Journal of Air Law and Commerce

Volume 20 | Issue 3

1953

Judicial and Regulatory Decisions

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Recommended Citation
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JUDICIAL AND REGULATORY DECISIONS

THE SCOPE AND REGULATORY LIMITS OF EXECUTIVE AGREEMENTS UNDER THE CIVIL AERONAUTICS ACT OF 1938

There have been several areas in which disagreement between the executive and legislative branches of our government has almost precipitated a complete stoppage in the proper functioning of government in the area affected. Fortunately such an impasse has not been reached in that international aspect of aviation law which concerns itself with the proper metes and bounds of executive agreements concluded under the Civil Aeronautics Act of 1938. But it is not unthinkable that such an unwanted happening may occur in the future even though not now foreseeable. And thus, it seems logical to take another look at the statutes, doctrines, and precedents that appear controlling in the field. With these as a background, it may be possible to work toward a determination of the authority of the executive, and the line of demarcation—however wavering and indistinct it may seem at times—between the legislative and executive departments of our government, when it becomes advisable to conclude agreements under the authority of the Civil Aeronautics Act of 1938.

Section 802, Civil Aeronautics Act of 1938, provides:

"The Secretary of State shall advise the Authority of, and consult with the Authority concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and service."2

Section 1102, Civil Aeronautics Act of 1938, provides in part:

"In exercising and performing its powers and duties under this Act, the Authority shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . . ."4

Other sections of the Act require a "foreign air carrier" to obtain a permit from the Board before it may engage in "foreign air transportation,"5 and makes such permission by the Board subject to the approval of

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2 Reorganization Plan IV, 54 Stat. 1235, provides that where the word "Authority" appears in the Civil Aeronautics Act above, it shall be read "Civil Aeronautics Board."
4 See Footnote 2 above with respect to the use of "Authority" in this section of Civil Aeronautics Act of 1938.
5 CAA, sec. 402; 52 Stat. 991, 49 U.S.C. 482; "Foreign air carrier" is defined as "... any person, not a citizen of the United States, who undertakes, whether directly or indirectly, or by a lease or any other arrangement, to engage in foreign air transportation." (CAA 1938 sec. 1 (20), 52 Stat. 977 (20), 49 U.S.C. 401 (20)); and "Foreign air transportation" is defined as "... the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively . . . a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." (CAA 1938, sec. 1 (21) (c); 52 Stat. 977 (21) (c), 49 U.S.C. 401 (21) (c)).
the President. The Act requires a foreign air carrier to file with the Board its tariffs showing all rates, fares, and charges for air transportation furnished by it, provides for a foreign rate study, and for procedures for continuation and termination of foreign mail contracts.

In addition to this, the Air Commerce Act of 1926, as amended, provides, in sec. 6(c) thereof:

"If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Civil Aeronautics Authority [Board] may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States. No foreign aircraft shall engage in air commerce otherwise than between any state, territory, or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country."

This section of the Air Commerce Act of 1926 was considered sufficient authority to permit negotiations with the British, Canadian, and Irish authorities that ultimately led to the establishment of transatlantic flight schedules and the subsequent issuing of permits to Pan-American Airways and Imperial Airways in 1927. This was accomplished by executive agreements. It is not illogical to believe that the drafters of the 1938 Act were fully aware of the understandings reached with the British, Canadian, and Irish authorities for the establishment of those transatlantic services; and that the drafters of the Act assumed that there might be further executive agreements dealing with flights in international air transportation.

Typical Air Transport Agreements

There have been forty-seven air transport agreements entered into by the United States subsequent to enactment of the 1938 act. Typical of these are the Bermuda agreement, the Paris agreement, and the bilateral agreement with Canada.

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6 CAA, 1938, sec. 801, 52 Stat. 1014, 49 U.S.C. 601, provides in part: "... or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President."


8 CAA, 1938, sec. 404(c), 52 Stat. 993 (c), 49 U.S.C. 484(c).

9 CAA, 1938, sec. 405(b), 52 Stat. 994(b), 49 U.S.C. 485(b).

10 49 U.S.S. 176(c), as amended by sec. 1107(i) (1) and sec. 1107(i) (5) of the Civil Aeronautics Act, 1938. See Note 2, supra for substitution of "Board" for "Authority."


12 See compilation of Air Transport Services Agreements dated March 1963 prepared by the Aviation Division, Department of State.

13 Air Services Agreement between the United States of America and the United Kingdom of Great Britain and Northern Ireland, effective February 11, 1946; TIAS 1507.


The Bermuda agreement, in its more important points, grants the use of certain specified routes and facilities in the country of each contracting party to the other contracting party, provides for requirements of operations according to the laws and regulations of the contracting state, and outlines procedures to be followed in the event disputes arise between the contracting states or in the event a modification is desired by either state. It is significant to note that existing operating rights granted to either state or a carrier of either state by the other state are not abrogated and that any future multilateral agreement to which both contracting states may be parties will serve to modify the bilateral one so that the provisions of the latter will conform to those of the former. The freedom to embark or disembark international traffic destined for or coming from countries other than the contracting ones is circumscribed by "general principles of orderly development" and made subject to the general principle that capacity should be related: (a) to traffic requirements between the country of origin and the countries of destination; (b) to the requirements of through airline operation; and (c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

The provisions of the Paris agreement bear a striking resemblance to those contained in the Bermuda agreement; and well they might since the signing of the former followed the signing of the latter by only a little over a month. It is probable that preliminary drafts of the two agreements were being prepared at nearly the same time. There is, however, one important feature appears in the Paris agreement that does not seem to be among the provisions of the Bermuda agreement. Article VII of the former grants to all air carriers for international air services of each contracting party and to all operational flights incidental to such services, "(1) the right to fly across [the territory of each contracting state] without landing; (2) the right to land in [the territory of each contracting state] for non-traffic purposes." There is a significant change wrought by a supplemental agreement entered into between the United States and France. Article X of the Paris agreement was amended to provide for appointment of three arbitrators within ninety days of the date of delivery of a diplomatic note at each of the places specified therein of all the airports, together with ancillary facilities and rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail . . . ."

