Shaping World Aviation: Anglo-American Civil Aviation Relations, 1944-1946

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MUCH HAS BEEN written about the contents and implications of the Chicago Convention and the 1946 Bermuda-I Agreement. Little is known, however, about the process that led up to these major aviation agreements. Until recent years, historical research has been hampered by legal restrictions limiting access to government records. Based on previously unstudied documents, this article discusses the Anglo-American differences underlying the Chicago Convention and the Bermuda-I Agreement.

I. INTRODUCTION

The basic positions held by Great Britain and the United States toward post-war international civil aviation are well known. In popular terminology, the British position was one of protectionism while the United States supported an open skies approach. These positions stemmed largely from the different aircraft production capability of the United States and Britain in the years following 1941. An agreement was reached between the two countries that Great Britain should concentrate its manufacturing capability on fighting aircraft, and the United States, with its

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far larger aircraft industry, would supply both countries with the transport planes necessary for the war. A closer look, however, reveals that much more was at stake. Both countries’ views toward civil aviation had changed dramatically compared to their official pre-war policies. In 1919, Great Britain vainly tried to persuade the Versailles Peace Conference to adopt a liberal attitude with regard to rights for international air services in the Paris Convention on International Civil Aviation (the Paris Convention). Liberalism in aviation was rejected, however, by the majority of countries present. Instead, article 15 of the Paris Convention stated: “the establishment of international airways shall be subject to the consent of the states flown over.”

Aeronautical developments of the next ten years, however, convinced Great Britain that the restrictive approach of article 15 was the best way to ensure control over the operations of foreign airlines. Restriction of this kind was seen to be the best method of protecting Great Britain’s national carrier, Imperial Airways, from being outclassed by foreign competition such as the Dutch carrier, KLM, on the prestigious air routes to colonial territories.

Although the United Kingdom continued to express a liberal approach to international civil aviation, this liberalism was aimed exclusively toward the maintenance of British aerial superiority. What Great Britain presented as liberalism on occasions such as the Paris International Civil Aviation Conference in June of 1929 was, in fact, a calculated position assumed to avoid blame for any further curtailment of international air transport. London in fact welcomed the Paris Conference’s rejection of a more

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1 Telegram from Winston Churchill to Franklin Roosevelt (Nov. 28, 1944) in Roosevelt & Churchill: Their Secret Wartime Correspondence, doc. 468, 608-11 (F.L. Loewenheim et al. eds., 1975) [hereinafter Roosevelt & Churchill].

liberal approach to international civil aviation with secret cheers:

We are now in a very strong position as regards art. 15, because, although we have pleaded for liberty, all the European nations, except Holland and Sweden, have voted against us. This can be borne in mind when negotiating with the French [and the Dutch] regarding the passage over India.³

In the following years, Britain quietly stopped foreign competition whenever possible. The Dutch were the main victims. Their projected direct air service from Holland to Australia (through the Dutch East Indies) never materialized because of British opposition. Britain continued, however, to officially favor liberalism in the air.

In the United States, the attitude toward international aviation was different in appearance rather than in fact. In 1920 the Senate chose not to ratify the Paris Convention because of its links with the Versailles Peace Treaty and the League of Nations.⁴ Thereafter, the Atlantic formed both a physical and legal barrier between civil aeronautics in Europe and the United States.

Until 1927, civil aviation in the United States was confined to internal postal services. Only in March, 1928, did Congress finally approve the Foreign Air Mail Act,⁵ aimed at establishing a network of American air services to the Caribbean and South America. The commencement of international flights necessitated a legal regime covering

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⁵ Foreign Air Mail Act, ch. 149, 45 Stat. 248 (1928), repealed by Air Mail Act of 1938, ch. 607, § 1107(k), 52 Stat. 1029.
such operations. This need formed the backdrop of the sixth conference of the Pan American Union, held in Havana in February of 1928, which adopted the Pan American Convention on Commercial Aviation.\(^6\) At first glance, the Convention appeared to provide a liberal basis for international aviation in the Western hemisphere.\(^7\) Article 4 granted a general right of innocent passage to the aircraft of contracting states and did not contain restrictions such as article 15 of the Paris Convention.\(^8\) Moreover, article 30 stipulated that none of the contracting states would obstruct the establishment of regular international air services.\(^9\) The central clause of interest here, however, is the lengthy and loosely formulated article 21:

The aircraft of a contracting State engaged in international air commerce shall be permitted to discharge passengers and a part of its cargo at one of the airports designated as a port of entry of any other contracting State, and to proceed to any other airport or airports in such States for the purpose of discharging the remaining passengers and portions of such cargo and in like manner take on passengers and load cargo destined for a foreign State or States, provided that they comply with the legal requirements of the country over which they fly, which legal requirements shall be the same for native and foreign aircraft engaged in international traffic and shall be communicated in due course to the contracting States and to the Pan American Union.\(^10\)

The United States interpreted article 21 to require that both national airlines and airlines of foreign contracting states obtain prior Commerce Commission permission to engage in any kind of air traffic to or from the United

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\(^7\) Id.

\(^8\) Id.; see 1 INTERNATIONAL LEGISLATION, supra note 2, at 359-76.

\(^9\) Pan-American Convention, supra note 6.

\(^10\) Id. art. 21, reprinted in, 3 INTERNATIONAL LEGISLATION, supra note 2, at 2354-69.
States. In practice, this meant that, notwithstanding the free trade policy of Roosevelt's Secretary of State Cordell Hull, only one foreign airline (Britain's Imperial Airways) was granted landing rights in the United States prior to the outbreak of the Second World War. Imperial's landing rights were provided for in an Anglo-American bilateral agreement executed in 1935. Progressing from the basic principles of the agreement to the operating permits deemed necessary for actual operations, however, took two more years. Restrictive attitudes and prestige-consciousness on both sides of the Atlantic revealed themselves in the central clause of the permits, which stated that service should not commence unless and until both airline companies involved, Pan American Airways (Pan Am) and Imperial Airways (restructured as the British Overseas Airways Corporation (BOAC) in April of 1940), declared themselves ready for scheduled transatlantic flights.

II. WARTIME PLANS

Allied cooperation during the war required that the restrictive prewar regime be loosened. As a result, the United States and Britain concluded a so-called no-exclusion agreement in an exchange of notes between Cordell Hull and the British ambassador to Washington, Lord Halifax, in July 1942 under which, as one British source summarized, "neither we nor the United States Government, nor companies acting for either of us, will set up arrangements which have the effect of denying landing or traffic rights to United States and British com-

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11 See NICOLAS M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 121 n.8 (1981).
13 Imperial Airways Operating Permit, issued by the U.S. Government, Apr. 17, 1937, in Public Record Office [hereinafter PRO], AM, AVIA 2, 2808.
panies in any part of the world.”

The British were not happy with this expression of Anglo-American cooperation because of the threat that the no-exclusion agreement posed to BOAC's postwar position in international civil aviation. In December 1943, the War Cabinet Committee on Post-War Civil Air Transport, in keeping with pre-war practice, advised the government to terminate the agreement at the end of the war in order to protect BOAC's interests. Great Britain could then enter into fresh bilateral negotiations with the United States. BOAC, however, had plans of its own and was convinced that "the best and perhaps the only way of maintaining the position of British air transport after or even during the later stages of this war" was to unite with commonwealth countries. BOAC prepared a proposal for the formation of a Commonwealth Air Corporation which would present a united front against the expected economic surprise attack by United States airlines on the post war international air transport market. The plan received the backing of both Winston Churchill and Max Beaverbrook, Minister of Aircraft Production. Of the dominions, however, only New Zealand and India were prepared to go along with this proposal. Canada, South Africa, and Australia strongly opposed the plan. These countries saw the Commonwealth Air Corporation proposal as potential infringement on their emerging national pride. As a result of Pan Am's perceived competitive abuses, however, the call for postwar protective measures in Britain only grew stronger. In the same year, Pan Am jumped at the opportunity to increase transatlantic flights

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16 Indeed, both countries would agree to terminate the no-exclusion agreement the moment they were to become bound by the international agreement on the subject. Telegram from the British Embassy in Washington, D.C. to the Foreign Office (Apr. 22, 1945) (PRO, 371, FO371, 50243).

17 Letter from Walter Runciman, President of the Board of Trade, to J.W.S. Brancker, Jr., BOAC agent in Lagos (June 7, 1942) (PRO, RAF-Museum depot (Hendon), BOAC papers, AW 1, 3763).
from twice to three times weekly while a war-struck BOAC was forced to reduce services.

The United States was meanwhile moving toward a more liberal position. On May 4, 1943, the Civil Aviation Board (CAB) issued a questionnaire to all United States airlines in an attempt to gather their views on post-war civil aviation. This questionnaire was intended to assist in the clarification of the United States international aviation policy. In response, however, sixteen United States airlines issued a joint statement on June, 15, 1943, that rejected Pan Am’s monopoly on international operations. The airlines’ declaration was then adopted by the Interdepartmental Committee on Civil Aviation which recommended active government involvement in international civil aviation.\(^\text{18}\) The final position advocated that a multilateral agreement be sought in order to obtain general rights of transit and technical landings.\(^\text{19}\) At the same time, although less explicitly, it became clear from the declaration that the Pan Am monopoly, closely guarded by its chief executive Juan T. Trippe, would not be continued after the war.\(^\text{20}\)

Roosevelt, no friend of Trippe’s to begin with, agreed that the Pan Am monopoly should be abolished in the post-war period and firmly stated his intention of ending Pan Am’s unique position.\(^\text{21}\) Although Roosevelt admitted that Pan Am must be given proper credit for its pioneering efforts (perhaps the cream of the business), he was not inclined to award all post-war business to Trippe.\(^\text{22}\) In the President’s view, the world would be divided into zones for American airline operations.\(^\text{23}\) Each

\(^{18}\) Memorandum from the Interdepartmental Committee on International Aviation Regarding International Civil Aviation, as revised and adopted Aug. 26, 1943 (Aug. 31, 1943) (on file with Franklin D. Roosevelt Presidential Library [hereinafter FDR-LIB], Hyde Park, NY, PSF 116).

