

21 MR. KRENT: I - I agree, Your Honor.

22 QUESTION: Given that the Postal Service was not
23 subject to the antitrust laws before, something so
24 fundamental happened in 1970 that it is now a person under
25 the antitrust law. That's - that's your -

1 MR. KRENT: I fully agree with that.

2 QUESTION: - your burden.

3 MR. KRENT: I full agree with that, and I think we can
4 discharge that burden if you look at the fact that the
5 Postal Service is financially independent, it's
6 administratively independent, it doesn't have to comply
7 with the pro-competitive measures and the Federal
8 acquisitions regulations, it has a sue-and-be-sued clause.

9

10 QUESTION: But its employees, are its employees
11 subject to the Taft-Hartley law, or - or - or are they
12 like - like Federal workers?

13 MR. KRENT: They are the only employees in the
14 entire government to my knowledge that must comply with
15 the Taft-Hartley law, and indeed, Congress specified that
16 it must comply within the law, because it wanted them to
17 act more like a business and not have this restrictures of
18 other organizations within the United States as they -
19 following the fellow labor relations authority, Your
20 Honor.

21 QUESTION: So - so - would - would their
22 employees be members of the American Federation of
23 Governmental Employees or other unions?

24 MR. KRENT: I believe it's the American Postal
25 Workers Union, Your Honor.

1 QUESTION: Postal workers union?

2 MR. KRENT: Yes. So it's a - it's a separate -
3 they're separated again from the Government with respect
4 to labor relations. And indeed, they are one of the few
5 governmental entities that have signified their own
6 operations under www-dot - dot-com All right, they have
7 decided not to become a governmental player.

8 QUESTION: But of course, the Reorganization Act
9 itself specified that they'd be subject to Taft-Hartley,
10 did it not?

11 MR. KRENT: That's correct. And that's part and
12 parcel, I think -

13 QUESTION: So why didn't it specify that they
14 would be subject to the Sherman Act?

15 MR. KRENT: Because -

16 QUESTION: You see, I - I don't think that helps
17 you, I think it hurts you.

18 MR. KRENT: I don't -

19 QUESTION: It - it is a significant feature that
20 - that the - their employees are subject to Taft-Hartley,
21 but that - that is more than answered by the fact that it
22 says so in the Reorganization Act. Why doesn't it say so
23 about the - about the antitrust laws?

24 MR. KRENT: Well, I think it's important to think
25 about what the Postal Reorganization Act does say. When

1 it waives immunity, it makes limitations. The limitations
2 are that the Postal Service must comply with the
3 limitations in the Federal Tort Claims Act, that it has a
4 different - the same venue provisions as by the United
5 States, and that it has some of the jurisdictional
6 qualities as the United States, though the - so the
7 limitations and ramifications of the waiver are grafted in
8 section 409 very clearly. There is no other limitation,
9 and I think it's important to realize -

10 QUESTION: Yeah, but there's one - one sticking
11 point that - running through my mind. The fact that they
12 had to waive the immunity in the sue-and-be-sued clause
13 suggest that they're a sovereign.

14 MR. KRENT: We agree that they're part of
15 government, Your Honor. There's never been any kind of
16 question about the fact that the Postal Service is part of
17 the Government.

18 QUESTION: And is a sovereign.

19 MR. KRENT: And - yes, Your Honor. And it takes
20 - takes part of the - in the - in the sense that it would
21 have immunity, but for the waiver, clearly because
22 Congress created the entity, and therefore Congress
23 decides whether to waive the immunity.

24 QUESTION: Of course, if you're right, they're
25 subject to criminal liability under the Sherman Act too.

1 MR. KRENT: Well, so are states theoretically, as
2 well as cities. I don't think that would ever arise, but
3 that is at least a theoretical possibility and this Court
4 has averted to that in prior decisions as well. The same
5 thing is true, of course, for cities under -

6 QUESTION: A criminal case with the United States
7 against the United States Postal Service.

8 MR. KRENT: Well, I don't think that's likely to
9 happen, Your Honor, but I think it's important that this -
10 this waiver allows the Postal Service also to vindicate
11 its own interests, right. But for this waiver, Postal
12 Service could not go in and sue for any kind of antitrust
13 injuries, and that's not clear.