16 Supra, note 13, Art. I and Annex I and III, "... the use on the said routes at each of the places specified therein of all the airports ... , together with ancillary facilities and rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail . . . ."

17 Supra, note 13, Arts. 2 and 5.

18 Ibid., Art. 3.

19 Ibid., Art. 9.

20 Ibid., Art. 8.

21 Ibid., Art. 10 which also states, "Except as may be modified by the present agreement, the general principles of the air navigation arrangement between the two Contracting Parties, which was effected by an Exchange of Notes dated March 28, and April 5, 1935, shall continue in force insofar as they are applicable to scheduled international air services, until otherwise agreed by the Contracting Parties."

22 Ibid., Art. 11.

23 Ibid., p. 19.

24 Ibid., p. 19.

25 Supra, note 14, p. 6.

26 Air Transport Services Agreement between the United States of America and France Amending Article X of Agreement of March 27, 1946, as amended, entered into force March 19, 1951; TIAS 2257.
by either contracting state to the other, requesting arbitration of a dispute between the two. The arbitrators are empowered to render an "advisory report" and the contracting states agree to "... use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report." With the further exception of the fact that the Paris agreement mentions neither the effect of a future multilateral agreement nor the efficacy of preceding agreements between the states the remainder of the agreement contains provisions that, in substance, achieve the same results as those achieved in the Bermuda agreement.

The major provisions of the bilateral agreement with Canada contain most of the best features of both the Bermuda and Paris agreements. A new method of definition and succinct clarification of a portion of the provisions of the agreement is used by making reference to definitions contained in the Convention on International Civil Aviation signed at Chicago December 7, 1944 to which both contracting states are parties. There are provisions requiring conformation of the bilateral agreement to any future multilateral agreement to which both contracting states are parties and protecting the efficacy of "existing right and privileges relating to air transport services" granted previously by either contracting state to an air line of the other. Somewhat incongruously, however, the agreement provides for the superceding of a previous agreement between the two states "relating to civil air transport effected by an Exchange of Notes of February 17, 1945" as amended by "an Exchange of Notes of April 10 and 12, 1947." This is contained in Article 14 of the agreement. Not so strangely perhaps, the provision relating to arbitration of disputes, while similar to that contained in the amendment to the Paris agreement, is not as complete.

Some Congressmen Evidence Opposition

Possibly as a result of the fact that some of the negotiations for these agreements or others similar to them were conducted in secrecy, some

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27 Ibid., p. 4.
28 Ante, p. 3.
29 Supra, note 15.
30 E.g., Arts. 1 and 9 (in the latter of which it is provided only, however, that the agreement shall be registered with ICAO) and Art. 10 which utilizes ICAO as the agency through which notification be made of termination of the agreement by either contracting state to the other.
31 Supra, note 15, Art. 12.
32 Ibid., Art. 9.
34 TIAS 1619; 61 Stat. 2869.
35 Supra, note 26.
36 Supra note 15, Art. 13 which provides for the appointment of arbitrators within ninety days of the date of delivery by either party to the other of a note requesting arbitration of a dispute. The provision, however, does not contain any method for the appointment of arbitrators in the event the contracting states fail or refuse to perform their function in this respect, i.e., each contracting state to have one arbitrator and the third to be agreed upon by the two originally named. It provides only for the appointment of the third—in the event of disagreement by the two original arbitrators—by the President of the Council of ICAO. The contracting states do agree, however, to "... use their best efforts under the powers available to them to put into effect the opinion expressed in any ... advisory report [reached by the arbitrators]".
37 Supra, note 12.
members of Congress have evidenced a desire to prohibit further executive agreements of this type.\textsuperscript{88}

For these reasons, it seems wise to carefully re-examine the scope and legal limits of executive agreements entered into under the authority of the Civil Aeronautics Act of 1938.

First, certain other provisions of that Act should be considered in conjunction with the negotiation of executive agreements. In the declaration of policy in section 2 of the 1938 Act, the Board is enjoined to consider, among other things, (as being in accord with public convenience and necessity and in the public interest) "The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States. . ." (Italics supplied.) It would seem paradoxical indeed to attempt to encourage the development of foreign air commerce without permitting the necessary authority to be vested in the executive, i.e., the Secretary of State, to allow it to attempt to negotiate with foreign governments to consummate such development.

There is still another provision of the 1938 Act which appears to contemplate negotiations between the United States and governments for the development of international air transportation. It is section 301\textsuperscript{39} and it provides:

"The Administrator is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad, and to areas, and other navigation facilities. . ." (Italics supplied.)

It seems obvious that the drafters of the 1938 Act anticipated that some action might be necessary to properly develop foreign air commerce. The language used appears to carry the implication that when negotiations to further foreign air commerce became wise or necessary they would be undertaken by the appropriate agency of the executive.\textsuperscript{40}

Since the term "executive agreement" covers documents of widely varying character that may not be submitted to the Senate for advice and consent as to ratification for many different reasons, use of the term is frequently confusing.

Agreements made by the executive and not submitted to the Senate have been classified as (1) agreements made pursuant to authority contained in acts of Congress, and (2) agreements entered into purely as executive acts

\textsuperscript{88} Resolution from the Committee on Commerce, Appendix A, Senate Report No. 482, 81st Congress; S. 1814, 79th Congress; S. 11, 80th Congress; S. 12, 81st Congress. The Senate bills were identical ones to amend the Civil Aeronautics Act of 1938, as amended, to provide "No agreement with any foreign government restricting the right of the United States or its nationals to engage in air transport operations, or generally granting to any foreign government or its nationals or to any airline representing any foreign government any right or rights to operate in air transportation or air commerce other than as a foreign air carrier in accordance with the provisions of the Civil Aeronautics Act of 1938, or respecting the formation of or the participation of the United States in any international organization for regulation or control of international aviation or any phases thereof, shall be made or entered into by or on behalf of the Government of the United States except by treaty."