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Policy Statement by Franklin Roosevelt (Nov. 10, 1943) (available from FDR-LIB, PSF 116).

\(^{22}\) Id.

\(^{23}\) Id.
zone would then be operated by one of several independent American companies.24 These airlines were to be private enterprises.25

Roosevelt's plans for civil aviation, however, went further than opposition to a Pam Am monopoly and favored a free exchange of landing rights: "[Roosevelt] wanted arrangements by which planes of one country could enter any other country for the purpose of discharging traffic of foreign origin and accepting foreign bound traffic" while reserving cabotage for the national carriers.26 Only General H.H. (Hap) Arnold, commanding General of the United States Army Air Force and an ardent supporter of liberalism in the air, was prepared to support Roosevelt in this position. In a memorandum to the President on March 26, 1944, Arnold stressed the importance of international civil aviation.27 He was convinced that liberalized international civil aviation would be beneficial to the maintenance of a strong aviation industry in the United States.28

In spite of these liberal voices, the furthering of United States interests in international civil aviation through postwar protectionism remained the foremost American goal. A special CAB report to Roosevelt revealed the bottom line of United States policy:

The United States should grant to foreign air carriers operating rights involving the taking on and discharge of traffic only where the extension of that privilege is required in order to permit the establishment of air services by United States carriers, the inauguration of which is required by our national interest.29

24 Id.
25 Id.
26 Memorandum of conversation with Franklin Roosevelt by Adolph Berle, Assistant Secretary of State (Nov. 11, 1943) (on file with FDR-LIB, PSF 116).
28 Id.
29 Id.
In practice, the CAB encouraged United States airlines to take over international air routes wherever and whenever the Military Air Transport Command ended its wartime operations. In this manner, the development of foreign airline competition could be effectively precluded. This approach was endorsed by the influential Senate Committee on Commerce which was bent upon retaining full sovereign control over United States airspace and continuing the all-American air policy conducted so far.\textsuperscript{30}

In the British camp, straightforward protectionism was giving way to ideas aimed at putting aviation on an international regulatory footing. In the wake of the plans for a Commonwealth Air Corporation, the Commonwealth Conference on Civil Aviation agreed on four general points in October 1943:

1. To set up an effective machinery to ensure the maintenance of broad equilibrium between air transport capacity and the traffic offering.
2. To provide for equitable participation by the various countries joining in international air transport.
3. To eliminate uneconomic competition by control of subsidies, thereby making air transport self-supporting wherever possible.
4. The United Kingdom considered that frequencies and quotas of operation could be controlled internationally on international air routes, and that these frequencies should be divided in the form of quotas based on the traffic interest principle among nations entitled to operate on the routes.\textsuperscript{31}

The concept of the four freedoms of the air was also put forward for the first time.\textsuperscript{32}

Two sets of basic principles resulted: the Canadian and


\textsuperscript{31} Peter Masefield, Summary of the British Position Regarding International Civil Aviation (June 20, 1944) (on file with PRO, AM, AVIA2, 2255).

\textsuperscript{32} Id.
the Australian/New Zealand approach. Canada proposed a new convention on international civil aviation in opposition to the plan for Commonwealth Air Corporation in January of 1944.\textsuperscript{33} The Canadian plan centered around an International Air Transport Authority that would regulate international civil aviation entirely. The goal of the International Air Transport Authority would be "to meet the needs of the peoples of the world for efficient and economic air transport and to ensure that, so far as possible, international air routes and services were divided fairly and equally between the various member states."\textsuperscript{34} Within this essentially political set-up, civil aviation was to be free. The Canadian plan was quickly adopted by Great Britain and, in early February of 1944, the War Cabinet Committee on Post-War Civil Air Transport was established to study the implications of the Canadian proposals. A month later, Australia and New Zealand developed a plan that went even further. Convening in Canberra, the two dominions proposed a scheme that would result in the internationalization of all non-domestic air routes.\textsuperscript{35}

Expanding on such plans, the Foreign Office offered the United States the use of British air bases for commercial purposes as a bargaining chip in order to reach an agreement with Washington on an international civil aviation convention that would safeguard British interests. Britain expected these new proposals to prevent the United States from using their "infinitely greater competitive efficiency," reasoning that otherwise "it might be impossible for us to retrieve our position."\textsuperscript{36}

\textsuperscript{33} Canadian draft for a New International Convention on Civil Aviation (Jan. 8, 1944) (on file with PRO, Ministry of Civil Aviation [MCA] Papers, BT 245, 912).

\textsuperscript{34} Id.

\textsuperscript{35} As a result of strong U.S. and Soviet opposition, the Australian Government withdrew the plan in September of 1944 in order to support the previously proposed alternative of establishing a Commonwealth Air Corporation. Telegram from Australian government to British Foreign Office (Sept. 26, 1944) (on file with PRO, FO 371, 42,572).

\textsuperscript{36} Letter from Richard Law, Foreign Office, to Max Beaverbrook, British Minister of Aircraft Production (Mar. 22, 1944) (on file with PRO, FO, FO371, 42,558).
British efforts to gain United States support for an effective machinery to regulate transport capacity offering and ensure control of subsidies preventing uneconomic competition were in vain. In early April of 1944, civil aviation discussions between the British and United States delegations produced only an agreement to draft and sign a new international convention on aerial navigation. This convention would be administered by an international authority that would make provisions for international regulation of the technical field. Beaverbrook, however, continued to voice concerns about the future of post-war British aviation. These concerns were shared by Air Minister Archibald Sinclair. For Sinclair, BOAC was much more than a body conducting air services: "[BOAC is] capable of maintaining and developing the prestige of this country in the air. . . . Moreover, it is already evident that many services will be required after the war, which would not be justified by the ordinary criteria of a commercial carrier."

In London there was a widespread belief that the United States intended to gain outright domination in air transport after the war. These concerns were fed by United States policy in the months prior to the Chicago conference. The United States approached Spain with a request for landing rights in early August of 1944. To the British, a bilateral agreement between the United States and Spain was an unsettling prospect: the United States had both the planes and the pilots to begin commercial operations between the two countries immediately after the signing of an armistice agreement in Europe. The British feared that the United States would conclude bilateral agreements with a number of key countries in Europe in the near future and gain a post-war advantage. Wide

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57 Summary of Informal Discussion on Civil Aviation Between the United Kingdom and the United States, Apr. 3-7, 1944 (Apr. 9, 1944) (on file with PRO, FO, 371, 42,559).
58 Id.
59 Memorandum by Archibald Sinclair, British Secretary of State for Air, on the Future of BOAC (May 27, 1944) (on file with PRO, FO, 371, 42,562).
support from the smaller European countries for an international regulatory body would thus be precluded. London therefore, attempted to pressure Spain into delaying the grant of aviation rights to the United States until after conceding similar rights to BOAC for which BOAC had a long-standing application. To strengthen the British position, the War Cabinet decided to accelerate the development of new civil aircraft and to begin their production as soon as possible. Great Britain also approached France and the Soviet Union to gain support for its position on the regulation of international air transport.\footnote{Memoranda by Archibald Sinclair, British Secretary of State for Air (Aug. 16, Sept. 18, 1944) (on file with PRO, MCA, BT 245,913).}

On October 8, 1944, a White Paper, outlining the British position, appeared in the form of Command Paper 6561.\footnote{Air Ministry, 1944, Cmd. 6561 (on file with PRO, ZHC 1, 8797).} It contained an assessment of pre-war civil aviation based on the premise that because pre-war aviation had been political, rather than economic, the orderly development of world communications had been impeded to the extent that any country could hold the operators of another country at ransom.\footnote{Id.} Bargaining for commercial and transit rights gave rise to international conflicts and no means of controlling heavy subsidization of airlines existed.\footnote{Id.} The Command Paper then presented the British position on post-war civil aviation.\footnote{Id.} It called for international cooperation to meet the needs for the peoples of the world for plentiful, efficient and cheap air services; maintain broad equilibrium between the world's air transport capacity and the traffic offering; ensure equitable participation by the various countries engaged in international air transport; eliminate wasteful competitive practices and, in particular, to control subsidies; standardize practice on technical matters important to the safety of flying; in general contribute
A new international convention on civil aviation was to be prepared to reflect these goals and to define anew the sovereignty principle and the freedoms that international air transport should enjoy within the limits of this doctrine. The Command Paper proposed that an International Air Authority with supra-national powers be established to execute the new convention. The International Air Authority would determine and distribute frequencies, fix rates of carriage, and establish safety standards.

