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THE ROLE OF THE CIVIL AERONAUTICS BOARD IN THE GRANT OF OPERATING RIGHTS IN FOREIGN AIR CARRIAGE

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"L"egislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies." This quotation from the opinion of the Supreme Court in C&S Air Lines v. Waterman Corp., like a critic's comment on a theatrical piece, epitomizes an end result. It is the purpose of this article to explore rather modestly the respective roles of the President, the Civil Aeronautics Board, and the Department of State in the negotiation of international air routes.

Analysis of the Problem

It is obvious — although frequently overlooked — that in matters relating to international civil aviation, international law is basic. The internationally accepted ground rules for obtaining permission to make one single international flight, a series of flights, or to conduct a permanent commercial operation must first be established. It is then necessary to examine what steps we as a people have taken through the Constitution, acts of Congress, and assigned functions of the State Department and the Civil Aeronautics Board to secure international operating rights for our own citizens abroad and to grant rights to operate in the U.S. to foreign citizens. In connection with this second aspect it is believed desirable to examine (a) the operating rights we have granted by treaty, (b) the legality of executive agreements granting rights not covered by treaty, and (c) the grant of rights not covered either by treaty or executive agreement.

1 333 U.S. 103, 110.
THE INTERNATIONAL FRAMEWORK

In surface shipping the doctrine of freedom of the seas prevails. In the air no parallel doctrine exists. On the contrary, the doctrine of absolute national sovereignty in the airspace overlying a country's territory has long been recognized. It was incorporated in the Paris Convention of 1919,\(^2\) to which the United States was not a party; the doctrine was asserted by the United States in the Air Commerce Act of 1926;\(^3\) it was recognized by us together with a number of Latin American nations in the Havana Convention of 1927;\(^4\) it was reaffirmed in the Civil Aeronautics Act of 1938;\(^5\) and is considered current doctrine by the more than 60 countries which have ratified the Chicago Convention.\(^6\) Article 1 of that Convention reads as follows:

"The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

This then is the starting point. It should be noted that it is not an international commitment in its phraseology, since recognition is not confined to "Contracting States" but extends to all states. It is an express negation of any "natural right" to a citizen of one country to fly into or over the territory of another country without that country's consent. This consent, to a limited degree, was given in that treaty itself, as will be discussed later in this article.

RECPROCAL GRANTS UNDER TREATIES AND BILATERAL AGREEMENTS

Having established that under basic doctrines of international law there is no right of international flight except with the permission of the country overflown, it becomes pertinent to examine what provision we as a nation have made for obtaining these rights abroad for our own citizens, and for granting such rights in the United States to foreign citizens desiring to fly into our airspace. It is appropriate here to make distinction between the grant of a right to foreigners to fly into the country on the one hand and obtaining such rights for our citizens to fly into foreign countries. As the Supreme Court said in U.S. v. Curtiss Wright Corp., 299 U.S. 304, 319:

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the

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\(^2\) Signed at Paris, October 13, 1919.
\(^3\) 44 Stat. 568, as amended, Aeronautical Statutes (1954 revision) p. 117 et. seq.
\(^4\) Signed at Havana, February 2, 1928.
\(^5\) Section 1107(i) (3).
\(^6\) 61 Stat. 1180.
House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., col. 613...

While this distinction is important, it should not be overstressed, since, as a practical matter, the President's bargaining power is dependent upon what he has to give in negotiating for the rights the country is to get. In the case of treaties the Senate approves what he has undertaken to give, and in the case of executive agreements, he can give only what is authorized to him to give under the Constitution or by statute.

*Examples of Different Types of Grants of Rights*

The United States has made several different types of grants of rights. Some have been by treaty, some by executive agreement, some by unilateral grant, some by a combination of the foregoing.

*By Treaty.* The Chicago Convention unconditionally granted certain rights to fly into this country, and in return our citizens obtained reciprocal rights to operate into other countries parties to the Convention. These rights are those of overflight and of making stops for nontraffic purposes and are confined to aircraft which are *not* engaged in scheduled international service.

In addition, the Chicago Convention in the second paragraph of Article 5 provides the privilege of taking on or discharging international passengers, cargo or mail for remuneration or hire by aircraft on *other than scheduled air services* subject to such regulations, conditions, or limitations as the state where such action takes place may desire to impose. This in effect is a grant, but subject to reservations of conditions, limitations and restrictions. One of the restrictions in United States law is that if the operation be in foreign air transportation, the foreign aircraft will not be permitted to come into the United States unless a permit is obtained pursuant to §402 of the Civil Aeronautics Act. This is a very substantial restriction in view of the fact that many nonscheduled operations are in common carriage.