14 QUESTION: But Congress could have said the
15 Postal Service is authorized to sue and omitted the be-
16 sued clause. It could have done it that way -

17 MR. KRENT: That -

18 QUESTION: - in which there would have been no
19 waiver.

20 MR. KRENT: That's correct, Your Honor. That
21 would have made this case go away. But Congress chose not
22 to follow that path, and indeed, if one could think that
23 one launches a - an organization into the commercial
24 marketplace and takes away the constraints of the APA, the
25 FAR, the Postal Rate Commission -

1 QUESTION: Well, to say launch into the
2 commercial marketplace, they're basically selling stamps
3 and nobody else is selling stamps. What kind of a
4 launching is that?

5 MR. KRENT: Well, I think it's now for the
6 monopoly business, Your Honor, but the launching with -
7 with respect to the package delivery business, the
8 greeting card business, the fact that they are sponsoring
9 Lance Armstrong's bicycling team, these are all the areas
10 in which the Postal Service has decided to venture outside
11 of its mandate, and it's - the danger is allowing the
12 Postal Service to extend its monopoly power into these new
13 fields.

14 QUESTION: Mr. Krent -

15 QUESTION: But when it goes into all those fields
16 anyway - we've made this point about 15 times - it - it
17 doesn't set the prices it wants. It sets prices
18 controlled by a commission under a mandate that says it's
19 supposed to break even.

20 MR. KRENT: No - no - if I understand your -

21 QUESTION: Isn't that right?

22 MR. KRENT: That's not right, Your Honor. In
23 terms of all these different areas, the Postal Rate
24 Commission does not operate whatsoever.

25 QUESTION: It has no - in greeting cards and so

1 forth?

2 MR. KRENT: No jurisdiction. The Postal Service

3 -

4 QUESTION: So is it - it - and it's free? In
5 other words, it doesn't - it isn't - well, you - I thought
6 you answered Justice Souter by saying that they do have an
7 obligation even there to break even overall?

8 MR. KRENT: Oh, overall, Your Honor, but the
9 Postal Rate Commission has no jurisdiction whatsoever on
10 the Postal Service's actions with respect to greeting
11 cards, bicycling gear, and the package delivery business.
12 And I think that points out the danger of the monopoly
13 practices. One could easily see -

14 QUESTION: So if in - in the greeting card
15 business, they decided to go into an agreement with three
16 other companies, Hallmark and Smith's greeting cards, and
17 they were to fix their prices at \$14 a greeting card,
18 which seems about right nowadays -

19 (Laughter.)

20 QUESTION: - the - the - then under those
21 circumstances, there would be no remedy -

22 MR. KRENT: That's correct, Your Honor.

23 QUESTION: - for the consumer of the stores.
24 There's no government agency anybody could appeal to?

25 MR. KRENT: That's correct, Your Honor.

1 QUESTION: All right. So that's -

2 MR. KRENT: Absolutely none. And indeed, if
3 there was a tying arrangement of trying to say, if you
4 want our postal services then you have to buy our greeting
5 cards, to follow your example, no remedy whatsoever there
6 as well, so that all these kinds of fear of predatory
7 pricing, tying arrangements, monopolistic prices, the -
8 there's a danger -

9 QUESTION: Well, but there - there wouldn't be a
10 remedying as the Postal Service, but I assume you could
11 sue American Greetings and Hallmark and whoever else had
12 conspired with the Postal Service.

13 MR. KRENT: You might, unless it was a tying
14 agreement, Your Honor. If it was just the universal,
15 unilateral action of the Postal Service with a tying
16 arrangement, there would be no remedy.