Great Britain failed to reach full agreement with the dominion governments on these issues at the Commonwealth Air Conversations held in Montreal on October 23-26 of 1944 because of Canadian reservations regarding the British plea for immediate and rigid control of frequencies. London then instructed its delegation to the Chicago conference to make a strong effort to secure the agreement of the United States and other delegates to a convention to address the control of frequencies, quotas, rates, and technical matters along the lines set out in the recent White Paper. If this proved to be impossible, the British delegates were directed to attempt to secure a bilateral convention with the United States covering technical matters such as safety regulations. Frequencies, quotas, and rates would then be set through bilateral negotiations.

The reasoning behind the British position was apparent. London feared the United States and indeed all foreign competition in air transport and realized that its technologically backward aviation industry was unable to produce competitive aircraft. Great Britain, therefore,

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45 Id.
46 Air Ministry, 1944, Cmd. 6561, supra note 41.
47 Id.
48 Id.
had no other option than to press for an international regulatory body that would divide major air routes along political lines. This division would, by giving an equal share of air routes to the airlines of the world's leading powers, limit and control competition among the airlines of the various countries.

III. CHICAGO COMPROMISE

The Chicago conference opened on November 1, 1944. In his introductory speech, the head of the United States delegation, Assistant Secretary of State Adolf Berle, made it clear that the United States would under no circumstances accept British proposals for an international regulatory body.50 Instead, Berle made a strong argument that the four freedoms should be accepted forthwith by the countries present as the basis for post-war civil aviation.51 In a personal letter to Roosevelt, he complained:

Before doing anything else, I invited Lord Swinton, Chairman of the British Delegation, to lunch. After the usual courtesies, Lord Swinton spoke of the White Paper as the unchangeable British position. I pointed out that this White Paper was merely a restatement of the British position as given to Dr. Warner and myself by Lord Beaverbrook in London in April 1944 in preparatory discussion. We had then made it clear that such a position was substantially impossible of acceptance, since it amounted to mere blanket delegation of power to an international body with no knowledge of what this body was designed to do. We had asked for clarification of the British position which we had not got.

Lord Swinton then stated that the British desire was that they should have roughly one half of the Atlantic traffic, and that in general they felt that United States lines should not play any great part beyond the Atlantic gateways. "Did you really think we were going to change our minds?" he asked. The general conception appeared to

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50 Adoph Berle, Assistant U.S. Secretary of State, Address at the Chicago Conference (Nov. 1, 1944), FDR-LIB, Berle Papers, nr.60.
51 Id.
be that American aviation had no particular reason to exist on the continent of Europe, Africa and Asia, beyond the seacoast.

I observed that as far as I could see the British Government was asking not merely for United States money and for United States planes, but likewise for United States traffic to put in her planes.  

The talks thus began with serious differences of opinion between the two leading allied powers. Personal dislike between Berle and Swinton only exacerbated this basic disagreement. In Berle's eyes, Swinton had trouble grasping the very essence of future aeronautical development. It is clear from Berle's comments on Swinton that Berle did not regard his British counterpart highly:

he tends to be arrogant and inflexible, not having quite appreciated the difference between the atmosphere of the coast of the Gulf of Guinea and that of the shores of Lake Michigan. Most of his European colleagues are in despair about it; but publicly the relations are in a basis of complete and almost exaggerated courtesy and cooperation.

Berle's original optimism that the United States dominated conference could be concluded quickly, waned fast. It became clear at an early stage that the British plea for international regulation was not without supporters. France, Belgium, Norway, Portugal, and Turkey heartily agreed with London on the need to stem competition. Berle underestimated this support. On November 6,

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52 Letter from Adolf Berle, Assistant U.S. Secretary of State, to Franklin Roosevelt, President of the United States (Dec. 7, 1944) (on file with the FDR-LIB, Berle Papers at 60).
53 Letter from Adolf Berle, Assistant U.S. Secretary of State, to Max Beavbrook, British Minister of Aircraft Production (Dec. 30, 1944) (on file with the FDR-LIB, Berle Papers at 59).
55 During the opening Session of the conference, the delegates even rose to sing the Star Spangled Banner.
56 Telegram from Lord Swinton, Chairman of the British Delegation to the Chicago Convention to Sir Edward Bridges, Secretary of the War Cabinet, (Nov. 4, 1944) (on file with PRO, FO371, 42,580).
Berle still believed that the conference could be concluded in a "ghastly ten days of agreeing on texts." The question of fifth freedom rights, however, turned out to be a much greater stumbling block than Berle anticipated.

The approaches of Great Britain and the United States to fifth freedom rights were fundamentally different. Britain regarded all air traffic as point to point services between final destinations, in accordance with London's desire that United States airlines not play any great part beyond the Atlantic gateways. The United States position, on the other hand, was that the fifth freedom rights should be treated as international traffic between any intermediate points en route which were necessary to make a given route economically viable by maintaining load factors high enough to ensure profitable operations. These positions may be summarized as politics versus commercialism. The point to point concept was consistent with Great Britain's support for an international regulatory body as an internationally acceptable division of frequencies and capacity would clearly be easier to arrive at if all traffic were point to point. The British thus tried to muster support for their view of fifth freedom as meaning traffic from the country of origin to non-final points on a given air route (e.g., New York-Athens on an air route New York-Cairo) and back again. The only practical difference between this view of fifth freedom traffic and third and fourth freedom traffic was that fifth freedom traffic would be combined on a plane carrying third and fourth freedom passengers. It took the United States nearly two weeks to persuade Swinton's delegation to agree to the United States interpretation.

Berle encountered other problems as well. He was faced with internal opposition in the American delega-

57 Berle & Jacobs, supra note 54, 500-01 (diary file Nov. 6-9, 1944).
tion. Senator Owen Brewster, so close an ally of Juan Trippe's that he was nicknamed "the Senator from PanAm," continuously leaked confidential information to the press. PanAm believed that the United States position on liberalization ran counter to its position of sole chosen instrument. Brewster, PanAm, and Chicago Tribune reporter Sam Pryor acted together in an attempt to destabilize support for the liberalization of international aviation.

Due to these underlying differences, the delegates did not reach agreement on the first four freedoms of the air, and the capacity problems connected with them, until November 17. In the end, through the efforts of a stubborn Swinton, the British delegation got its way on capacity. Capacity was allocated to each country on a traffic embarked basis. Swinton and Berle also agreed to regulate fares to prevent undercutting and unfair subsidies. The issue of fifth freedom traffic (the traffic between any two countries on a given air route) entered the negotiations on November 18. Great Britain agreed to the United States' definition of fifth freedom for economic operating purposes after extended discussions because of the British desire to limit fifth freedom rights.

Berle then proposed what he viewed as the logical next step in regard to fifth freedom traffic. Berle recalled that:

We had insisted that in this regard traffic should find its natural level, and while we were content to accept a starting quota, if additional traffic offered, the line should have the right to increase its frequencies through the process of "escalation" - adding additional planes when planes were running at 65% load factor, which in operating language means substantially full.

Berle's proposal encountered stiff opposition from Great

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59 Berle & Jacobs, supra note 54, at 503 (diary file Nov. 26, 1944).
60 Id.
61 Telegram from Winston Churchill to Franklin Roosevelt (Nov. 28, 1944), in Roosevelt & Churchill, supra note 1, at 609.
62 Berle & Jacobs, supra note 54, at 503-05 (diary file Nov. 26, 1944).
Britain. The British delegation vigorously objected to the insertion of an escalator clause on fifth freedom rights, which they felt that they had already been forced to accept in regard to third and fourth freedom traffic. The United States viewed this opposition as a radical change in Britain's position and attributed it to news from London. The British countered that the controversy was due to the United States delegation's misunderstanding of the British position.

A crisis developed at this stage. Roosevelt strongly protested the British interpretation of fifth freedom rights in a telegram to Churchill. According to Roosevelt, refusal to allow an escalation clause would stifle the development of air transport. Roosevelt attempted to persuade Churchill by asserting that the restriction of air transport would not be beneficial to the British. He urged Churchill to tell his delegates to accept some sort of compromise.

Matters came to a head on November 27. The conference convened in a closed session to discuss the differing positions of the United States and Great Britain. The British delegates maintained their earlier stand and stated that their position was in the interest of smaller countries because it would allow each country equal rights of access to the air traffic market. As the various delegations made their speeches it became apparent that the British position carried very little support. Only the French and Australian delegations were unequivocal in their adhesion to British definitions of fifth freedom rights.

Irritated by Berle's November 18th introduction of the escalation clause, Churchill sent a telegram to Roosevelt in which he wrote:

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63 Telegram from Franklin Roosevelt to Winston Churchill (Nov. 21, 1944), in ROOSEVELT & CHURCHILL, supra note 1, doc. 462.
64 Id.
65 Id.
66 Id.
67 BERLE & JACOBS, supra note 54, at 505-06 (diary file Nov. 27, 1944).
a combination of the escalator clause and the fifth freedom... would enable American aircraft to carry most of the traffic between the United Kingdom and the Dominions and India and all foreign countries, as well as between all nations of the Commonwealth. It would, in fact, give the United States airlines the right to everything save cabotage.68

Churchill strongly urged Roosevelt to reconsider and accept the British position on the five freedoms.69 Churchill concluded that the effect of agreements reached earlier in the war dividing industrial production of aircraft was that the United States was ready for "a flying start," whereas Great Britain and other countries were not.70

The conference now threatened to grind to a halt, having reached the ultimate point to which the British were prepared to go. In order to bypass British obstructionism the United States delegation then proposed

a simple plan under which each of the parties granted to the other all five freedoms, subject to a general right of the proposed Council and assembly of the Organization to listen to complaints, examine them and hold consultations thereon; and in extreme cases, to suspend a signatory from its privileges.71

Although Brazil voiced some reservations, the entire South American block agreed that they would support this proposal. China was also supportive, as were some European countries, notably the Netherlands. A number of countries that had rejected the British proposals the day before, however, were also unwilling to support the United States plan, viewing it as too extreme.