With respect to commercial operations by foreign aircraft not in

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7 Article 5, Chicago Convention, para. 1, reads as follows: "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights."

8 Chicago Convention, Article 5, 2nd para., reads as follows: "Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

9 The first sentence of section 402(a) reads: "No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage."
common carriage, the Congress has made provision for granting the rights by delegating authority to the Board in §6 (b) of the Air Commerce Act. This section, revised in 1953, reads as follows:

"Sec. 6(b) Foreign aircraft, which are not a part of the armed forces of a foreign nation, may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States and only if such navigation is authorized by permit, order, or regulation issued by the Civil Aeronautics Board hereunder, and in accordance with the terms, conditions, and limitations thereof. The Civil Aeronautics Board shall issue such permits, orders, or regulations to such extent only as the Board shall find such action to be in the interest of the public; Provided, however, That in exercising its powers hereunder, the Board shall do so consistently with any treaty, convention or agreement which may be in force between the United States and any foreign country or countries. Foreign civil aircraft permitted to navigate in the United States under this subsection may be authorized by the Board to engage in air commerce within the United States except that they shall not take on at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States. Nothing contained in this subsection (b) shall be deemed to limit, modify, or amend section 402 of the Civil Aeronautics Act of 1938, as amended, but any foreign air carrier holding a permit under said section 402 shall not be required to obtain additional authorization under this subsection with respect to any operation authorized by said permit."

The Havana Convention, signed at Havana, February 20, 1928,10 also contained conditional grants of the right to fly which are somewhat analogous to those in the Chicago Convention. This is of historical importance only since the Havana Convention was denounced by the United States as a result of ratifying the Chicago Convention.

Grants by Executive Agreement. Grants under this head are of two types—those contained in multilateral agreements, such as the Air Services Transit Agreement (two freedoms)11 and the International Air Transport Agreement (five freedoms);12 and bilaterals, the most significant of which is the Bermuda Agreement.

Unilateral Grants. Both section 402 of the Civil Aeronautics Act (foreign air carrier permits) and section 6 (b) of the Air Commerce Act (non-common carrier flight permits for foreign aircraft) are examples of a unilateral grant. Usually, the section 402 power is used in conjunction with an executive agreement, but this is by no means required or universally the case. The section 6 (b) authorization also is a means for carrying out United States commitments in the Chicago Convention, but it may be applied to aircraft which are not registered

10 Treaty Series 840.
11 Appendix III to Final Act of Chicago Conference, accepted by U.S. February 8, 1946.
12 Appendix IV to Final Act of Chicago Conference, accepted by the U.S. February 8, 1945 and denounced by it July 25, 1946, effective July 25, 1947.
in a contracting State under that Convention. However, the Board may not grant any right under section 6 (b) of the Air Commerce Act unless reciprocal privileges are accorded by the foreign nation involved to United States aircraft. There is no similar restriction in the case of section 402 permits in the Civil Aeronautics Act; such a restriction would not have been in harmony with the dominant role of the President in this field, which will be discussed later.

**Legality of Executive Agreements**

The question of the legality of executive agreements has frequently been debated, but the question now appears to be more one of when are they legal and under what conditions. The power generally appears to be a mixture of the independent Constitutional power of the President plus a delegation of authority to him by the Congress. This was forcibly brought out by Mr. Justice Sutherland, speaking for the Court in *U. S. v. Curtiss Wright Corp.*, 299 U.S. 304 at 319, 320.

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other government power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . ."

A discussion of the various aspects of Presidential power is neatly brought out in the opinion of the Honorable Robert H. Jackson, who, as Attorney General, advised President Roosevelt with respect to the agreement to trade over-age destroyers to England for bases in British territory. In that case the proposal was that the U. S. acquire rights to certain off-shore naval and air bases in the Atlantic ocean for a period of 99 years. In return it was proposed to transfer (a) certain

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over-age destroyers and (b) certain small patrol craft which were then still under construction.

The opinion deals with three aspects of the proposal—(a) the President's power to acquire rights for the U. S. abroad, (b) his power to dispose of the destroyers in trade, and (c) his power to dispose of the patrol boats in trade. With respect to (a) above the Attorney General said (39 Op. A.G. 484 at 487):

"The President's power over foreign relations while 'delicate, plenary, and exclusive' is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. The consideration, which we later discuss, is completed upon transfer of the specified items. The Executive agreement obtains an opportunity to establish naval and air bases for the protection of our coastline but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation." (Italics supplied.)