\textsuperscript{40} Article by Stephen Latchford, Adviser on Air Law, Aviation Division, Department of State, titled "Concerning Acceptance of Aviation Agreements as Executive Agreements," U.S. Government Printing Office, Washington, 1945.
without legislative authorization.41 One writer says, "In addition to the authority of the President under the Constitution to negotiate and sign treaties with foreign governments and by and with the advice and consent of the Senate to ratify them, the executive is empowered without legislative sanction to conclude with foreign governments certain classes of agreements which are not classified as treaties in the sense in which that term is used in the Constitution. These agreements are concluded by virtue of the authority inherent in the chief executive under the Constitution and are confined to subject matter within the purview of his constitutional authority."42

In view of the specific language in the Civil Aeronautics Act of 1938, it is submitted that the executive agreements to be examined in this paper fall within the classification of those made pursuant to authority contained in acts of Congress.

Doctrine of "Inherent Powers"

It is significant, however, to note at this juncture that the executive has, according to many authorities, the inherent power to enter into executive agreements completely exclusive of any prior congressional authorization or subsequent congressional ratification. This significant fact should be borne in mind throughout any discussion of the scope and legal limits of executive agreements under the Civil Aeronautics Act.

In the present world atmosphere it would seem gratuitous to repeat that the United States cannot be left at the untender mercy of an obstructionist minority that conceives its interests to be antithetical to that of the remainder of the nation. The United States must remain unshackled in order to shoulder its share of leadership in the world community. Concomitantly, its executive officers—charged with the task of negotiating with foreign governments—must be permitted a reasonable amount of freedom and flexibility responsive, of course, to the will of the majority in executing, modifying and abrogating international agreements.43 "The practices of successive administrations, supported by the Congress and by numerous court decisions, have for all practical purposes made the Congressional-Executive agreement authorized or sanctioned by both houses of Congress interchangeable with the agreements ratified under the treaty clause by two-thirds of the Senate.44 Presumably also the scope of these agreements is similar to that of treaties ratified by two-thirds of the Senate.

Actually there is little difference between an executive agreement and

41V. Hackworth, Digest of International Law 390 (1940-44).
42Ibid, page 402, quoting Under Secretary of State, Joseph Grew. This authority, it is submitted, stems from the fact that the chief executive is the "... sole organ of the nation in its external relations, and its sole representative with foreign nations...." (See statement of John Marshall while a member of the House of Representatives, 10 Annals of Congress 613 (1800)); from Art. 2, sec. 1 of the Constitution which says "The executive power shall be vested in a President of the United States of America"; from Art. 2, sec. 2, which says "The President shall be Commander in Chief of the Army and Navy of the United States...."; and from Art 2, sec. 3, which says "... he shall take care that the laws be faithfully executed,..." and "... he shall receive Ambassadors and other public ministers....".
43On this subject see generally Dunn, Peaceful Change (1937); Brierly, The Law of Nations, 72-77 (4th ed. 1949); and New Fabian Research Bureau, Re- vision of Treaties (1932).
44Treaties and Congressional-Executive or Presidential Agreements; Interchangeable Instruments of National Policy; I, 54 Yale Law Journal 181, 187.
a treaty.' The Harvard Research in International Law\textsuperscript{45} succinctly states, "The distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance\textsuperscript{46} and that "... there is no rule of international law and no definite usage which determines what shall be the essential constituent elements of a 'treaty' or which lays down any tests or criteria by which a treaty may be distinguished from other international instruments such as conventions, protocols, arrangements, declarations, etc."\textsuperscript{47}

In fact, an executive agreement has been defined as an agreement which is made by the President on his own authority and which can be carried out by this country without action on the part of the legislative branch of the Government.\textsuperscript{48} The effectiveness of executive agreements concluded under the chief executive's diplomatic and war powers has been acknowledged by the Supreme Court in the Pink and Belmont cases.\textsuperscript{49}

Examples of Congressional-Executive type agreements may be found in the agreements entered into under the Trade Agreements Act of 1934 and Postal Treaties under the authority of the provisions of postal laws. The latter authorized the President to conclude such treaties with foreign governments.

Reliance on Constitutional Provision

Development of the first Congressional-Executive agreements occurred under a Constitutional provision that, at first blush, appears to be applicable solely to domestic problems. Article 1, Section 8 authorizes Congress "... (7) to establish post offices and post roads." In 1792, Congress, under the authority of this Constitutional provision, enacted legislation empowering the Postmaster General to enter into agreements with foreign powers for reciprocal mail delivery.\textsuperscript{50} Numerous similar statutes have been enacted in subsequent years and more than 300 postal conventions have been concluded under their authority.\textsuperscript{51} Judicial tribunals have held these conventions to be "part of the law of the land"; similarly, treaties are specifically stated to be such by Article VI of the Constitution.