Because of continued British opposition, Roosevelt again implored Churchill to relent on the fifth freedom.

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68 Telegram from Winston Churchill to Franklin Roosevelt (Nov. 28, 1944), in ROOSEVELT & CHURCHILL, supra note 1, doc. 468, at 609.
69 Id.
70 Id. at 609-10.
71 BERLE & JACOBS, supra note 54, at 507 (diary file Dec. 2, 1944).
He denied the permanent effects of any American head start and expressed willingness to make any type of plane available to the British. Roosevelt then asked Churchill:

Would you like to see a world in which all ports were closed to all ships but their own or open to one foreign ship, perhaps two, if they carried only passengers and cargo bound all the way from Liverpool to Shanghai? Where would England be if shipping were subjected to such limitations? Where will it be if aviation is? I cannot agree that the answer is to hold everyone back. It must be rather to go forward together. Given, on both sides, that spirit of justice and fair play of which you speak, I know that an agreement can be reached which will be equally beneficial to both our interests and to the world.

The plenary session of the conference was engulfed by new developments on December 1st. The session began with a speech by New York's Mayor LaGuardia who pleaded for some kind of general agreement, if not on five freedoms, then on four, three, or two. Swinton, not wanting to appear the eternal wrecker of ideas, thereupon indicated that Great Britain might be willing to consider agreeing to the the plan for general rights of passage and technical stops. After this concession there was no going back without a British loss of face. The French then introduced a proposal that was the literal text of the earlier United States proposal on all five freedoms, but which now referred only to the first two freedoms. The conference decided to incorporate the first two freedoms in a separate document to be attached to the main convention. Satisfied to have achieved something tangible at last, Berle remarked in his notes "the main work of the confer-

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73 Id.


ence is finished."\textsuperscript{76} The Chicago Convention was signed without the five freedoms of the air on December 7, 1944. These were only included within the International Air Services Transit Agreement and the International Air Transport Agreement, which were signed by those individual parties in agreement with the United States position.

IV. ATLANTIC WATERSHED

Churchill continued to oppose liberalism in the air, and particularly the United States position on the fifth freedom. His views remained those which Great Britain brought to Chicago. Within one month of the signing of the new convention, the British Ministry of Civil Aviation and the British Foreign Office took concerted steps to reach unofficial agreements with France and other countries that supported British views at Chicago. The British hoped that these agreements would present a united front which would prevent the Americans from obtaining gateways into Europe and the Middle East by way of fifth freedom rights.\textsuperscript{77}

On the other side of the Atlantic, the United States continued to espouse liberalism in international civil aviation. The United States caused Churchill to fume by discussing a bilateral air agreement with Ireland without informing Great Britain.\textsuperscript{78} In spite of British opposition, a United

\textsuperscript{76} Id.

\textsuperscript{77} Letter from Sir George Cribbett, British Deputy Secretary of the Ministry of Civil Aviation (MCA) to Foreign Office (Jan. 3, 1945); Remarks by John Cheetham, First Secretary of the Foreign Office (Jan. 5, 1945) (on file with PRO, FO 371, 50,228). The BOAC was not itself displeased with the Chicago Convention. Minutes of Verbal Report by Knollys, BOAC Chairman, to the Board of the BOAC on the Chicago Convention (Jan. 11, 1945) (available from PRO, BOAC Papers, AW 1, 4812). While sharing the British reservations on the fifth freedom, BOAC's chief executive, Knollys, felt that BOAC would be better placed than the Americans for negotiating fifth freedom rights with countries in Europe and the Middle East in view of its existing relations. \textit{Id}.

\textsuperscript{78} Telegram from Winston Churchill to Franklin Roosevelt (Jan. 27, 1945), in \textit{ROOSEVELT \& CHURCHILL}, supra note 1, doc. 507, 652-53. At BOAC there was concern that United States airlines would invade the BOAC's European and Mid-
States-Irish Agreement was signed on February 3, 1945.\textsuperscript{79} It granted United States aircraft general operating rights between the United States, Ireland, and points beyond.\textsuperscript{80} London viewed this bilateral agreement as a breach of good faith, particularly because the United States then commenced negotiations for bilateral civil aviation agreements with Greece, Egypt, Iraq, Iran, and Lebanon. Both the United States and Great Britain claimed that the other was improperly pressuring these governments to adhere to their respective policies. The British suspected Washington of covertly threatening to withhold economic aid if United States demands for landing rights were not met. The United States, on the other hand, accused London of pressuring Greece, Egypt, Iraq, and Iran to oppose the United States position which Great Britain portrayed as the American drive towards world domination in the air.\textsuperscript{81}

Thus, the wartime allies each went their own way. While the United States continued to seek landing rights in various countries through Chicago-style liberalism, Great Britain continued to advocate regulation. An official restatement of the British position was formulated as follows:

In order to avoid uneconomic competition and reduce, and ultimately eliminate, subsidies, capacity should be settled and varied by agreement, so as to provide a reasonable equilibrium between the aggregate of services and the amount of traffic offered on a particular route and that capacity should be fairly divided between the countries concerned.\textsuperscript{82}

die East markets via the United States-Irish agreement. PRO, BOAC papers, AW 1, 2947.


\textsuperscript{80} Id.

\textsuperscript{81} Telegram from the British Resident Minister in Cairo to the Foreign Office in London (May 9, 1945) (on file with PRO, FO, 371, 50,246); Memorandum from U.S. State Department on United Kingdom International Civil Aviation Policy (Nov. 21, 1945) (on file with the NA, State Department (STD), Decimal File, Record Group 59, 811.79600/22-2145).

\textsuperscript{82} Note from the British Embassy in Washington, D.C. to the U.S. State Department (July 26, 1945) (on file with the PRO, FO, 371, 50,255).
Great Britain continued to develop its own model for standard bilateral agreements which defined air transport along what were essentially political lines, i.e., as end-to-end traffic. The Ministry of Civil Aviation regarded fifth freedom rights as an intrusion of uncontrollable commercialism into the predominantly political and strategic business of maintaining overseas air connections.\(^9\) The British concept contained only third and fourth freedom rights under which bilateral traffic was divided on a reciprocal 50/50 basis.

BOAC disagreed with this position. In September of 1945, BOAC's advisor on air transport policy, J. Randolph McCrindle, wrote an influential memorandum to the Board of BOAC in which he argued that either fifth freedom provisions must be allowed in the interest of economic operation, or, better still, BOAC should be permitted to conduct its own international relations.\(^4\) BOAC's opposition, soon to be supported by Swinton, had profound effects. Great Britain's position was modified to incorporate two standard forms for bilateral agreement: one based on end-to-end traffic and another including limited fifth freedom rights.

The gradual adoption of fifth freedom rights was accelerated by a particularly unsettling meeting in Washington between the British civil air attaché Peter Masefield and American Airlines executives Ralph Damon and Cyrus Smith. In response to British opposition to fifth freedom rights, Damon and Smith referred to the fact that both Ireland and Holland had accepted these rights. They threatened to bypass Great Britain if the British remained uncooperative by striking a deal with KLM to organize an

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\(^9\) Note from Sir George Cribbett, British Deputy Secretary of the Ministry of Civil Aviation, to the Minister of Civil Aviation (June 15, 1945) (on file with the PRO, AM, AVIA 2, 2759).

\(^4\) Memorandum from J. Randolph McCrindle, BOAC Advisor, to the Board of BOAC, Control of Capacity in Relation to the Five Freedoms (Sept. 26, 1945) (on file with the PRO, BOAC Papers, AW 1, 4235).
Amsterdam-London shuttle service. Though the Foreign Office assumed that the Americans were bluffing, the threat was not wholly unfounded. Eager to recommence commercial operations, KLM aggressively lobbied the Air Ministry and Ministry of Civil Aviation (MCA) for months to have their pre-war rights for an Amsterdam-London service restored and to be reallocated their old peacetime facilities at London's Croydon Airport. The British felt that KLM would be eager to cooperate with the Americans.

Internal opposition to Great Britain's position also continued. BOAC emphatically pressed for a more liberal policy. In early October of 1945, Sir William Hildred, Director-General of Civil Aviation at the MCA, received a memorandum from BOAC which suggested that the Chicago-regime determination of capacity on the basis of traffic embarked be replaced by a less stringent system based on load factors. BOAC argued that a load factor system was in Great Britain's best interest because London was not the final destination of a substantial portion of the passengers embarking from the United States on flights to London. Thus, if capacity were to be divided on the basis of a traffic-embarked system, an undue advantage for United States carriers would result. It seemed more profitable to BOAC to divide capacity on the basis of load factors. Fifth freedom was thus acceptable in principle to BOAC as long as it was granted on a quid pro quo basis and without any permission for a change of gauge.