With respect to trading the destroyers, the Attorney General found that Congress had specifically authorized the President to dispose of material into the general classification of which the destroyers fell. However, with respect to the "mosquito boats" the Attorney General ruled that the President did not have the power to make the transfer, in view of certain provisions of the Act of June 15, 1917, which made it unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war with the intent that they should enter the service of a belligerent. He distinguished the case of the destroyers, which he found were clearly not built with the intent that they should enter the service of a belligerent from the mosquito boats, which were still under construction, and which equally obviously would be built with such intent.

In the debates on the Civil Aeronautics Act the constitutional powers of the President were specifically recognized, and although these powers were not so sharply delineated as in Jackson's opinion, they nevertheless indicate a Congressional awareness of the problem. The debate was on an earlier draft of section 802 which as presented provided in part "Whenever . . . the public interest requires agreements to be negotiated with foreign governments for the establishment or development of air . . . services the Secretary of State shall initiate and conduct such negotiations and conclude such agreements as may be satisfactory to the Authority and to the President." Senator White moved to strike this provision on the ground that it interfered with

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the Constitutional powers of the President. The motion carried.¹⁶

This portion of the debate is set forth in full:

"Mr. White. . . Mr. President, it seems to me this section gives no authority which the President of the United States or the executive arm of the Government does not now have as inherent in the executive authority of the United States. Quite apart from that, however, the provision seems to me to be a very definite limitation upon the clear authority of the Executive in negotiating international agreements; for this section says that the Secretary of State may 'conclude such agreements as may be satisfactory to the Authority and to the President' of the United States. In other words, there must be the concurrence of the authority with the President of the United States.

"I submit to the Senator from Nevada [Mr. McCarran], and I submit to the present occupant of the chair, who is also the chairman of the Foreign Relations Committee of the Senate, that we should not by any language undertake to limit the authority of the President in the field of international negotiation, and I also express the opinion that we cannot constitutionally do so.

"I think, therefore, that the section in its entirety should be stricken from the bill.

"Mr. McCarran. Mr. President, if I may say so to the Senator from Maine, there are various phases of this matter to be considered. The Authority cannot control in foreign parts. The Authority can control an American-flag airline flying abroad. It can control it with regard to many things within the territorial boundaries of the United States. An American-flag line flying abroad must of necessity acquire landing privileges abroad. Landing privileges abroad can be acquired only by and through and with the cooperation of the State Department; and the President of the United States of necessity comes into the whole situation. But there is such a blending of authority there that it was the view of the author of the bill that the President, the Secretary of State, and the Authority should have a very important part to play, not taking from the President any power, permitting him to retain every power he has, and giving him more, too, and likewise bringing in the State Department, because of necessity the State Department must come in. It must negotiate with foreign countries; and then comes the Authority itself, because the power of the Authority immediately impinges when the American-flag line touches the territorial boundaries of this country.

"Mr. White. Mr. President, of course, it is inconceivable that the executive authority, in conducting negotiations with a foreign nation with respect to an international agreement, would not consult with all his advisers — the authority, the Secretary of State, and whoever else might be interested in the general subject.

"Mr. McCarran. That is true.

"Mr. White. After all, however, the final responsibility for conducting the negotiation and for the conclusion of international agreements rests with the President of the United States.

"Mr. McCarran. I grant that to be so.

"Mr. White. We do not need to give him any of the authority here suggested; and I say that when we write into the bill the language —

¹⁶ Congressional Record—Senate, May 13, 1938, pages 6853-6854.
'Conclude such agreements as may be satisfactory to the Authority and to the President —'
we have given, or attempted to give, a concurrent authority to the aeronautics authority set up in the bill and to the President.

'There ought not to be any such concurrent authority at all. The only body that should have any voice with respect to a negotiation conducted by the President of the United States and its conclusion is the Senate itself. I simply urge that we ought not in this way, and I believe we cannot in this way, limit or control the authority of the President by making it concurrent with that of the air authority.

'Mr. McCarran. First of all, let me say to the Senator that the air authority that we propose to set up must of necessity have absolute control over the industry after it comes within the continental boundaries of the United States. The President would not want to control it after it came in here.

'Mr. White. That is not what the section says. The section gives to the air authority and the President control over the negotiation of an international agreement.

'Mr. McCarran. There, again, it may be essential, because labor conditions or safety conditions may enter into the equation; and the President certainly would want to call to his advice and counsel the authority that we propose to set up.

'It does not provide that the authority shall make the negotiation.

'Mr. White. No; but it provides that only such agreement shall be negotiated as may be satisfactory to the authority and to the President. In other words, if the President alone is satisfied, still the agreement may not be made.

'Mr. McCarran. I have a very profound respect for the Senator's opinion. Would the Senator be entirely content if the expression 'authority' were stricken out?