In the Curtiss-Wright case,\textsuperscript{52} Congress enacted a joint resolution\textsuperscript{54} providing, in substance, that if the President found that the prohibition of the sale of arms and munitions to countries then engaged in armed conflict in the Chaco might contribute to the reestablishment of peace in these countries he could make a proclamation to the effect that it would be unlawful

\textsuperscript{46} Ibid., at 697.
\textsuperscript{47} Ibid., at 687.
\textsuperscript{48} Hearings before the Committee on Commerce, United States Senate, 79th Congress, on S. 1814, p. 139.
\textsuperscript{50} 1 Stat. 236 (1792).
\textsuperscript{51} McClure, International Executive Agreements, Columbia University Press, p. 6. Apparently only three of these postal conventions have been submitted to the Senate.
\textsuperscript{54} 48 Stat. 811, c. 365.
to sell arms and munitions to those countries. Section 2 of the joint resolution provided a penal sanction for the violation of the provisions of the resolution. Pursuant to the resolution, the President on May 28, 1934, issued a proclamation finding that the prohibition of sale of the mentioned articles to the Chacoan countries would contribute to peace among them, admonishing all to abstain from violating the provisions of the joint resolution, and warning that violation would be rigorously prosecuted. Curtiss-Wright Corporation was indicted for conspiring to sell fifteen machine guns to one of the Chacoan countries in violation of the joint resolution and the proclamation. Curtiss-Wright contended, among other things, that the joint resolution effected an invalid delegation of legislative power to the executive. The Supreme Court rejected this view and significantly held that the scope of the delegable Congressional powers in the foreign relations field exceeds that in the domestic one.

A careful consideration of the extent to which Congressional-Executive agreements have become interchangeable with treaties completely refutes any suggestion that the executive agreement is confined to matters that are minor or unimportant in character. In fact, since the early part of the nineteenth century executive agreements have been used more and more. The trend has been to use them in the place of treaties wherever possible. And, most significantly, executive agreements have been used interchangeably with treaties as a means of concluding negotiations with foreign nations for the settlement of commercial and industrial problems from the very beginning of the Republic. Excepting only the Pan-American Convention of 1928 international air transportation matters have been con-

55 48 Stat. 1744.
57 "The two classes of powers [those in respect of foreign or external affairs and those in respect of domestic or internal affairs] are different both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs...”; Ibid. at 315-6. "...[legislative] participation in the exercise of the power [over external affairs] is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation...”., Ibid. at 319. “It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations...”.; Ibid. at 319-20.
58 For an elaboration of contra doctrines see Borchard, Against the Proposed Amendment as to the Ratification of Treaties (1944) 30 A.B.A.J. 608, 609, n. 12; Borchard, Shall the Executive Agreement Replace the Treaty? (1944), 53 Yale Law Journal 664; and Borchard, The Two-thirds Rule as to Treaties: A Change Opposed (1945) 3 Econ. Council Papers No. 8, p. 7.
59 McClure, International Executive Agreements, Columbia University Press, p. 4 “During the first fifty years of government under the Constitution the President is known to have entered into some 27 international acts without invoking the consent of the Senate, while 60 became law as treaties; for the second half century the figures appear to be 238 executive agreements and 215 treaties; and for the third similar period, 917 executive agreements and 524 treaties.”
60 In 1939 Asst. Secretary of State Sayre compiled a list of 81 executive agreements dealing with commercial matters. All but 15 had been negotiated before 1933. The list did not include agreements negotiated under the 1934 Trade Agreements Act. Sayre, The Constitutionality of the Trade Agreements Act, 39 Col. L. Rev. 751, 770-8 (1939).
61 U.S. Treaty Ser., No. 840 (1928). This convention had the advice and consent of the Senate prior to ratification.
sistently negotiated by the United States solely by means of bilateral agreements with individual foreign nations. In various instances these agreements have provided for issuance of airmen and air worthiness certificates, division of routes, mutual landing privileges, and right of passage in commercial flights.62

The United States has adhered to two international tele-communication conventions.63 But it has entered into a large number of similar arrangements by means of bilateral executive agreements concluded with individual foreign nations; these were concluded without the authority of any specific legislation.64 Other matters which have been concluded by executive agreements are those relating to international financial and war debt agreements.65 The wide range is obvious; indeed, it is so great that "... it seems reasonable to conclude that there is no apparent reason why the use of such agreements should not be extended to any other matter not yet encompassed that may approximately be the subject of inter-governmental arrangements."66 In fact, there is some judicial authority for the position that Congress cannot now restrict the power of the executive to enter into executive agreements either under congressional authorization or by virtue of his constitutional prerogatives. In Myers v. U.S.67 the Supreme Court sustained the proposition that when "long practice" has confirmed the propriety of the executive, alone, exercising control in a given situation, although Constitutional language could be interpreted to give Congress an equal voice, the latter would not be permitted to restrict the executive's action by legislation.

**Effect and Duration**

There has been a proliferation of remarks by scholars and statesmen concerning the limited effect and uncertain duration of executive agreements. Though these remarks are abstract and more often than not unsubstantiated, they have cast doubt upon the efficacy of executive agreements. Even prior to the Curtiss-Wright, Belmont and Pink cases68 there were numerous decisions which upheld the validity and force of executive agree-

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62 See e.g., U.S. Exec. Agreem't Ser. Nos. 24 (1931), 38 (1932), 47 (1933), 50 (1933), 54 (1933), 58 (1934), 76 (1935), 110 (1937), 129 (1938), 143 (1939), 152 (1939), 153 (1939), 159 (1939), 166 (1939), 186 (1940).

63 The Washington Convention of 1927, 4 Malloy Treaties at 5031 and the Madrid Convention of 1932, 4 ibid at 5979. These conventions received Senate approval.

64 See e.g., U.S. Exec. Agreem't Ser. Nos. 34 (1932), 62 (1934), 66 (1934), 72 (1934), 109 (1937), 136 (1938). For earlier examples, see 3 Malloy Treaties at 2707, 2768.

65 See Schuman, Intl. Politics, 1941 Ed. (462-6); 3 Malloy Treaties at 2601; 4 ibid. at 4213; 47 Stat. 3 (1931); Myers and Newton, The Hoover Administration (1936) c. 6; and other citations set out in 54 Yale L.J. 279, Footnotes 138-166.

66 54 Yale L.J. 282, supra, note 19.