85 Telegram from Peter Masefield, British Civil Air Attaché, to the Foreign Office (Sept. 12, 1945) (on file with the PRO, FO, 371, 50,258).

86 Note by Sir William Hildred, Director-General of Civil Aviation at the MCA, commenting on his meeting with Albert Plesman, Managing Director of KLM (May 5, 1945) (on file with the PRO, MCA, BT217, 64); Letter from H. Spry Leverton, KLM's London Station Manager, to Sir William Hildred, Director General of Civil Aviation at the MCA, (May 5, 1945) (on file with the PRO, MCA, BT217, 610).

87 Letter from Viscount Edward G. Knollys, BOAC Chairman, to Lord Winster, Minister of Civil Aviation (Oct. 22, 1945) (on file with the PRO, MCA, BT217, 1171). The term “change of gauge” refers to the transfer of passengers from a large (transatlantic) aircraft to a smaller plane in London for onward destinations in Europe.
Adopting a more liberal stand in aviation matters posed difficult political problems for the recently installed Labour Government. A too obvious drift away from established British policy on civil aviation was sure to place Labour in an awkward position because of its established position as an advocate of public control of the economy and international cooperation. To allow international civil aviation to be governed by market forces would make Labour appear to support principles that even the previous Conservative Government had rejected.

Internal politics, albeit important to the Labour Government, caused only a small ripple in the pool of Anglo-American civil aviation relations compared to general financial and economic issues. At the end of wartime hostilities in August 1945, President Truman terminated the Lend-Lease Agreement of 1941, under which the United States had supplied Britain with food and weapons on credit during the war. This decision, for which the British were completely unprepared, had a dramatic impact in London. It threatened to wreck Great Britain's economy at a point in time when most of the country's financial reserves were depleted because of the war. Enormous sums of money were needed for reconstruction and post-war imports that would have to be purchased primarily from the United States. Great Britain then initiated bilateral talks regarding the conditions upon which the United States would supply vital post-war aid. The United States made it clear from the outset that this assistance would come at a price: post-war aid to Great Britain was to be in the form of a loan and linked to a general revision of financial and trading relations between the two countries. These revisions were to promote the twin interests of the United States: the liberalization of world trade and maintainence of Great Britain as a major trading partner.

On September 11, 1945, discussions in Washington began on a variety of issues related to transportation and trade, among them shipping. Great Britain took a liberal position on this issue because of its large merchant navy. Great Britain's attempt to assert liberalism in this area of transportation, however, was hard to reconcile with its restrictionism regarding aviation. Great Britain thereby endangered its negotiating position in both areas. The head of the British delegation, John Maynard Keynes, urged the Ministry of Civil Aviation to sacrifice restrictions on aviation for the more economically important liberalization of shipping.\(^8\) London instead tried to keep shipping and aviation separate as to both time and space.\(^9\) This tactic was unsuccessful. As talks on the Loan Agreement progressed, London began to fear that the United States would condition shepherding the loan through Congress upon British acceptance of American style liberalism in the air, since the United States also used this loan as a lever to push Britain into formal ratification of the Bretton Woods Agreements of July 1944\(^9\) regarding the shape of the post-war world economy and the establishment of the International Monetary Fund. This pressure resulted in a reluctant shift of British policy away from protectionism.

Meanwhile, in the United States, the desirability of complete freedom in the air was being debated. The President asked Congress to ratify the Chicago Convention forthwith in order to spur the process of ratification by other nations.\(^9\) Ideas of free competition had led to the abandonment of the chosen instrument principle for

\(^8\) Memorandum from Sir William Hildred, Director-General of Civil Aviation of the MCA, to Lord Winster, Minister of Civil Aviation (Oct. 6, 1945) (on file with the PRO, MCA, BT217, 1171).

\(^9\) Note from Cheetham, Foreign Office, to Arthur Bevin, Foreign Secretary (Oct. 25, 1945) (on file with the PRO, FO, FO371, 50,264) (on the basis of a letter from Winster).


\(^9\) Hearings on the Chicago Convention were held on February 20 and 23, and March 6, 9, 10, 23 and 26, 1945. Convention on International Civil Aviation:
overseas operations. This principle was replaced by a system of regulated competition.\footnote{U.S. Senate Committee on Commerce Report on International Air Policy, (July 27, 1945) (on file with NA, SEN 79a-F6, 106).} On June 1, 1945, the CAB decided the \textit{North Atlantic Route Case},\footnote{6 C.A.B. 319 (1945).} which institutionalized admission to the potential boom market of post-war transatlantic air services. As a result, Pan Am gained two competitors: American Export Airlines (renamed American Overseas Airlines (AOA) on November 10, 1945, after its merger with American Airlines) and Trans World Airlines (TWA).\footnote{Id. at 325, 342, 350-52.} The \textit{Route Case} decision limited Pan Am to its pre-war routes by allowing it to operate only to fixed points in Britain, France, Ireland and Portugal.\footnote{Id. at 351.} Trippe felt that this limitation unduly hampered Pan Am's freedom to develop its overseas network as it saw fit. Because permits granted to TWA and AOA did not contain any explicit restriction of routes and landing points,\footnote{Id. at 350-51.} Pan Am claimed unfair treatment and mobilized its supporters in Congress to attempt to block the CAB decision.

The case reached Truman's desk. Pan Am argued that it was being treated unfairly as it was not given the right to operate services to any point in France other than Marseille, while TWA was permitted to serve Paris and any other point in France excepting Marseille. Further, Pan Am was restricted to the isolated airport of Foynes on the Western coast of Ireland while TWA could serve Dublin and thus gain a larger share of Irish traffic. Pan Am would face competition from AOA in London and was not permitted to serve other points in Britain. In Portugal Pan Am would be limited to Lisbon. TWA had received rights to fly to Italy and a few points in the Middle East. Additionally, Northern Europe and the Soviet Union, except

\begin{flushleft}
\textit{Hearings before the Comm. on Foreign Relations, 79th Cong., 1st Sess. (1945).}
\end{flushleft}
for southern Germany, would fall largely under the monopoly of AOA. Pan Am therefore believed that it had been dealt less than its fair share of the market. Although Pan Am did not demand the complete exclusion of AOA and TWA from the Atlantic routes Pan Am did seek full freedom of competitive action. Pan Am's complaints were brushed aside as contrary to the aviation policy of the CAB.

The United States now had several airlines operating over the North Atlantic. Having established international air transportation on a competitive footing, the CAB addressed the important issue of fifth freedom rights. CAB Chairman L. Welch Pogue expressed disappointment at British opposition to the International Air Transport Agreement concluded at Chicago in a letter to the Secretary of State. The CAB Chairman argued it was of the utmost importance that the British grant fifth freedom rights as soon as possible and cease its obstruction of approaches by the United States to third countries for bilateral agreements on fifth freedom rights.

The United States expected that access to the American air traffic market in exchange for liberal bilateral agreements would present an attractive deal to any nation. Pogue ascribed the failure of this strategy to British influence behind the scenes. His suspicions were not unjustified. The British goal was to stall the United States, particularly in Europe, until Great Britain's airlines were in a stronger, more competitive position. In response,

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98 Id. at 351.
100 Order Denying Petitions for Rehearing, Reargument and Reconsideration, North Atlantic Route Case, argued before the CAB, in HST-LIB (Nov. 1945), file 3i: North Atlantic Route Case.
101 Memorandum from Sir George Cribbett, British Deputy Secretary of the Ministry of Civil Aviation, to Sir William Hildred, Director-General of Civil Aviation at the MCA (June 25, 1945) (on file with the PRO, MCA, BT217, 126). Hildred fully agreed.
Pogue asked that economic pressure be placed on Great Britain and her supporters:

In like manner, we suggest if Great Britain should continue over our protest to assert her influence to block our attempts to conclude bilateral agreements, the Department could, to equal advantage, make the satisfaction of certain British needs conditional upon her agreement to cease interfering with our attempts to secure these agreements.102

He added that he was not suggesting that direct relief funds and supplies be denied but only that some of the less critical extras be used as leverage.103 Pogue urged the Department of State to adopt this view in order to secure United States superiority in international civil aviation.104 According to Pogue, this new approach could first be used to pressure the French into accepting a bilateral agreement on American terms in exchange for the delivery of badly needed C-54 aircraft to Air France.105 Pogue also suggested that, if necessary, the same tactics could secure United States interests in Holland, Portugal, Belgium, Egypt, Iraq, Lebanon, and Turkey.106 The State Department disagreed at first and argued that if the United States embarked on such a policy aviation policy would become too closely connected with general economic issues.107 In Great Britain's case, however, a reluctant State Department was persuaded that the United States should compromise only as a last resort and that therefore the United States should utilize its bargaining position to the fullest extent possible.108 As a result, avia-

102 Letter from L. Welch Pogue, CAB Chairman, to the Secretary of State, (July 16, 1945) (on file with the HST-LIB, CAB, General, C7(BOX 10)).
103 Id.
104 Id.
105 Id.
106 Id.
107 Letter from Joseph P. Grew, Acting Secretary of State, to L. Welch Pogue, CAB Chairman (July 31, 1945) (on file with the HST-LIB, CAB, General, C7(BOX 10)).
108 Memorandum of meeting by William Clayton, Assistant U.S. Secretary of State (Sept. 7, 1945) (on file with the HST-LIB, Clayton Papers, BOX 1, Aviation).
tion experts were attached to the delegation sent to financial and trade discussions with Great Britain.