'Mr. White. Except that I do not believe that the paragraph adds a single thing to the powers which are inherent in the Chief Executive. As a matter of fact, not a line of this is necessary. I object to it on that ground. But I object to it even more strongly because I think there is an effort to circumscribe and limit the negotiating power of the President by providing that only such agreements shall be negotiated as may be satisfactory to the authority and to the President.

'Mr. McCarran. Naturally the authority, having control of American-flag lines flying abroad, would want to be consulted, and naturally the President would want to consult the authority, because the authority would be responsible for the American-flag lines flying abroad.

'For instance, there is the line that flies today from the Pacific coast to the Orient. That line would fly by authority and under the rules and regulations promulgated by the aeronautics authority. It touches a foreign country. It must have landing facilities in foreign countries.

'Let us take, for instance, the Pan American Co., which flies down the east coast of South America and across South America, with landing facilities in South America, and then up the west coast of South America, and so on. They must negotiate through the State Department, and they have negotiated through the State Department, and the President is always interested in those negotia-
tions. Would the Senator from Maine say that the authority which
gave that line the right to fly out of this country, which it must
have in the first instance because otherwise it could not land in this
country, should be eliminated? I cannot believe that.

"Mr. White. Mr. President, I should say without any hesitation
that that air authority should have no right to limit the authority
of the President of the United States in negotiating a foreign
undertaking, and this language purports to give to the authority
a right of concurrence with the President before one of these
agreements can be concluded."

As a result of this action the Conference reworded the provisions
of section 802 to provide only consultation with the Board rather than
approval by the Board.

The present situation has been construed by the State Department,
various members of the Senate Committee on Foreign Relations and
by the then Chairman of the Board as authorizing the State Depart-
ment to enter into the current type of bilateral agreements, after
consultation with the Board. Dean Acheson, then Assistant Secretary
of State stated the position of the State Department as follows:

"That (Section 802) places upon the Department the responsi-
bility of consulting with the Authority when it enters into these
agreements, and clearly indicates the conception that the State
Department is the negotiating agency for the making of agree-
ments.

"Then section 1102 of the act states:
"In exercising and performing its powers and duties under this
Act, the Authority shall do so consistently with any obligation
assumed by the United States in any treaty, convention, or agree-
ment that may be in force between the United States and any
foreign country or foreign countries, shall take into consideration
any applicable laws—

and so forth. Now, under those two provisions it was perfectly
clear that the Department had the duty of negotiating agreements
and had the obligation of consulting with the Authority, and that
when the agreements were made the Authority in exercising its
functions under the act had to do so consistently with the agree-
ments entered into.

"Now it has always been understood to be within the purpose
and scope and intent of the act that there should at least be bilat-
eral discussions and agreements made, and no one I think has ever
questioned that fact. Therefore when you enter into an agreement
with one foreign country there is first of all the duty of the
Department to consult with the Authority in making the agree-
ment. It then makes the agreement. It is then the duty of the
Authority in exercising its powers to do so in the light of the
agreement, that has always been a fact."

With respect to the power of the State Department vis-a-vis the
Board, the following colloquy took place:

"Senator Bailey. I mean what the law means, now. I have got

17 Hearings before the Committee on Foreign Relations, U.S. Senate, 79th
Congress on the Chicago Convention.
18 Id. at 43.
19 Id. at 44.
great respect for the State Department, and I would agree to anything that they would say, but I am thinking now of what it could do under the law and the whole thing, as to the legality of it.

"Mr. Acheson. I suppose under the law which says the Secretary of State shall advise the Authority of and consult with the Authority concerning the negotiation of agreements, the State Department if it wished to be arbitrary could notify and consult and pay no attention to what the Authority said. The State Department would not do that."

Again, as to the force of an executive agreement:

"Senator Shipstead. What force has an international agreement, an Executive agreement, as in the case of a treaty, as to superseding all other domestic legislation? A treaty is called the supreme law of the land. It overrides any other provision of the domestic laws. Now, here you have an Executive agreement. What is your opinion as to its effect on the domestic law?

"Mr. Acheson. But, Senator, we are here talking about an executive agreement which is made, claimed to be made, wholly within the four corners of a statute, and which we claim is authorized by a statute. We make no claim whatever that an executive agreement has any power whatever to override the statute."

The Attorney General has held that the bilateral air transport agreements are valid under the statutory authority of the Civil Aeronautics Act.