67 272 U.S. 52 (1926). The nub of the case is well stated in 54 Yale L.J. 295, footnote 18. "The question involved was whether the President had the exclusive power of removing executive officers of the United States. Since Art. II, Sec. 2 of the Constitution empowered the President to appoint officials only 'by and with the advice and consent of the Senate' or, in the case of minor officials, pursuant to statute, it would seem logical to assume that Congress could impose conditions on the exercise of the removal power. However, usage and the importance of preserving the President's control of the executive departments were held to preclude congressional control of removals. The doctrine of the Myers case was not overruled in Humphrey's Executor v. U.S., 295 U.S. 602 (1935) which merely held the President's removal power was limited in the case of members of independent regulatory commissions with quasi-judicial functions."

68 Supra, notes 28 and 31.
ments under domestic law. In fact it has been said there is "no instance known where executive agreement had been judicially declared to be invalid or go beyond the constitutional authority of the executive." In both the Belmont and Pink cases, the Supreme Court took the position that international agreements concluded by the executive by virtue of the constitutional power were predominant over state laws and judicial decisions and bound all courts under the supremacy clause, in the same way as treaties. Missouri v. Holland is generally conceded to be the leading authority for the proposition that a treaty is superior to the state law. The Belmont and Pink doctrine is an extension of that contained in Missouri v. Holland so that presidential agreements are covered. It is submitted that the language is sufficiently broad to include Congressional-Executive agreements.

On several occasions, the Supreme Court has held that where there is a conflict between provisions of a treaty and those of a statute, the document that has most recently come into force will govern. As has been pointed out previously, Congressional-Executive agreements are part of the "law of the land." Hence, such an agreement would supercede an earlier treaty if provisions of the two were in conflict.

The Harvard Research Draft of the Law of Treaties states that "for purposes of international law [executive agreements] are not to be distinguished from treaties." It is the opinion of many publicists that even unwritten agreements are enforceable if the agents who entered into the obligations were authorized to do so by their respective nations and if the requisite intent to make the agreements binding, was present.

Great difficulty has often been encountered in determining the duration


71 252 U.S. 416 (1920). The United States entered into a treaty with Great Britain providing for the protection of migratory birds. Opponents of the treaty vigorously contended that the provisions of the X Amendment taken in conjunction with the current interpretation of the commerce clause, reserved regulation of the subject matter exclusively to the States. The Supreme Court sustained the validity of the treaty.

72 In U.S. v. Belmont, 301 U.S. 324, 331-2 (1937) the Supreme Court, Mr. Justice Sutherland speaking, says "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when Judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision . . .". Cf. the language of Mr. Justice Douglas in the Pink Case, 315 U.S. 203, 230 (1942): "All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation, as if they proceed from the legislature, . . .".


74 Supra, p. 13 and note 52.


76 Research in International Law of the Harvard Law School, etc., 29 Am. J. Int. L. Supp. No. 4, 728-32. Difficulty of proof of provisions should cause a nation to rigidly proscribe the use of unwritten agreements.
of an executive agreement. In considering this factor one should remember that treaties and executive agreements possess a dual status. They are (1) part of the law of the United States and (2) intergovernmental contracts.\(^7\) Additionally, it is erroneous to believe that treaties and executive agreements have any particular claim to a special kind of permancy. They always have echoed—and presumably will continue to echo—the ebb and flow of international power relations.

There are six ways in which the domestic impact of treaties as the “law of the land” may be rendered of no effect. First, and perhaps most obvious, conflicting terms or an express provision for repeal in a later treaty renders a prior one negatory.\(^7\) Second, a later executive agreement will supercede an earlier treaty.\(^7\) Third, a joint resolution or similar congressional enactment may conclude a treaty if the latter is clearly denounced.\(^8\) Fourth, as a corollary to the first method, a treaty may be terminated obliquely by the passage of inconsistent or conflicting legislation.\(^8\) Fifth, if Congress fails to pass legislation necessary to implement the treaty or refuses to appropriate funds needed to assure its efficacy the treaty is of no practical effect.\(^8\) Sixth, a treaty may be terminated by the executive denouncing it, either after Congress has authorized such a step or even in the absence of congressional authorization.\(^8\) An executive agreement entered into under authorization of legislation may be terminated by any of these methods and, according to respectable authority, by the repeal of the legislation as well.\(^8\)

In the absence of some specific provision in the executive agreement providing for termination of it, its termination, insofar as its international effects are concerned, could be lawfully accomplished only by agreement. Any other method, it is submitted, would be a breach of the law of nations.

**Abiding By Agreements**

The chief factor persuading a nation to live up to one of its agreements is the very realistic and practical one implicit in the belief that if it does

\(^7\) 54 Yale L.J. 332, supra, note 19, citing Bottiller v. Domineuez, 130 U.S. 238, 247 (1889); Matthews American Foreign Relations c. 27 (1928).

\(^7\) 1 Malloy Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 782; 2 ibid. 1710; 5 Moore, A Digest of International Law 363-4.

\(^7\) 1 Malloy Treaties, etc., 854; Wilson, Handbook of International Law 228, n. 55 (1939 Ed.).

\(^8\) See 5 Moore, International Arbitrations 4429-32 (1898).

\(^8\) See e.g., The Cherokee Tobacco, 11 Wall., 616, 621 (U.S. 1870); U.S. v. McBratney, 104 U.S. 621, 623 (1881); Pigeon River Co. v. Cox, 291 U.S. 138 (1933).


\(^8\) This was done during the administrations of Presidents Madison (2 U.S. Dept. of State. Papers relating to the Foreign Relations of the United States 722 (1873)), Grant (7 Richardson, Messages and Papers of the Presidents 371-3, 414-6 (1789-1897)), McKinley (U.S. Dept. of State. Papers relating to the Foreign Relations of the United States 754-7 (1899), and Taft (Ibid., 695-9 (1911), and Taft Our Chief Magistrate and His Powers 116-7 (1925)).