17 QUESTION: If it was unilateral action, they'd
18 be -

19 QUESTION: We won't sell you any stamps unless
20 you buy our greeting cards?

21 MR. KRENT: You never know. One never knows.

22 QUESTION: It might happen, I suppose.

23 QUESTION: Mr. Krent, can we go back to Sea-
24 Land, where I thought that the first point made in that
25 decision was indeed as a result of the change in the APA

1 that Alaska Railroad could be sued for injunctive relief.
2 The Court said, yeah, they could be sued like any person,
3 not for damages, but for injunctive relief. And then it
4 said, but this is the question of whether Congress
5 authorized them to be a defendant in an antitrust case is
6 a totally discrete question, it has nothing to do with the
7 waiver of sovereign immunity.

8 MR. KRENT: Well, indeed, that - that's right,
9 Your Honor, and indeed, the difference in - in Sea-Land is
10 the fact that the Alaska Airlines never had a - never had
11 to argue that they were separate from the United States.
12 Their argument was that the United States could be sued
13 for its proprietary activities under the Sherman Act.
14 They didn't argue that they were a distinct entity, so
15 they never said that - there was no - they agreed that
16 there was no sue-and-be-sued clause, and so that whole
17 argument that we're making in this case was never even
18 raised in Sea-Land.

19 QUESTION: Well, I'm - from the Court's point of
20 view, it - the Court made as a threshold determination
21 that the railroad could be sued for equitable relief, so
22 it could be sued. And then it says, but that doesn't
23 answer the question, we have to determine whether there is
24 a claim, any claim under the antitrust laws, and on that
25 the Court relied on Cooper.

1 MR. KRENT: That's correct, Your Honor, because
2 of the Court's holding that the Alaska Airlines did not
3 qualify under the term person under the antitrust laws.
4 And it's our contention, because the Postal Service is not
5 structured anywhere like the Alaska Airlines, because it's
6 - Alaska Airlines did not have a separate budget, the
7 Alaska Airlines could not sue and be sued, the Alaska
8 airlines had to comply with the APA, unlike the Postal
9 Service, that the Postal Service is a person, whereas the
10 Alaska Airlines and the SBA and the Department of Commerce
11 and HUD would not be persons under the antitrust law. So
12 it's a very narrow argument predicated on the structure -
13

14 QUESTION: Eleven people running this, nine of
15 whom were appointed by the President of the United States,
16 I take it that's your -

17 MR. KRENT: I'm sorry -

18 QUESTION: I take it that the directors are
19 appointed by the President of United States, almost all of
20 them

21 MR. KRENT: Except for the Postmaster and the
22 Deputy Postmaster.

23 QUESTION: All right. So nine out of the eleven
24 are appointed. Are they confirmed by Congress?

25 MR. KRENT: By the Senate, sure.

1 QUESTION: Yes, all right. So - and they're
2 represented by the Solicitor General, and their license
3 plates have government on them

4 MR. KRENT: Well, I've never seen their license
5 plates, your Honor, but I'm -

6 QUESTION: But, I mean, and - and they say that
7 they're part of the Government, and 80 or 90 percent of
8 what they do is not what private industry does at all and
9 you have remedies against all of it except - under other
10 statutes or powers of review within the Government, except
11 for a small portion, I take it it is a small portion, this
12 greeting card business.

13 MR. KRENT: Well, we're focusing on the 20
14 percent we agree -

15 QUESTION: All right, then, so you're - in other
16 words, I thought you were selling them sacks, you wanted
17 to sell them burlap sacks.

18 MR. KRENT: Well, they're not burlap, but yes,
19 they are -

20 QUESTION: Well, whatever they are -

21 MR. KRENT: - they are sacks.

22 QUESTION: - they're some kind of sack.

23 MR. KRENT: Sure.

24 QUESTION: Aren't they used for mail?

25 MR. KRENT: They are used for international mail,

1 for third-class mail.

2 QUESTION: All right, so - and they make
3 treaties, by the way, too. I don't know that General
4 Motors now can make a treaty.