The Report of the Senate Committee on Interstate and Foreign Commerce of the Senate, 81st Congress, 1st Session, on S. 12, a bill to require international agreements to be in the form of treaties specifically recognizes the validity under present law of the bilateral air transport agreements in the following language:

"... In other words, these are Executive agreements for which the authority is statutory. That being the case, certainly Congress can withdraw the authority which it may have granted either with respect to specific statutes, or with respect to any particular field of negotiations. The authority for making such Executive agreements comes from Congress. Congress can take it away, or modify it, or circumscribe it, as Congress will."

The Congressional Aviation Policy Board in its report to the 80th Congress also recognized the validity of these agreements in the following terms: "It is recognized that the executive agencies are in a position to designate routes in bilateral agreement negotiations, but procedures should be examined to establish improved methods of considering the effects that the granting of such routes may have on the over-all economy of United States flag carriers."

As a matter of interest it should be noted that Mr. Pogue, as General Counsel of the Board, by memorandum dated October 18, 1939,
advised the Board that it was very doubtful whether the President had power to negotiate route exchanges by executive agreement. This matter is cited for historical interest, since it formed the basis of some discussion in the Senate hearings on the Chicago Convention. The opinion is of double interest since Mr. Pogue was appearing before the Committee in his capacity as Chairman of the Board supporting the validity of executive agreements. On the question as to difference between his opinion as General Counsel and his opinion as Chairman of the Board, he stated:

"... that opinion is, I believe, still sound insofar as it actually does require the issuance of a permit to a foreign-flag operator, and naturally there is nothing that dispenses with the public hearing required by law."\(^\text{26}\)

Who Is Responsible for the Bilateral Agreements?

As has been discussed previously, the President is the one who is ultimately responsible for the bilateral agreements. However, under section 156 of Title V of the United States Code, the Secretary of State is required to perform such duties as from time to time may be enjoined on or entrusted to him by the President relative to negotiations with public ministers from foreign states or princes, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department.

The legislative debates relating to the Civil Aeronautics Act cited above indicate that it was the intention of the Congress not to place any restrictions on the ultimate right of the President, acting through the State Department, in the negotiation of aviation grants. The present wording of section 802, which merely requires the Secretary of State to advise the Board and consult with the Board concerning negotiation of any agreements with foreign governments, cannot be construed to vest in the Board any final authority in connection with the negotiation of these international agreements. Mr. Acheson's testimony (supra) bears this out.

However, it would appear obvious that if the Secretary consults the Board and follows the Board's advice as to economic questions and as to the exchange of routes, the Secretary of State would be entitled to rely on the recommendations made by the Board, and the Board would have responsibility for its recommendations in fact, if not in law.

The role of the air carriers which may be affected by a route exchange in a bilateral air transport agreement is not provided for by statute. Prior to the war negotiations for landing rights in foreign countries were largely conducted by the carrier concerned with only incidental aid from the Government. These negotiations by the carrier resulted in concessions to the carrier involved from the foreign country concerned. On October 14, 1943, the Board and the State Department issued a joint release, adopting as the joint policy of the two agencies

\(^{26}\text{Hearings Senate Committee on Foreign Relations, February 20, 1945, on the Chicago Convention, page 54.}\)
the policy that negotiations for international rights would thenceforward be conducted by the Government. The policy statement was somewhat ambiguously worded, and a further explanatory memorandum was issued by the Board under date of December 2, 1943. This statement concluded as follows:

"While the acquisition of landing rights by means of intergovernmental negotiations is expected to be the general procedure, the practice is not to be arbitrary or inflexible, and any carrier is of course at liberty to present any unusual or compelling reasons which the carrier feels would justify its conduct of independent negotiations abroad. If possible, such reasons should be submitted at the time the carrier files its application with the Civil Aeronautics Board."

While there is no express sanction provided in the Civil Aeronautics Act to compel adherence to this policy, it is obvious that the unlimited discretion vested in the President as to the issuance of certificates of public convenience and necessity could be used to prevent an offending air carrier from realizing the benefits of his private negotiations. Moreover, there is at least implied power in the Board to disapprove a contract obtained by an offending carrier with a foreign country under section 1102, insofar as there is concerned any obligation, duty, or liability imposed on the air carrier by the contract.

In addition, it is possible that such private negotiations, if conducted by the air carrier with intent to defeat the measures the United States is taking in respect of a bilateral air transport agreement would be a crime under §953 of Title 18 U.S.C. (Crimes).27

It should be noted that the Congressional Aviation Policy Board recommended that more effective machinery should be set up in the State Department and in the Board to govern the procedures for considering the effects which the granting of international routes may have on the over-all economy of United States flag carriers.