\(^8\) V. Hackworth, Digest of International Law, 429-30; see also U.S. Dept. of State. Papers Relating to the Foreign Relations of the United States, 77-81 (1894). But for a contrary viewpoint held now by the Department of State, see Hearings Before the Committee on Commerce, U.S. Senate, 79th Congress, on S. 1814, pp. 133 and 163. The Department of State now takes the position that executive agreements entered into under authority of congressional enactment would not fall merely because that congressional enactment was repealed. By implication, if not by direct statement, the Department’s position now is that it would take special legislation specifically repealing the executive agreement in addition to the legislation repealing the congressional enactment under which the executive agreement was executed.
not do so, other nations will feel free to ignore obligations under international agreements to the possible detriment of all. What the late Justice Cardozo often described as the "tyranny of labels" should not be the decisive force that impels adherence to agreements; nations should just as readily live up to an agreement if it is labeled "executive agreement" as if it is more formally called "treaty." Diplomatic history gives credence to the belief that many executive agreements entered into by the United States have been adhered to for substantial periods of time. That standard of fair dealing that should prevail among enlightened nations in a close-knit world suggests that when it is necessary for a nation to end an executive agreement prior to its agreed upon termination date, the contracting nations should utilize a negotiation procedure.

It should be borne in mind that the passage of conflicting legislation by a nation does not conclude the international obligations imposed by an executive agreement or treaty even though the instrument is thereby supplanted municipally. A contrary viewpoint can only be said to ignore a breach of international law.

It is submitted that, in the absence of a specific provision in the international compact, there is no difference in duration between a treaty and an executive agreement.

In summary, it is the position of this inquiry—not a novel one, it is submitted—that there is no important difference, under the Constitution of the United States or in the diplomatic procedures of our government, between a treaty and an executive agreement other than the process and authority by which the consent of the United States to ratification is obtained. To put it another way, those agreements between the United States and other governments that are brought into force in accordance with a congressional authorization or which are subsequently sanctioned by Congress, have the same legal and practical consequences, not only under the domestic law of the United States but under international law as well, as treaties consented to by a two-thirds vote of the Senate.

Earl Snyder*

Integration of Seniority Systems as a Condition for Airline Mergers

In July, 1950, with the approval of the President of the United States, the Civil Aeronautics Board in the North Atlantic Route Transfer Case approved the merger of the Pan American World Airways, Inc. (PAA) and the American Overseas Airlines (AOA). The order included a temporary provision that no employee of PAA or AOA be discharged without cause. On September 22, 1950, this provision was amended to read that for two years PAA was to reimburse all employees who lost their jobs, had their

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3 Id at 680.
salaries reduced, or suffered other monetary loss because of the merger. However, the question of the seniority rights of the employees of AOA who were taken over by PAA was left to negotiation or arbitration between the various employee groups and PAA. Some classes of employees settled their differences by negotiation, while others did so by arbitration. But the flight engineers were unable to reach an agreement. The engineers of PAA insisted that the former AOA employees be placed at the bottom of the seniority list, while the AOA engineers demanded full credit for the time spent with AOA. When the flight engineers would not agree to arbitration, the Civil Aeronautics Board reopened the case and ordered that length of service with AOA be accorded full recognition in the seniority system of PAA. The PAA flight engineers appealed the order, but it was affirmed by the Court of Appeals in Kent v. Civil Aeronautics Board.

The authority of the Civil Aeronautics Board to impose employment conditions on a merger, consolidation, or acquisition is not expressly provided for in the Civil Aeronautics Act. However, section 401 (i) of the Act empowers the Board to transfer a certificate from one carrier to another if such transfer is consistent with the public interest. Section 408 (b) of the Act gives the Board the authority to approve a merger, consolidation, or acquisition "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe." The Board's authority to impose conditions is also indicated in section 205 (a), which empowers the Board to perform such acts, and to issue and amend such orders, as it deems necessary to carry out the provisions of the Civil Aeronautics Act and to exercise its powers and duties thereunder. In section 2 of the Act the Congressional declaration of policy appears which should also be considered in determining the extent of the authority of the Board to impose conditions. That section provides that the Civil Aeronautics Board shall exercise its powers and duties towards the "encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;" towards fostering sound economic conditions in the transport industry, and towards promoting adequate, economical, and efficient service. It appears that the public interest in this industry will be well served so long as the conditions imposed tend to promote a faster, safer, and more economical air transport service, by minimizing labor disputes growing out of mergers and by a just and reasonable treatment of the employees.

A further indication of the power of the CAB to impose conditions on a merger is the use made of section 5 (4) (b) of the Interstate Commerce Act of 1933. That section authorizes the Interstate Commerce Commission

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6 North Atlantic Route Transfer Case, 1A CCH AVIATION LAW REP. ¶21,432 (1951).
7 204 F. 2d 263 (2d Cir. 1953). The court held that the CAB has statutory authority to impose such terms and conditions upon a merger as it finds necessary in the public interest and that an order dealing with seniority was such an interest.
to approve railroad consolidation "upon terms and conditions ... found to be just and reasonable. The ICC has repeatedly used this authority to approve the merger of railways on condition that adversely affected employees would be compensated, and the imposition of these conditions have been upheld by the United States Supreme Court. In 1940, Congress amended section 5 (4) (b) by requiring the ICC to include in its orders of approval of mergers provisions safeguarding the rights of employees so that they would not be in a "worse" condition after the consolidation. In 1943 Congress imposed a similar mandatory provision in the telegraph industry mergers. Since 408 (b) of the Civil Aeronautics Act is worded substantially the same as was section 5 (4) (b) of the Interstate Commerce Act, and has been interpreted as the CAB interprets the Civil Aeronautics Act, it would appear that the CAB has the authority to impose employment conditions on its approval of mergers. Furthermore, Congress has recognized the similarity of the labor problems in these two forms of transportation by specifically making the Railway Labor Act applicable to air carriers.