5 MR. KRENT: I agree with you, Your Honor.

6 QUESTION: All right, so - so it wouldn't help
7 you if we said that in the vast bulk of their business
8 where they have all of these characteristics I just
9 mentioned -

10 MR. KRENT: Well, I think it would, Your Honor.

11 QUESTION: - that it - it would help you? How?

12 MR. KRENT: I think it would because I think the
13 argument here -

14 QUESTION: They're selling the sacks for the
15 greeting cards too?

16 MR. KRENT: I think that what - actually that
17 they probably do, but the - the - the gravamen here is
18 that there was a conspiracy to monopolize the mail sack
19 business, as well as the -

20 QUESTION: Of course there was. Don't they have
21 a right to monopolize the mail sack business or not? Isn't
22 there some -

23 MR. KRENT: No.

24 QUESTION: They don't?

25 MR. KRENT: We don't believe that's part of the -

1 the monopoly -

2 QUESTION: Statute. Then why don't you go to the
3 commissions that run them and tell them they can't do it?

4 MR. KRENT: Well, there - there is a procurement
5 claim pending, Your Honor, but the Postal Rate Commission
6 would not have jurisdiction over the - the mail sack
7 purchase at all, Your Honor. And so the - the fear is
8 that these kind of - of trade practices that are anti-
9 competitive can go on without any kind of direct
10 restraint. Certainly there is an overlap between
11 procurement and antitrust, but it's not congruent in that
12 sense.

13 I think it's helpful to think about what
14 Congress intended by waiving the Postal Service's immunity
15 in the sue-and-be-sued clause. Clearly it has to apply to
16 something. There was some point in waiving the immunity
17 of the Postal Service. We know, for instance, at least I
18 think that the Government has conceded, that the Postal
19 Service is now subject to torts at state law torts. The -
20 Franchise Tax suggested that the Government -

21 QUESTION: Well, I - I thought conceded they were
22 subject to Federal Tort Claims Act?

23 MR. KRENT: But the waiver was for torts and then
24 the limitation in the waiver said that the procedures of
25 the Federal Tort Claims Act must be applied, but clearly

1 there' s a waiver -

2 QUESTION: Even though it' s a state court action
3 against the Post Office?

4 MR. KRENT: That' s correct, just as it would be
5 in any - for other Federal entity, but, for instance, the
6 -

7 QUESTION: So the - the Post Office can be sued
8 in state court then for a - for a state tort?

9 MR. KRENT: Well, it could be, except for the
10 fact that the - the limitations of the Federal Tort Claims
11 Act apply by virtue of 409.

12 QUESTION: Well, that' s - that what I thought I
13 asked you a minute ago -

14 MR. KRENT: Well then -

15 QUESTION: - and you said something different.

16 MR. KRENT: Well, I' m sorry if I misunderstood
17 your question, Your Honor, but the - the argument then is
18 that - that in other kinds of cases, such as the state law
19 that said person in the Franchise Tax - Tax - whether
20 that - the question is whether that applies to the Postal
21 Service as well, and of course in this Court, upheld the
22 determination that the Postal Service would comply under
23 the term person under the state law as well.

24 So how far does person apply? Contract law,
25 tort law, what about the Lanham Act, the trademark case?

1 Before the recent amendments to the Lanham Act that were
2 mentioned recently, the - all the statute said was that it
3 was applied to persons, and three courts of appeals
4 suggested that even though person could not apply to the
5 United States, person could apply to the Postal Service,
6 by virtue of its distinct status.

7 QUESTION: But I thought the Lanham Act,
8 definition written right into the Lanham Act was that a
9 person within the meaning of that act is an organization
10 capable of suing and being sued. MR. KRENT: Yes, but courts
11 had said that the United States, previous to that, did not
12 fall within the term person, because the person doesn't
13 refer to governmental entities at all. So there the courts
14 had distinguished -

15 QUESTION: It said it with respect to the
16 antitrust law in Cooper, but the Lanham Act defined person
17 differently.

18 MR. KRENT: But just slightly, Your Honor. The
19 only difference was the capable-of-being-sued part. The
20 United States is also capable of being sued.