It is understood that representatives of the Air Transport Association have several times suggested that this machinery should include a representative of the airlines as an active member of the delegation negotiating bilateral agreements. While there certainly would be no legal objection to the naming of such a representative by the State Department, if the State Department so desired, it is submitted that any legislative requirement that such a representative be included on the negotiating delegation would be an unconstitutional invasion of the exclusive power of the President, referred to above, to conduct

27 §953. Private correspondence with foreign governments. Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects. June 25, 1948, c. 645, 62 Stat. 744.
international negotiations. The same considerations advanced by Senator White, in connection with the Senate's consideration of section 802 of the Civil Aeronautics Act, should apply here.

UNILATERAL GRANTS OF LANDING RIGHTS TO FOREIGN AIRCRAFT

The machinery set up by section 402 of the Civil Aeronautics Act (foreign air carrier permits) and of section 6 (b) of the Air Commerce Act have heretofore been discussed in connection with their relation to the executive agreements and the treaty obligations. They will now be discussed as a method for providing a grant of landing rights apart from such agreements and treaties.

Section 402 (b) of the Act places in the Board the power to issue foreign air carrier permits if it finds that the applicant foreign air carrier is fit, willing, and able to perform the air transportation and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board, and that such transportation will be in the public interest. Section 402, however, must be read in conjunction with section 801, which reads in part as follows:

"Sec. 801. The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. . . ."

The reason for this interrelationship was explained by Mr. Clinton M. Hester, in testifying before the Congressional Committees on behalf of the Interdepartmental Committee which had drafted the bill, as follows: "The bill would require the new agency to exercise its executive functions, including those relating to national defense and international affairs, under the general direction of the President. All executive functions under the Constitution are vested in the executive branch of the Government and since much of the work of this new agency would be executive in character, the bill gives to the President his constitutional control over these executive functions." Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. (1938), on H. R. 9738, p. 37; see also p. 40. In the Senate hearing Mr. Hester stated: "The authority of the President under this legislation would be the power under section 801 to approve certificates authorizing the operation of American flag air lines in foreign air commerce." The Chairman. "That is a natural function of the President in foreign affairs." Hearings before the Senate Committee on Commerce, 75th Cong., 3rd Sess. 1938, on S. 3760, p. 6. When the substitute bill, S. 3845, the pertinent provisions of which were similar to those in S. 3760, was reported out by the Committee, Senator Truman, acting at the request of Senator McCarran, moved consideration of the bill. In explanation of Section 801, Senator Truman
stated (83 Cong. Rec. 6726): "Certificates involving national defense: 
Section 801 of the substitute, unlike S. 3659, gives the President the 
power to approve or disapprove the issuance, denial, terms, and so 
forth, of certificates and permits for overseas and foreign operations. 
This check is required by the very delicate questions of national 
defense which are involved. . . ."

The Supreme Court in C&S Air Lines v. Waterman Corp. 28 had 
ocasion to pass upon this relationship, stating very clearly that while 
the Board is the arm of the Congress with respect to domestic matters, 
it is subordinated to executive control in foreign matters. Pertinent 
language from the court's opinion reads as follows: 29

"In the regulation of commercial aeronautics, the statute con- 
fers on the Board many powers conventional in other carrier 
regulation under the Congressional commerce power. They are 
exercised through usual procedures and apply settled standards 
with only customary administrative finality. Congress evidently 
thought of the administrative function in terms used by this Court 
of another of its agencies in exercising interstate commerce power: 
'Such a body cannot in any proper sense be characterized as an 
arm or an eye of the executive. Its duties are performed without 
executive leave and, in the contemplation of the statute, must be 
free from executive control.' Humphrey's Executor v. United 
States, 295 U. S. 602, 628. Those orders which do not require 
Presidential approval are subject to judicial review to assure appli- 
cation of the standards Congress has laid down.

"But when a foreign carrier seeks to engage in public carriage 
over the territory or waters of this country, or any carrier seeks 
the sponsorship of this Government to engage in overseas or for- 
egn air transportation, Congress has completely inverted the usual 
administrative process. Instead of acting independently of execu- 
tive control, the agency is then subordinated to it. Instead of its 
order serving as a final disposition of the application, its force is 
exhausted when it serves as a recommendation to the President. 
Instead of being handed down to the parties as the conclusion of the 
administrative process, it must be submitted to the President, 
before publication even can take place. Nor is the President's con- 
trol of the ultimate decision a mere right of veto. It is not alone 
issuance of such authorizations that are subject to his approval, 
but denial, transfer, amendment, cancellation or suspension, as well. 
And likewise subject to his approval are the terms, conditions and 
limitations of the order. 49 U.S.C. § 601. Thus, Presidential con- 
trol is not limited to a negative but is a positive and detailed control 
over the Board's decisions, unparalleled in the history of American 
administrative bodies.