As the British had feared, efforts now increased to pressure Great Britain to agree to the United States position on aviation. These met with stiff resistance because of the British strategy of separating aviation concerns from other economic issues in Anglo-American relations. On September 10, 1945, Morgan questioned Masefield about the reasons for Great Britain's opposition. Masefield replied that London did not consider the matter to be very urgent; surely civil aviation could be addressed separately without inserting it into the context of general economic matters between the two countries. Morgan informed him that this was not the view of the United States and that the State Department considered aviation as a prime subject in discussions of general economic relations between the two countries.¹⁰⁹

By November, an interim agreement which provided for a system of double approval of rates and regulation of capacity was under discussion. This approval system was included at the insistence of Great Britain, which was primarily concerned with the reduction of unfair subsidies. Trippe, however, vigorously opposed any solution along these lines preferring control of frequencies to governmental interference in rate-making. A system of controlled frequencies, but free rates would make it easier for Pan Am to force its new competitors, AOA and TWA, from desirable routes by undercutting their fares. Trippe announced Pan Am's intention to drastically reduce its transatlantic fare from $375 to $275 in late October.¹¹⁰

The result was confusion and British fury. Pan Am's move confirmed British fears of cut-throat competition

¹⁰⁹ Memorandum from Stokely Morgan to the Secretary of State (Sept. 10, 1945) (on file with the NA, StD, 711.4127/9-1045).
¹¹⁰ Even that was not Pan Am's greatest reduction. Earlier that year, Pan Am had supplied the Dutch KLM with confidential information regarding its intended fare structure after the war. Fares were envisaged to go down to $186.30 for the New York-London route. Board Meeting Minutes (Mar. 24, 1945) (on file with the KLM Royal Dutch Airlines archive (Amstelveen, Netherlands)).
unless a fare regulatory agreement could be reached with the United States. Even at its pre-reduction rate of $375 Pan Am was charging nearly $200 less for a transatlantic return ticket than its competitors BOAC and AOA. On November 24, 1945, Hildred threatened to reduce Pan Am’s five weekly flights to the two flights a week it was actually entitled to under its 1937 permit, while maintaining the provisional capacity of 500 seats a week for both United States and British operators across the Atlantic. Pan Am faced the risk of being pushed back in favor of its competitor AOA. Other United States airlines were warned that if they matched Pan Am’s new fare their provisional permits would be withdrawn. In a letter to the State Department that same day, Masefield added that although Great Britain realized that the CAB did not have the power to fix rates, some action by the United States government would be necessary to control Pan Am. Great Britain stated that Pan Am must maintain a $375 rate in order to be permitted to operate more than two weekly flights.

These were harsh measures between friends and allies, but Pan Am’s rate-cutting put the British in a difficult position. The day after Masefield’s letter, Morgan told Trippe and Smith of AOA that the United States government recognized that airlines could operate into Britain only under the conditions prescribed by the British government. Although the United States disagreed with the control of frequencies, the fixing of rates, and the severe limitations on fifth freedom rights that the British proposed, the State Department felt that it had no option but

111 John C. Cooper, Pan Am International Vice-President, Pan Am Press Statement (Dec. 3, 1945) (on file with McGill University, Montreal, John C. Cooper Papers 543).
112 Letter from L. Welch Pogue, CAB Chairman, to John T. Trippe, Pan Am Chief Executive Officer (Nov. 29, 1945) (on file with McGill University, Montreal, John C. Cooper Papers 542).
113 Telegram from the U.S. Embassy in London to the U.S. Department of State (Nov. 24, 1945) (on file with the NA, Std, 711.4127/11-2445).
114 Letter from Peter Masefield, British Civil Air Attaché, to Stokely Morgan (Nov. 24, 1945) (on file with NA, Std, 811.79641/11-2445).
to accept Britain's conditions pending the conclusion of a formal bilateral agreement. Compliance would offer more long-term benefits to United States airlines than any short-term gains that would result from the imposition of United States dominance. Smith was prepared to accept this. Trippe, however, was determined to find an alternative. In a conversation the next day with Morgan, Trippe remarked that the present policy was actually a tacit consent for United States carriers to enter into rate fixing and other restrictive arrangements with the British. In his opinion, the United States should suspend operations on British-approved rates and fly only the two services permitted by the 1937 agreement, i.e., let only Pan Am fly. Morgan was opposed to this because it would mean that the United States had actively helped to restrict aviation and thereby decreased aviation service to the public. Adoption of the State Department plan would mean that Great Britain, not the United States, would be responsible for restricting aviation. Morgan was also fairly certain that Great Britain would relent on the frequency issue if services were operated only at agreed upon rates. Trippe disagreed and stressed the importance of avoiding a position in which the United States would be permanently tied to governmental rate fixing.

Because the loan issue was pending in Congress, the controversy over the Pan Am rate question occurred at a critical time. Due to the extensive financial and material wartime aid to Great Britain, there was a strong feeling in the United States that Great Britain should now stand on its own two feet. Matters threatened to become stormy. W. Lee O'Daniel, Senator for Texas, in his capacity as member of the Senate Committee on Commerce, suggested that the United States should condition the loan to

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115 Id.
116 Memorandum from Stokely Morgan to Secretary of State (Nov. 25, 1945) (on file with NA, StD, 811.79641/11-2545).
117 Memorandum from Stokely Morgan to the Secretary of State (Nov. 26, 1945) (on file with the NA, StD, 811.79641/11-2645).
Great Britain on the conclusion of a satisfactory civil air agreement. His was not the only voice heard in this respect. The State Department's final decision was to stick to its earlier position: discussions of the loan and aviation issues would remain separate after all, although the British would not be informed of this decision. On the contrary, Assistant Secretary of State Dean Acheson used the loan issue on several occasions to pressure Britain to enter into bilateral talks on aviation.

Masefield did not succeed in monitoring these developments closely enough to become aware of the United States decision to separate loan and aviation issues. London therefore had little real knowledge of events in the American camp and relied instead upon what the Americans said, which was misleading. Indeed, on November 15, 1945, Secretary James Byrnes, while talking to Clement Attlee during the latter's first visit to Washington in his capacity as Prime Minister, stressed the need for a productive conference on civil aviation in the near future because of the unsettled state of bilateral civil aviation. Secretary Byrnes noted Trippe's efforts to produce a Senate rejection of the loan agreement with Britain. Byrnes suggested that a conference be held in either Washington or Bermuda immediately after the ongoing telecommunications conference.

Troubled, the British backed down somewhat on fares. To soften public opinion in the United States, Great Britain was eager to make a gesture regarding the rate issue and indicated that it might be prepared to allow Pan Am to introduce its rate of $275 (as compared to $375 by BOAC) until the conclusion of a bilateral conference on aviation. Trippe, however, was resolved to show that Pan Am had been forced to maintain high fares by the British

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118 Letter from Senator W. Lee O'Daniel, Member of Senate Committee on Commerce, to the Secretary of State (Dec. 19, 1945) (on file with the NA, StD, 811.79641/12-1945).

and sought public outcry condemning British actions. In general, Trippe preferred frequency control to rate control and had by this time reached an informal agreement including only frequency controls with BOAC.\textsuperscript{110} He challenged Great Britain by repeating Pan Am’s intention to reduce transatlantic fares to $275,\textsuperscript{121} and stepped up Pan Am’s advertising campaign explaining why air fares could not be lowered.

In response, the Foreign Office issued a formal memorandum in which Great Britain stated that, as of December 10, 1945, Pan Am and American Overseas Airlines would be allowed to operate up to fourteen services per week to Britain (six additional weekly flights) at a fixed rate of $375. Rates were to remain at this price until IATA recommended another rate. The permit was temporary and would remain in force only until a permanent Anglo-American bilateral agreement was concluded. It allowed for third and fourth freedom traffic only. The British message was clear: carriers who dodged the $375 fare would have their permits withdrawn.\textsuperscript{122} Pan Am was effectively forced to conform to the British rate.\textsuperscript{123}

Continued pressure from Acheson now paid off. On January 3, 1946, Lord Halifax, the British Ambassador to Washington, told Acheson that London had agreed to convene a conference on the aviation issue in Bermuda on short notice.\textsuperscript{124} That same day, Livingston Satterwaite, the United States civil air attaché in London, had a conversation with Hildred. British anxiety about the loan, shortly to be debated in Congress, was revealed by Hil-

\textsuperscript{110} Telegram from the U.S. Embassy in London to the U.S. Department of State (Dec. 1, 1945) (on file with the NA, StD, 711.4127/12-145).
\textsuperscript{111} Telegram from U.S. Embassy in London to U.S. Department of State (Dec. 3, 1945) (on file with the NA, StD, 811.79641/12-345).
\textsuperscript{122} Memorandum Peter Masefield, British Civil Air Attaché, to the U.S. Department of State (Dec. 10, 1945) (on file with the NA, StD, 811.79641/12-1045).
\textsuperscript{123} Telegram from U.S. Embassy in London to U.S. Department of State (Dec. 7, 1945) (on file with NA, StD, 711.4127/12-745).
\textsuperscript{124} Memorandum by Dean Acheson, Acting U.S. Secretary of State, of conversation between Lord Halifax and himself. (Jan. 3, 1946) (on file with NA, StD, 811.79641/1-346).
dred's indication that Great Britain would no longer press for frequency control: "[t]he key note to the British conception of order in the air is not frequencies escalation . . . but uniform fares based on the costs of the most effective operator." 125 Fifth freedom remained an issue to be resolved, although Hildred suggested that Great Britain was willing to make some allowance for such traffic in the interest of the travelling public. On the question of rates, the British now began to interpret IATA's role as a true supra-national organization. This change in position was revealed by Hildred's insistence that Pan Am attend and conform to rates set at an IATA conference to convene in Montreal on January 8, 1946.