21 QUESTION: But I - I thought that was what was
22 critical, that any organization capable of suing and being
23 sued was within the Lanham Act.

24 MR. KRENT: But the United States, Your Honor,
25 can also be sued and is capable of suing itself, so I'm

1 not sure that that distinguishes it, and indeed, under
2 that language, courts had held the United States was not
3 liable, and yet the Postal Service had registered
4 trademarks in its own name, the Postal Service had
5 registered copyrights in its own name, even though the
6 United States cannot hold copyrights, and there is an
7 exception -

8 QUESTION: But isn't there a good reason for
9 that?

10 MR. KRENT: Well, I think there is a good reason.

11 QUESTION: To stop people from engaging in
12 designed piracy in stamps?

13 MR. KRENT: And indeed, if that were all that the
14 Postal Service had filed for, I would be - I would be in
15 total agreement with Your Honor. But the Postal Service
16 had filed for 300, at least 350, I believe, copyrights,
17 books, training manuals, things that have nothing to do
18 with the protection for the legitimacy of - of stamps.

19 So again, the Postal Office has defined itself
20 through its actions as a person in comparable commercial
21 tort situations. It's only logical that if a Postal
22 Service in the commercial world, saying that it's not like
23 the United States for copyrights, for trademarks, then
24 it's not like United States with respect to antitrust.

25 When Congress formed the Postal Service, Your

1 Honors, and it took away the APA, the Postal Rate
2 Commission for these non-monopoly actions, as well as the
3 Federal acquisition regulations, certainly there was a
4 quid pro quo.

5 If you streamline the operations of the Postal
6 Service, launch it into business, you would expect the
7 private commercial torts in antitrust laws to be the
8 restraint to make sure that the monopoly is not extended
9 to the other kind of operations. And so I think that
10 Congress' intent is quite clear that the Postal Service is
11 unique, does not partake of the United States, and
12 therefore, just as the Postal Service can be sued in tort
13 law and under the Lanham Act, be it the old Lanham Act,
14 the new Lanham Act, it can be sued under the antitrust
15 laws as well.

16 The burden, therefore, on the Solicitor General
17 to explain why Congress would have wanted the Postal
18 Service's monopoly to be extended, and why Congress would
19 have wanted the Postal Service to be sue - to be able to
20 be sued and to sue themselves without really being able to
21 take advantage of the opportunity to sue in their own name
22 under the antitrust laws or under trademark and copyright
23 law, et cetera, and why they shouldn't be sued as well.

24 If there are no further questions, thank you.

25 QUESTION: Thank you, Mr. Krent.

1 Mr. Kneedler, you have six minutes remaining.

2 **REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER**

3 **ON BEHALF OF THE PETITIONER**

4 **MR. KNEEDLER:** Several points, Mr. Chief Justice.

5 In addition to the other statutes that I've mentioned with
6 respect to the right to sue, there are a number of other
7 respects in which Congress has treated the Postal Service
8 as a Federal entity. It's subject to their Freedom of
9 Information Act, the Privacy Act, the Inspector General
10 Act, it's subject to the Federal sector OSHA regulations,
11 and as this Court pointed out in the Loeffler decision,
12 it's subject to the Federal sector Title VII prohibitions,
13 not - it's not treated as a private corporation for
14 purposes of Title VII.

15 It is subject to the National Labor Relations
16 Act, but this act was passed in 1970 before the Federal
17 sector labor - labor management provisions came in in the
18 Civil Service Reform Act, and as you pointed out, Justice
19 Scalia, that's an express provision subjecting the Postal
20 Service to something that otherwise applies to private
21 entities, but in - but in virtually every other respect,
22 Congress has specified that it would be subject to Federal
23 law.

24 And in section 409 of the act, with respect to
25 judicial proceedings, Congress specified that the Postal

1 Service would be - would be treated just like the United
2 States, not just with respect to Tort Claims Act, but
3 venue, removal jurisdiction, and representation by the
4 Attorney General.