"Congress may of course delegate very large grants of its power 
over foreign commerce to the President. Norwegian Nitrogen 
Products Co. v. United States, 288 U.S. 294; United States v. Bush 
& Co., 310 U.S. 371. The President also possesses in his own right 
certain powers conferred by the Constitution on him as Com- 
mander-in-Chief and as the Nation's organ in foreign affairs. For 
present purposes, the order draws vitality from either or both

28 333 U.S. 103.
29 Id. at 108 to 110.
sources. Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies."

It is interesting to note that the draftsmen of the Civil Aeronautics Act considered it constitutionally necessary to place the issuance of foreign air carrier permits under the control of the President, yet those same draftsmen did not consider it necessary—or at least they made no provision for Presidential review—in the case of foreign flight permits under Section 6 (c) (now Section 6 (b)) of the Air Commerce Act. Complete discretion was left in the Authority to admit or refuse admission to foreign civil non-common carrier aircraft, provided only that reciprocal rights be given U. S. aircraft. This power was transferred to the Administrator by Reorganization Plans III and IV of 1940, but was re-transferred to the Board in 1953, with certain amendments.

Functions of the Board Under Sections 402 and 802 of the Act

It is clear from the decision of the Supreme Court in the Waterman case, supra, that in the field of foreign air carrier permits and of certificates of public convenience and necessity to engage in foreign air transportation, the Board functions not as an arm of Congress, but as a branch of the Executive, whose statutory duties are to act as an advisory body to the President. The manner in which it formulates this advice is carefully laid out in section 402, but despite its quasi-judicial garb, such proceedings cannot be considered as quasi-judicial in the usual sense, since the Board has no final say in its own right, and there is no appeal from proceedings not challenged as to regularity. Indeed, if they were true quasi-judicial proceedings, the statute would be self-contradictory in effect, since the Board would have considered one of the basic issues—public interest—at length in the earlier consultations under the bilateral agreements with the State Department and with the carriers, and would have made its conclusion as to that issue off the record and generally before the opening of the 402 proceeding. Moreover, it would be required by section 1102 of the Act to exercise its discretion in conformity with the agreement which it earlier had had a major part in formulating. This, quite obviously, is the very antithesis of a judicial proceeding, and would not be in conformity with the requirements of the Administrative Procedure Act for quasi-judicial "adjudications." Fortunately that Act does not require adjudications involving "the conduct of military, naval, or foreign affairs functions," to be conducted in the same manner as the usual adjudication.

31 67 Stat. 489.
32 This was the direct holding in the Waterman case.
33 Section 7 (d) of that Act provides in part that the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision . .." [Italics supplied].
34 Administrative Procedure Act, Sec. 5.
While the section 402 procedure makes very little sense when regarded from a quasi-judicial standpoint, it makes much better sense when regarded as part of a whole scheme for advising the President with respect to these foreign matters. The Board will first, in cases under the bilateral agreement, have been consulted by the State Department as to the economic problems involved in the grant of a foreign route. The Board will have had its voice heard throughout the negotiations, but it does not have the right or responsibility for making the executive agreement.\textsuperscript{35} In arriving at what its advice to the State Department shall be, the Board consults with the carriers affected, but it is not under any legal compulsion to follow what they say.

The Board must thus undertake its section 402 proceeding\textsuperscript{36} and pass upon the evidence in the proceeding, making its finding of public interest. Although Mr. Pogue testified,\textsuperscript{37}

"It does begin to look a little, you might say, empty to have a public hearing and the formality of making a finding of a public interest after you have made an international agreement which pretty much covers the general basic problem of the cases."

it does have the beneficial effect of allowing the United States carriers who may oppose the grant of the right to present their case in the manner they consider most desirable, and in a gold fish bowl so to speak. The Board must then justify its conclusion—which almost inevitably will be an affirmation of the bilateral agreement, on the basis of the evidence before it. Conceivably this evidence might persuade the Board to recommend to the President the denial of the permit and the denunciation of the agreement. The President then of course could either follow or disregard the advice. The virtue, however, is that it assures that the President himself will have a look at the entire situation and will enable him to review it after we have entered into the bilateral agreement to determine whether the agreement has produced an undesirable effect. In essence, the Civil Aeronautics Act places in the President full control over our international air routes and who shall operate them, and the section 402 procedure, when applied after the negotiation of a bilateral agreement, merely assures that for each new grant of operating rights under the agreement, the matter will be brought to the President's personal attention, so that he may reappraise the situation in the light of current facts and recommendations from the expert body—i.e., the Board.

When the matter is viewed in this light, it is submitted that there is no invasion of the Board's discretionary powers, since in point of fact, the Board has no final discretionary powers.