Finally, as stated in United Western, Acquisition Air Carrier Property: "The short answer to any challenge to the Board's power to impose conditions in a certificate transfer case is that by imposing conditions, the Board finds that without the conditions the transfer is not consistent with the public interest and should be disapproved. Hence, any imposition of conditions does no more than give the parties to a certificate transfer an opportunity to modify the basis of their transaction and thereby avoid the order of disapproval which the Board would otherwise be compelled to issue."

The conditions imposed by the Civil Aeronautics Board included compensation for (a) loss of salary attributable to furlough, termination of employment, or reduction to a lower paying position resulting from the merger; (b) moving expenses incurred as a result of being forced to accept a position in a different locality; and (c) an amount equal to the difference between the fair value of property and the price received for the property in a forced sale made necessary by a transfer. These protective provisions were designed to promote labor peace in air transportation in accordance with the objectives of section 2 of the Act, just as the conditions imposed by the ICC were designed to promote labor peace in rail transportation.

The PAA flight engineers, however, contended that the integration of the AOA seniority list with that of PAA is not the type of protective condition which the Board is empowered to make. Certainly it is not the same as requiring compensation for salary losses and other expenses caused by the merger. But if the PAA and AOA flight engineers cannot agree successfully, and refuse to arbitrate, then labor peace is broken and air passenger

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18 Ibid.
17 49 Stat. 1189 (1936), 45 U.S.C.A. § (1943). For the view that the two methods of transportation are not really comparable, see note 64 HARV. L. REV. 664 (1951).
19 Id. at 707.
20 United-Western, Acquisition Air Carrier Property, supra note 18; Braniff-Mid Continent Merger Case, 1A CCH AVIATION LAW REP. ¶21,490 (1952); Delta-Chicago & Southern Merger Case, 1A CCH AVIATION LAW REP. ¶21,567 (1952); West Coast-Empire Merger Case, 1A CCH AVIATION LAW REP. ¶21,568 (1952).
21 See note 11 supra.
and freight service may be impaired. Such impairment is certainly not in
the public interest, and therefore cannot be tolerated by the Board.

It has been suggested that the CAB could have required that PAA com-
penstate the AOA flight engineers for any loss resulting from reduction or
loss of their seniority rights rather than requiring an integration of sen-
iority systems. Before that could be done however, some very difficult
questions would have to be answered. For example: (a) Will a loss occur,
and if so, what will be the nature and extent of the loss? (b) To what extent,
if any, will merger hinder or aid promotion and pay increases? (c) Will
greater or less job security result from the merger? (d) If no loss can be
shown at the time of the merger, is it possible that there will be a future
loss? (e) Can these and other losses and gains be translated into dollar and
cent values? It thus would appear that the amount that PAA would be
obligated to pay would be next to impossible to compute. Furthermore, since
the situation can be resolved by the integration of the two seniority lists,
such compensation payments would seem to be an unnecessary burden on the
airlines, especially since section 2 of the Act provides for the fostering of a
sound economic condition in the transport industry.

It has also been suggested that the imposing of a permanent seniority
list would be inconsistent with the theory of voluntary settlement of dis-
putes embodied in the Railway Labor Act. This theory however, would
logically imply that the Board should impose no conditions whatsoever on
behalf of the employees in companies being merged. If the Board adopted
this position, it would not fulfill its duties as outlined in sections 2, 401 (i),
and 408 (b) of the Act.

Furthermore, while it is apparently true that the ICC has never imposed
any seniority integration system on a merger or consolidation, it does not
follow that the CAB should refuse to do so. The positions of the unions in
the respective transportation systems are quite different. When the railroad
consolidations and mergers began in the 1930's, the railway unions were
powerful and centralized organizations which represented the same trade or
craft throughout the industry. This meant that the seniority problems
could be and were settled by the Railway Brotherhoods themselves, and the
services of the Commission were not required. In air transportation, on
the other hand, the same trade or craft may be represented by a number of
different unions, each competing with the other for members. These rival
unions find it difficult to settle their differences. Furthermore, if a trade is
represented entirely by one union, that organization is unwilling to impose
a settlement which will antagonize a single group of employees within the
trade to the point where they may decide to join a rival union. Thus, as
in the instant case, the settlement of seniority problems in the air trans-
portation industry is an extremely difficult one requiring, in most cases,
some sort of Board action.

Finally, it is not altogether clear that the Board's action was incon-
istent with the theory of the Railway Labor Act. It is true that the serv-

22 65 HARV. L. REV. 1059 (1952). This solution would be even less satisfac-
tory in the railroad industry where, unlike the air carriers, their main considera-
tion for merging is for economic reasons.
24 These duties are outlined in text, supra.
26 But see Commercial Telegrapher's Union v. Western Union Tel. Co., 53 F.
Supp. 90 (D, D.C. 1943).
27 See note 22 supra.
28 See note 23 supra.
ices of the various mediation boards set up to handle disputes were not utilized, but the Railway Labor Act provides for the use of these Boards in a dispute arising between employees and the carriers. The act makes no mention of a dispute between two groups of employees. Furthermore, the "spirit" of the Railway Labor Act, that is, voluntary settlement of disputes, was carried out. The Civil Aeronautics Board used its power to condition mergers only when negotiation and arbitration failed to effect a settlement. In September, 1950, when the merger was first approved, the Board in discussing the seniority question stated:

"It is clear to us that we should not undertake to determine the precise manner in which the individual seniority lists for various categories of employees should be merged, or other provisions made for the determination of seniority. Such a determination is dependent upon so many factors, and is of such a detailed nature that it would not be practical for an administrative agency such as the Board to undertake the task. It would therefore be more desirable that the task be accomplished by those most directly concerned, the company and the employee groups. It is a matter which lends itself directly to voluntary agreement by negotiation and, failing that, to arbitration. We are therefore providing for such a method of determination here."