5 But the - the most fundamental point, however,
6 to be made is that this is not a situation in which
7 Congress has created a new entity and launched, in that
8 sense, that entity into a private commercial world. Here,
9 Congress has carried forward the nation's tradition of
10 treating postal services as sovereign functions performed
11 by the Government of the United States. These are - these
12 are - to the extent they're commercial functions and - and
13 they are unusual commercial functions, the Constitution
14 treats them as - as something of particular interest to
15 the United States Government.

16 I should point out that with respect to the
17 postal services, all postal services are subject to the
18 jurisdiction of the Postal Rate Commission, not just those
19 that are subject to monopoly, that - that the Postal
20 Service has monopoly control over, Justice Breyer. So
21 even in those areas in which the Postal Service is subject
22 to competition in - in parcel and express mail, for
23 example, the Postal Service - the Postal Rate Commission -
24 does have regulatory jurisdiction over those -

25 QUESTION: So greeting cards?

1 MR. KNEEDLER: It does not over greeting cards,
2 but the non-postal functions of the Postal Service
3 constitute less than 1 percent of the revenues of the - of
4 the Postal Service. We're talking about a very minor
5 aspect of the Postal Service's operations, and the
6 affirmative authorization for the Postal Service to engage
7 in that in section 404(7) of the act is cast in the same
8 terms as the Postal Service's authorization to engage in
9 all the other functions and they're really incidental.

10 QUESTION: But the fact that it's only - the fact
11 that it's only 1 percent means they're only liable under
12 the antitrust laws for 1 percent of their business.

13 MR. KNEEDLER: No, I think - I think it shows
14 that - that - that the predominant character of the Postal
15 Service is as it always has been, and these - these other
16 services are really in most ways incidental to - to postal
17 services like greeting cards and - and that sort of thing.

18 QUESTION: But they're the services that they
19 want to bring suits under. That's -

20 MR. KNEEDLER: This - this is - this is not -
21 this is not that. This case is a - is an ordinary
22 procurement dispute that - all Federal agencies engage in
23 procurement and - and -

24 QUESTION: That's the curious thing about this
25 suit. It actually represents a portion of the monopoly

1 business, of using the monopoly to - to monopolize
2 procurement.

3 MR. KNEEDLER: And in procurement, and in
4 procurement in particular, Congress has treated the Postal
5 Service like all other - all other Federal agencies under
6 the Contract Disputes Act, particularly with respect to
7 the disputes at issue here. So in the end we believe
8 that, as Justice O'Connor said, this is essentially a
9 policy choice for Congress. If - if in the current
10 climate the Postal Service is to be subject to the
11 antitrust laws, notwithstanding the fact that it remains a
12 governmental entity, that is a - that is a choice that
13 Congress should make, whether these governmental
14 activities should be regulated by treble damage actions,
15 which was extremely unusual under - under Federal
16 statutes.

17 And where Congress has chosen to subject the
18 United States to liability under statutes such as this,
19 but not nearly as free-ranging in the patent laws, et
20 cetera, it has done so expressly, and we think 30 years
21 after the passage of the Postal Reorganization Act, that
22 if the - if the Postal Service is now to be subject to the
23 antitrust laws, that is something for Congress to do and
24 not for the courts to try to divine from complete silence
25 in the Postal Reorganization Act or its legislative

1 history on that point.

2 If there are no further questions.

3 QUESTION: Do they really sell biking gear? They
4 don't sell biking gear. Do they sell biking gear?

5 MR. KNEEDLER: I - I'm not sure whether they - I
6 - I don't know whether they sell biking gear. The fact
7 that they - the fact that they use the Postal Service team
8 in - in - in promoting Postal Service products, I think,
9 doesn't say anything about whether they're subject -

10 QUESTION: They might deliver some mail on
11 bicycles, I mean -

12 (Laughter.)

13 MR. KNEEDLER: It's entirely possible.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Kneedler. The case is submitted.

16 (Whereupon, at 10:59 a.m., the case in the
17 above-entitled matter was submitted.)

18

19

20

21

22

23

24

25