\textsuperscript{35} This point was discussed in a previous paragraph.
\textsuperscript{36} Trans-Canada Air Lines, Foreign Air Carrier Permit, (1945) 6 CAB 529, 530.
\textsuperscript{37} Senate Hearings on Executive A, Committee on Foreign Relations, February 20, 1945, page 54.
On the basis of the foregoing discussion, it is concluded that:

(a) Scheduled international air services cannot be conducted except as specifically or generally authorized by the States overflown.

(b) The obtaining of landing rights for U.S. carriers abroad is a function of the President which cannot be Constitutionally interfered with by the Congress.

(c) The grant to foreign air carriers of landing and traffic privileges within the United States is a matter subject to Congressional control.

(d) The Congress, in the Civil Aeronautics Act, with respect to the grant to foreign air carriers of traffic privileges within the United States, has delegated this power to the President (section 801), but subject to the condition, in effect, that he first have before him the recommendations of the Board with respect to the specific grant. These recommendations must be based on the procedures specified in section 402 of the Act.

(e) The Congress also has authorized the President—to the extent such authorization is necessary, in view of the delegation of power referred to in (d) above—to undertake to grant traffic rights to foreign air carriers in agreements with foreign countries, as a quid pro quo for obtaining similar rights for our carriers abroad. When these negotiations are conducted by the State Department, that Department is required to advise the Board of the negotiations and to consult it with respect thereto (section 802).

(f) Notwithstanding the power in (e) above, the President does not have the power, by executive agreement, to make an immediate and outright grant of traffic rights in the United States to foreign carriers. Since he is operating under delegated powers from Congress, he must follow the steps prescribed by Congress for their exercise—i.e., section 801 preceded by Board action under section 402. In other words the operative grant of traffic rights is the section 402 permit and not the bilateral agreement.88

(g) Section 1102, which requires the Board to exercise its functions in conformity with our international agreements, has little practical effect, in the writer's opinion, in this situation. This is because the Board is under the complete control of the President so far as the issuance of a foreign air carrier permit is concerned, its only true function being to advise the President and make recommendations to him on the basis of the record before it. Under section 402 the Board cannot recommend the grant of a permit unless it finds that the foreign air carrier is fit, willing, and able, and that the transportation will be in the public interest. However, under section 801, the President can direct the Board to issue the permit notwithstanding a prior adverse Board recommendation. The decision as to whether the permit shall

88 It should be noted that most of the bilateral agreements unfortunately use the term "grants" instead of "undertakes to grant."
issue is thus in fact not the Board's but the President's. The only "power and duty" of the Board left for section 1102 to operate on in this regard is its finding—i.e., the advice it gives the President. Surely section 1102 cannot be construed to mean that the Board must recommend to the President a course of action as being in the public interest, when in fact it is the reverse, in the Board's opinion. Naturally, the Board can consider the agreement as an element of public interest, but it is not conclusive on the Board in advising the President.

(h) While the functions of the Board under sections 402 and 802 of the Act are executive, the proper relationship of the Board to the Executive Branch may be regarded as that of an agent of Congress, assigned to the President to aid in carrying out the functions delegated by the Congress to the President and otherwise to act as a Presidential advisor.

(i) The powers, duties, and obligations placed on the Board under the Civil Aeronautics Act cannot be construed as vesting in it final responsibility for executive agreements. In part such a responsibility would be unconstitutional; in part in derogation of the powers granted the President under the Act. Presidential power in this field has been delegated to the State Department.

(j) In connection with non-common carrier operations by foreign aircraft, to the extent the right to operate into and through the country has not been granted by treaty, discretion is placed in the Board under section 6 (b) of the Air Commerce Act to admit or not to admit. No Presidential review is provided.

(k) A Congressional enactment that a representative of the air carriers concerned be included on every delegation negotiating bilateral air transport agreements would probably be an unconstitutional interference with the Constitutional powers of the President in foreign affairs.

(l) The only methods for securing greater participation of the carriers by Congressional action would be either (a) requiring all air transport agreements to be made by treaty, or (b) placing a greater limitation on the powers delegated by Congress to the President in respect of the grant to foreign carriers of traffic rights in the United States, or (c) a statutory requirement that the Board consult with the air carriers concerned before advising the State Department in connection with bilateral negotiations.

The last alternative is already being complied with administratively and therefore Congressional action is unnecessary. The second alternative, to the extent it derogates substantially from the present delegated powers of the President, would in short order make the executive agreement impractical, since the President would then not be in a position to assure the foreign government that the rights promised would be granted. The first alternative has the disadvantage of materially slowing down our bilateral program and of placing more work on the State Department and its staff in justifying the treaty.