Preparations for a conference finally began. The United States ambassador in London, John Winant, wrote in the months prior to the conference that there had been an increasing willingness in British government circles to agree to the United States position of liberalism in the air, especially since the United States had been successful in concluding a number of liberally inspired bilateral agreements in 1945 that provided generous fifth freedom rights. 126 The fares crisis had had a profound negative effect by hardening the positions of those in Great Britain who supported restrictions. Pan Am's actions had seemed to indicate that freedom of rates would push BOAC, and possibly AOA and TWA, from transatlantic routes by allowing the undercutting of prices. Predatory tactics such as rate-cutting formed the basis of British fears. 127

Although differences still existed, the gap between the British and American positions was narrowing. The CAB did not raise objections to the participation of United States airlines in the IATA conference on rates until very late in the day. The CAB also deferred consideration of

125 Telegram from U.S. Embassy in London to U.S. Department of State (Dec. 3, 1945) (on file with NA, StD, 711.4127/12-345).
127 Id.
IATA rate control until further notice. The CAB reversed its decision, however, at the very last minute, after the United States delegates had already arrived in Montreal. The CAB indicated at this point that it preferred to complete a bilateral agreement with Britain at Bermuda prior to a general international approach through IATA.

V. BERMUDA ANTICLIMAX

If the British were in the dark about what was going on inside the American camp, the United States, for its part, did not fully appreciate the importance which the loan issue had assumed for the British. On January 3, 1946, Sir Henry Self, the British representative to the Wartime Combined Production and Resources Board in Washington and one of the senior negotiators of the Loan Agreement, was appointed to lead the British delegation at Bermuda. The link between the loan and Bermuda was also stressed in Foreign Secretary Ernest Bevin's telegram of appointment to Self. Nevertheless, Great Britain intended to go no further than the exploration of a possible basis for a bilateral agreement which was then to be negotiated on the ministerial plane, especially since Britain's bargaining position in the upcoming talks was not a strong one. Hildred summed up the main topics likely to be discussed as follows: 1) control of frequencies and the question of possible escalation; 2) rate-control; and 3) fifth freedom. As a fall-back position on frequency control, Great Britain was willing to accept an escalator clause which would allow more flights to efficient operators that could show through traffic statistics and load factors that they were generating extra traffic. IATA was to play a crucial role in setting recommendations for transatlantic fares. The British found fifth freedom acceptable in principle provided that it be on a reduced frequency basis, i.e., less flights/seats for destinations beyond the initial disembarkation point. Primary frequencies, in this case United States-United Kingdom traffic, must not be allowed to increase as a result of fifth freedom. The overriding impor-
tance of securing the United States loan made itself felt even at this point: the British delegation was instructed to ultimately agree if the United States insisted on untram-melled fifth freedom rights. The only condition that the British would insist on would be a price difference for fifth freedom tickets from London, which would make United States flights more expensive than British flights to Europe. As long as the United States agreed to a fare control, the British would agree to almost anything. Hildred wrote: "Our discussions will take place under the implied threat that unless the United States secure what they want, there will be no approval for the loan."

This was the situation when the two delegations first met in Bermuda on January 16, 1946. In light of British anxiety over the loan, it was hardly surprising that the British adopted a low profile in the discussions and left it to the United States to come forward with initiatives. After all the previous maneuvering, a somewhat strange situation now developed. Having decided to keep civil aviation apart from the general scope of Anglo-American economic relations, thus willingly forsaking direct use of the loan as a bargaining chip, the United States showed themselves to be in a very benign mood. They had little idea how powerful their position was, even without actual resort to putting the loan in the balance. Their aim was to quickly reach an agreement conceding freedom of frequencies and some provision for fifth freedom traffic. Because the British had decided beforehand to agree to almost anything the United States might propose once the matter of fares was resolved satisfactorily, the resulting negotiations were lukewarm.

Three days into the conference, George Baker, Director of the Office of Transport and Communications Policy at

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128 Letter from Sir William Hildred, Director-General of Civil Aviation at the MCA, to Sir Alan Barlow, Treasury (Jan. 9, 1946) (on file with the PRO, FO, 371, 54,495).

129 Interview by the author with L. Welch Pogue, CAB Chairman (Feb. 10, 1989).
the State Department and the United States chief delegate, telegraphed William Clayton, Assistant Secretary of State for Economic Affairs, that the talks were progressing according to expectations. The British appeared willing to surrender frequencies control on third and fourth freedom traffic in order to extract an agreement on rate control. The fifth freedom issue could probably also be settled satisfactorily along the lines of the recent United States-French draft bilateral agreement. The remaining issues were how far the CAB would be willing to go on rate control and whether the CAB would accept IATA as a fare-setting body.130 In private conversations with British delegates, Baker expressed his willingness to subscribe to the doctrine that the ideal traffic division among contracting parties would be to strike an equilibrium between traffic offering and traffic capacity. Baker also agreed that long-haul services (third and fourth freedom ultimate destination traffic) should be designated a primary objective of the agreement. Capacity should then be divided on a 50/50 basis between the parties to the agreement.131

At the Ministry of Civil Aviation in London, Deputy Secretary Sir George Cribbett advised that now was the time to introduce the principle of escalation in order to permit North Atlantic traffic to find its own level through future development.132 Determination of capacity could thus be arrived at on a trial and error basis.133

On January 23rd, after a week of delicately probing the

130 Telegram from George Baker, Director of the Office of Transport and Communication Policy, U.S. Department of State, to William Clayton, Assistant U.S. Secretary of State (Jan. 19, 1946) (on file with the NA, StD, 841.796/1-1946).

131 Secret Telegram from Henry Self, British Representative to the Wartime Combined Production and Resources Board, to Foreign Office (Jan. 20, 1946) (on file with the PRO, FO, 371, 55,496).


133 Id. This directly led to the ex-post facto review of capacity. The point is not without importance, as it has been supposed that the ex-post facto division of capacity represented the liberal spirit of Bermuda. However, from Cribbett's telegram, it becomes clear the reason for ex-post facto was not liberalism, but the down-to-earth desire for an orderly development of civil aviation. Hence, it was
British position, the United States suggested that they would be willing to exchange rate control for the abandonment of control on third and fourth freedom frequencies. The possibility of lifting restrictions on fifth freedom was also raised. These proposals were welcomed by the British delegates, most strongly by Henry Self. The United States proposals were well within the limits imposed by London prior to the conference and the loan issue had never even been introduced. A year later Baker remembered:

As one of the delegates to Bermuda, I know the question of the loan was constantly in our minds, not as a tool which we could or would use in bargaining, but as a tremendous incentive toward the completion of some adequate agreement since we all knew that failure to get an agreement might jeopardize the accomplishment of the loan which the administration which we represented so earnestly desired to put through.134

Discussion then centered on fifth freedom rights. The final agreement granted fifth freedom rights to the United States on all routes to points beyond Britain which were presently desired or in operation.135

The issue of change of gauge remained to be settled. Change of gauge referred to the right to transfer passengers with a final destination beyond Britain to a smaller aircraft in London. This was of considerable interest to the United States because the use of smaller planes after the majority of passengers were unloaded in the British capital would greatly benefit the economic efficiency of United States carriers flying to Europe and the Middle East. Here, Great Britain again showed its willingness to

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134 G.P. Baker, The Bermuda Plan as the Basis for A Multilateral Agreement, Lecture Delivered at McGill University, Montreal, Canada (Apr. 18, 1947).

135 The question of rate-control was settled in Annex II of the Bermuda Agreement of February 11, 1946. The issue of fifth freedom was dealt with in clauses 5 and 6 of the Final Act of the Civil Aviation Conference held at Bermuda, and Annex III(b) of the Bermuda Agreement.
accommodate the United States agenda. The two delegations reached agreement in principle on changes of aircraft. Britain stipulated, however, that prior permission for change of gauge must be obtained but assured the United States that permission would not be unreasonably withheld. The right to a change of gauge would also be limited to the necessities of airline economy. In addition, the agreement specifically provided that fifth freedom operations could only take place as a continuation of trunk services and that no separate schedules for onward flights would be permitted. The smaller aircraft would have to wait for the trunk service to come in.\textsuperscript{156} Although the United States delegation was not happy with restrictions on change of gauge because it imposed foreign control on United States commercial airline operations, the agreement which had been reached was left standing. At the explicit request of the United States delegation, the principles agreed upon were memorialized in a formal agreement between the two countries.\textsuperscript{137}

Despite the fact that it provided Great Britain with substantial safeguards against overpowering United States competition, the Bermuda Agreement was not welcomed in London. The British Cabinet was unanimous in its dislike of the Bermuda terms. The main stumbling block was the United States' insistence that fifth freedom rights must be combined with the right to change of gauge. Nevertheless, the British Cabinet's strong feeling that the United States must be obliged in order to get the loan they sought weighed heavily on the question of whether to sign the agreement.\textsuperscript{158} The sorry state of Great Britain's economy proved decisive. After a few days of deliberations, the Cabinet decided to shelve its reservations in order to secure the loan and gave Henry Self official app-

\textsuperscript{156} Annex to the Bermuda Agreement, art. 5.