When a voluntary system was not concluded, a temporary system was imposed in the hope that the problem would be settled without the Board's determination. The Board stated:

"We propose therefore, to give the employee groups concerned and Pan American one last opportunity to arrive at a resolution of the seniority issue by agreement or by arbitration. If within 30 days, the parties have not arrived either at an agreement or at an agreement to arbitrate, we will assign this case for further hearing, and settle the issue ... as we find to be just and reasonable and in the public interest."

The Civil Aeronautics Board has carried out this policy in the other merger cases it handled.

A further argument against the imposition of a seniority system by the CAB is that such a condition may force the airlines to adopt a system inconsistent with the one which they contracted for with their employees. This was the situation in the instant case, and the flight engineers of PAA claimed that CAB could not compel PAA to breach its contract with them.

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29 See note 6 supra.
30 See note 25 supra.
31 Note 25 supra at 130.
33 Id. at 423.
34 In some cases the Board has refused to impose conditions of any sort on the ground that they were not shown to be necessary: Capital Airlines, Inc.-National Airlines, Inc., 1 A CCH AVIATION LAW REP. ¶21,162 (1949); Southwest Renewal-United Suspension Case, 1 A CCH AVIATION LAW REP. ¶21,450 (1952). In other cases broad conditions were imposed and the details left to be worked out by arbitration: United-Western Acquisition Air Carrier Property, supra note 18. In still other cases detailed conditions were imposed with the understanding that they were subject to revision if the parties reached an understanding or agreement by negotiation or arbitration: West Coast-Empire Merger Case, supra note 20; Delta-Chicago & Southern Merger Case, supra note 20. Finally, in Braniff/Mid-Continent Merger Case, supra note 20 as affirmed in 1 A CCH AVIATION LAW REP. ¶21,572 (1953), the Board ordered negotiation, and failing that, arbitration. In the instant case, arbitration was not insisted because the breakdown in negotiations led the Board to believe that the public interest demanded a seniority integration system which would be fair to all employees and that labor difficulties in connection with a merger might deter future desirable mergers.
Even if such a contractual provision does exist, the Civil Aeronautics Board is authorized by Congress to impose any reasonable and just conditions by reasons of sections 2, 401 (i), and 408 (b) of the Act, and the Supreme Court has held that a private contract must yield to the paramount powers of a governmental agency in order that the latter may perform its duties under the statute creating it.

Further, while the Federal Constitution provides that no state shall pass any law impairing the obligation of contracts, the Constitution does not forbid Congress, when acting within the scope of its powers, to enact laws the effect of which may operate to impair the obligation of contracts. Hence, the obligation of private contracts for the payment of money is subject to the exercise of the power vested in Congress over the monetary system. Congress also has power to invalidate the provisions of a private contract calling for the payment of gold coin, dealing with public lands and Indian Territories, and contracts affected by bankruptcy proceedings.

Also, the resulting impairment to the obligations of a contract does not violate the "due process" clause of the Fifth Amendment. In the words of Chief Justice Hughes:

"Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

In addition, it is well established that the power to regulate commerce among the states and with foreign states is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the Constitution. That Pan American Airlines is engaged in interstate commerce is beyond question. And, as was stated by the Supreme Court in *Addyston Pipe & Steel Co. v. United States*:

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35 In North Atlantic Route Transfer Case, *supra* note 25, the Board outlined its belief that such a provision in the contract did not exist. In Kent v. C.A.B., *supra* note 7, the court bypassed that question, basing its decision on the fact that even if the provision were in the contract, the result would still have been the same.


37 U.S. Const. Art. 1 §10.


39 Legal Tender Cases, 12 Wall. 457 (U.S. 1870).


41 Egan v. McDonald, 246 U.S. 227 (1918).


43 Hepburn v. Griswold, 75 U.S. 603 (1869); Adkins v. Children's Hospital, 261 U.S. 625 (1923); Louisville J. Bank v. United States, 298 U.S. 38 (1936).


45 Gibbons v. Ogden, 9 Wheat. 1. (U.S. 1824); Brown v. Maryland, 12 Wheat. 419 (U.S. 1827); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); Atlantic Coast Line R. Co. v. Riverside Mills, 219 U.S. (1911).

46 175 U.S. 211 (1899).
"Anything which obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

Thus the CAB, a creation of Congress, has the authority to impose conditions upon a merger, even if the conditions will force the airlines to breach its contracts with its employees.

In conclusion, it appears that the Civil Aeronautics Board in integrating the two seniority systems, acted not only within its powers, but also within the "spirit" of the Act. The Board had the alternative of either refusing to act on the problem, or of directing Pan American to integrate former AOA employees in what appears to be a fair and equitable system. If the Board had adopted the former course, then the possibility of labor peace being broken and air passenger and freight service being impaired was enhanced. Furthermore, continued instability resulting from a lack of settlement of this problem would not only affect PAA, but also discourage other potential mergers within the industry, which mergers might well promote the public interest in better transportation.

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47 Id. at 230.

48 It is apparent that the constitutionality of the Civil Aeronautics Board and the regulations issued thereunder must depend upon the existence of a paramount constitutional power residing in Congress. Those powers of Congress are as follows: (a) The power to provide for the common Defense and general Welfare of the United States, (b) the power to regulate commerce with foreign nations and among the several states, (c) To establish Post Offices and post roads, and (d) the power to make all laws which shall be necessary and proper for carrying into execution the enumerated powers. U.S. Const. Art. 1. §8.