\textsuperscript{157} Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, February 11, 1946, 60 Stat. 1499, T.I.A.S. 1507.

\textsuperscript{158} Summary of Cabinet Discussions on the Draft of the Bermuda Agreement (Feb. 4, 1946) (on file with the PRO, FO, 371, 54,503).
In contrast to the British reaction, the United States delegates returned from Bermuda feeling satisfied. Pogue spoke of the agreement before the Senate Committee on Commerce as:

bridging the gap between the old pre-war restrictionist attitude toward the development of international air transportation and the new concept of international air transportation as being an instrument of transportation designed to promote trade and travel on a wide basis and to permit international air carriers, including our own, to have a fair opportunity of developing the great potential business which we believe to be available.140

Neither party was prepared for the bombshell that followed. While the two delegations were engaged in discussions, Pan Am had been preparing a last-ditch battle to prevent its fall from grace. With the “Senator from Pan Am,” Owen Brewster, leading the attack, the Committee on Commerce rejected the Chicago Convention, the International Air Transport Agreement, and the Bermuda Agreement on constitutional and legal grounds.141 The resolution adopted by the Committee stated:

1. That no agreements of this character should be made except in the form of treaties to be considered by the Senate; that any Executive agreement which purports to grant to any foreign country the right to have an airline or airlines nominated by it to operate to or from United States territory without public hearing in advance and the determination of the public interest by the Civil Aeronautics Board called for under section 402 of the Civil Aeronautics Act, is inconsistent not only with the Constitution but

139 Extract from Cabinet Conclusions on the Bermuda Agreement (Feb. 7, 1946) (on file with PRO, FO, 371, 54.503).
140 Civil Aviation Agreements, 1946: Hearings on S. 1814 Before the Senate Comm. on Commerce, 79th Cong., 2d Sess. 44 (1946) (statement of L. Welch Pogue, Chairman of the CAB). Baker was also quite pleased with the results, though neither he nor Pogue expected Bermuda to form a lasting agreement. Videotape of George Baker's lecture at the Massachusetts Institute of Technology, Cambridge, Mass. (Sept. 20, 1979); Interview by the author with L. Welch Pogue (Feb. 10, 1989).
with the letter and spirit of said act, and therefore illegal and void; and that any and all proceedings thereunder should be forthwith terminated by appropriate notice to the Governments concerned.

2. That, notwithstanding the International Air Transport Agreement and the bilateral agreements above mentioned, this Government is not bound by such agreements so long as the same have not been ratified as treaties, but the Civil Aeronautics Board and the President continue to have the duty and the obligation of passing, without prejudgment, upon the question whether any proposed operation by a foreign-flag air line is in the public interest as defined in the Civil Aeronautics Act.\textsuperscript{142}

A time-bomb thus lay under both the Chicago Convention and the Bermuda Agreement. The Committee's rejection created a grave situation and caused much concern. At the White House, the President's Secretary, Matthew J. Connelly, discovered "that the resolution was drafted by representatives of the Pan American Airways, with a view to further clouding the issues relative to British-American agreements, relating to civil aviation."\textsuperscript{145} The adoption of the resolution by the full Senate had to be prevented because it would not only be a blow to the Truman Administration, but would also seriously jeopardize United States international civil aviation policy. The United States would be forced to withdraw from both the Chicago Convention and the Bermuda Agreement, causing a major setback to international civil aviation. Consequently, pressure was applied to prevent the Senate adoption of the resolution. In a special message to the Senate, Truman urged adoption of the Chicago Convention. The President stated that a number of countries were withholding ratification of the Convention because the United States ratification had been pending in Congress since March 12, 1945, when Roosevelt had asked for

\textsuperscript{142} Id.

\textsuperscript{145} Memorandum from Matthew J. Connelly, Presidential Secretary, to Harry Truman (Apr. 22, 1946) (on file with the HST-LIB, OF 249, Off. agrt. folder).
immediate consideration and ratification.\textsuperscript{144}

Brewster's clout in Congress, however, was not easily overcome. Brewster attacked the very legality of executive agreements by questioning the President's constitutional powers to sign such agreements without consulting Congress. He also claimed that international civil aviation policy was not receiving proper attention at the State Department and pointed to the recent resignations of important figures in United States aviation diplomacy like Stokely Morgan and George Baker, which he interpreted as clear signs of dissatisfaction with present policy.\textsuperscript{145} The State Department issued a press statement in response to these criticisms on the morning of July 25, 1946 which implied that the United States would withdraw from the International Air Transport Agreement. Convening in executive session that same afternoon, the Senate adopted the Chicago Convention.\textsuperscript{146} Senate approval of Chicago also had the effect of lending legality to the Bermuda Agreement.

Bermuda did not, however, stamp out the basic differences in United States and British policy on international civil aviation. Acheson suggested that the United States and Britain should have further discussions in order to arrive at a general implementation of Bermuda which would then serve as a blueprint for other bilateral agreements.\textsuperscript{147} A United States delegation was sent to London to discuss the Bermuda principles and a joint protocol was arrived at on September 14th which stated that Bermuda was to form the basis for all future agreements on bilateral civil aviation issues.

\textsuperscript{144} Report of the hearing for the President (June 14, 1946) (on file with the HST-LIB, OF 249, Off. Agrt. folder).
\textsuperscript{145} Id.
\textsuperscript{146} 92 Cong. Rec. 8, 9945-72 (1946).
\textsuperscript{147} Letter from Dean Acheson, Acting Secretary of State, to Lord Inverchapel (Aug. 12, 1946) (on file with the HST-LIB, OF 249, Off. Agrt. folder).
VI. CONCLUSION

This article discusses the effects which differing British and United States approaches to international civil aviation had upon the final form of the Chicago Convention and the Bermuda-I Agreement, and thus on the shape of international civil air transport since World War II. At Chicago, a collision of British and United States interests produced a convention which addressed basic legal and technical issues, but avoided the key issue of contemporary international civil air transport: the primacy of politics as opposed to commercialism. The United States interest in open skies and free trade clashed with British ideas on the regulation of air transport and British interests in curbing airline losses.

By leaving these basic issues unsettled, Chicago necessitated major compromise. Because United States carriers were ready to commence transatlantic services, the United States had a strong incentive to hammer out an agreement with Great Britain. Additionally, Great Britain's position as the United States ally most likely to offer the largest market for transatlantic air travel would enable United States carriers to cash in on the headstart they enjoyed at the time. Great Britain, on the other hand, after seeing its proposal for fare regulation turned down by the United States at Chicago, embarked upon a policy aimed at curbing United States intrusion into European and Middle Eastern air travel markets in order to protect its own national carrier BOAC. For a time, the United States tried to overcome this resistance by tying aviation to the larger context of Anglo-American economic relations; in particular, the loan to Great Britain then under discussion. This policy was more successful than Washington realized. It severely limited Great Britain's ability to deny the United States the position in international air transport that they claimed and actually forced London to reconsider the British position altogether. Unknown to Great Britain, the link-up between the loan and international civil aviation issues was secretly abandoned by the
State Department in light of PanAm’s high-handed atti-
du e towards the question of fares. Unrestricted prices
were seen to run counter to the Administration’s inten-
tion that several United States airlines operate over the
Atlantic. The fare crisis revealed that unregulated competi-
tion might carry disadvantages for United States carriers
as well as the British carrier.

In the context of Great Britain’s anxiety over the United
States loan, London’s acceptance of liberal third and
fourth freedom rights at the subsequent Bermuda Confer-
ence was not surprising. Because of the difficulties of its
overextended economy, Great Britain had always been
primarily concerned with control of foreign airline subsi-
dies and the reduction of losses that would be suffered by
BOAC. British policy therefore focused on fares. If fares
could be controlled, the British reasoned, BOAC would
be able to compete with the United States carriers even if
it operated less efficiently. If freedom of fares was ac-
cepted, even under a system of frequency control, BOAC,
with its ramshackle fleet of converted bombers and exotic
flying boats, could not be competitive and would there-
fore continue to suffer heavy losses. These losses would
only be made worse by the need to match fares offered by
the American carriers.

The Pan Am fare crisis thus worked to Britain’s advan-
tage. It offered an additional justification to the position
that rate control should be traded for liberalization of
third and fourth freedom frequencies. Great Britain’s po-
sition that fifth freedom traffic must be limited in order to
protect BOAC against possible cut-throat competition
from PanAm on routes between London, Europe, and the
United States was also bolstered by the fare crisis.

Bermuda thus presented something of a victory for the
British, who managed to curtail United States competition
with BOAC across the Atlantic and in Europe. Great Brit-
ain’s economic plight was so severe, however, that had the
United States presented a clearer set of objectives at Ber-
muda and used the loan issue as leverage, Great Britain
would have likely accepted unlimited fifth freedom rights and demanded only a price difference. If this had occurred, international civil air transport after Bermuda would have developed in a dramatically different manner.