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ON May 17, 1946, the Civil Aeronautics Board granted a permanent certificate of convenience and necessity to Chicago and Southern Airlines, Inc. (C & S), authorizing air transportation over two routes in the Caribbean. Both routes originated at the co-terminal points, New Orleans, Louisiana, and Houston, Texas, and passed through the intermediate point, Havana, Cuba. From Havana, one route extended to the terminal point, San Juan, Puerto Rico; the other extended to Caracas, Venezuela. Subsequently, the issuance of the certificate was approved by the President.

On October 11, 1946, C & S filed with the Board a petition which, as later amended on November 14, 1946, requested temporary mail pay of $2.17 per revenue plane mile over the New Orleans-Havana segment of the route. The Postmaster General, on October 25, 1946, designated a schedule of one round trip daily for the carriage of mail over this segment. Thereafter, on November 1, 1946, C & S inaugurated service on the New Orleans-Havana run but did not begin flying the remaining segments of the Caribbean route. Later, on January 17, 1947, the certificate of C & S was amended to authorize another intermediate stop between Havana and Caracas. The Board, on January 28, 1947, issued an order to C & S to show cause why a 50¢ per airplane mile mail rate should not be paid for the entire Caribbean route. C & S advised the CAB on February 3, 1947 that it would not answer the 50¢ mail pay show cause order, and then on February 6, 1947, filed a petition which, as amended by C & S on February 17, 1947, asked for temporary mail rates of $1.77 per revenue plane mile for New Orleans-Havana and $1.47 for New Orleans-San Juan after inauguration of service beyond Havana. A few weeks later, the president of C & S wrote a letter, which was received by the Board on March 3, 1947, in which he set forth the political and economic difficulties encountered in attempting to extend operations beyond Havana, expressed willingness in extending operations beyond Havana to move as cautiously and slowly as the CAB might feel proper, and stated that C & S would incur no further costs on these routes without concurrence of the Board.

The culmination of this sequence of events was that the Board, on March 3, 1947, issued two orders to C & S, one to show cause why a temporary mail rate of 95¢ per airplane mile should not be established on the New Orleans-Havana segment of the route, and the other instituting a
proceeding under Section 401(h) of the Civil Aeronautics Act to "determine whether the public convenience and necessity require that the . . . certificate of convenience and necessity for C & S's Caribbean route, except in so far said certificate authorize and require service between New Orleans and Havana, be suspended until further order of the Board." (Emphasis supplied throughout.)

In the order instituting investigation, the CAB, after giving all the above facts, stated that it had considered the following points in arriving at its decision: (1) Present and potential traffic in whole route area; (2) Availability of service of other U. S. airlines; (3) Developments since hearings in Latin American Case; (4) Present and probable future cost to the government of C & S's service over the entire route; (5) Statements contained in the letter from the president of C & S. The Board added that after a reasonable time had elapsed, if existing facts then warranted further action, it would issue a similar order covering the New Orleans-Havana part of the route.

Board member Branch wrote a separate concurring opinion in which he reviewed C & S's position in the light of changing circumstances and rising costs. He expressed the view that the situation warranted constructive action by the Board and that this could best be accomplished after investigation and re-appraisal. By referring to a recent Supreme Court decision, Mr. Branch made it clear that the Board in no way intended to revoke C & S's certificate or to force abandonment of its routes. Board member Lee wrote a dissenting opinion which will be discussed later.

Recently the Board has expressed concern over its power to adjust and

5 §401(h) states: "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." (Emphasis added.) 52 Stat. 987 (1938), 49 USCA §481(h) (Supp. 1946).

6 Chicago and Southern Airlines, 7 CAB—, (Serial E-338, Mar. 3, 1947). All the facts and related Board orders leading to the issuance of the investigation order are set forth at pages 1-3 of the mimeographed report.

7 United States v. Seatrain Lines, 329 U.S. 424, 67 S. Ct. 435 (1947). The Supreme Court, relying heavily upon a declaration of legislative intention, held that the ICC could not revoke the certificate of a water carrier, as a suspension and revocation provision had been expressly excluded from the Water Carrier Act.

This case is of added importance to the present discussion as it points out clearly the fact that the suspension section of the Motor Carrier Act, unlike the suspension section of the Civil Aeronautics Act, is meant to be construed as a penalty provision. The Court, in footnote 4 of the opinion states: "Commissioner Eastman, Chairman of the Commission's Legislative Committee reporting to the Senate Committee on Interstate and Foreign Commerce on S. 2009 on Jan. 29, 1940, stated: 'This bill leaves §212 (a) unchanged and has no corresponding provision in the new Part III. While there is room for argument we are inclined to believe that provision for the revocation or suspension of water-carrier certificates is not essential if adequate penalty provisions are provided for violation of Part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement since there are so many such carriers and the operations of the great majority are so small, that enforcement through penal actions in court presents many practical difficulties, but this is not true of water carriers.'"
regulate the airline route pattern. The fundamental issue raised by the C&S investigation order is: What are the limitations upon the Board's power to force the abandonment or realignment of the present certificated routes to meet the changing requirements of public convenience and necessity through the use of the suspension provision in Section 401(h)? The C&S order presents the first case in which the CAB has invoked these suspension powers. The opinions of the Board in issuing this and subsequent similar orders were not unanimous. In view of these facts, an examination of the authority granted the Board in Section 401(h) to suspend certificates of convenience and necessity, would seem to be most timely. Since this is true, there is reason to discuss some of the basic definitions, opinions of the Board interpreting this section, similar sections in other regulatory acts, and the legislative background and history, all of which are fundamental to the interpretation of this section and to the analysis of the scope and limitations of the power of the Board to suspend certificates of convenience and necessity.

Before examining the decisions of the Board in which this section had been applied, certain pertinent terms should be defined. Webster's dictionary defines “suspend”: “to debar, or cause to withdraw temporarily, from any privilege, office, function, etc.; to cause to cease for a time; to stop temporarily; to set aside or make temporarily inoperative.” “Suspend” is given the following definitions in Black's Law Dictionary: “to interrupt; to cause to cease for a time; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption.” In addition the courts have interpreted the meaning of the word “suspend” as being “held in abeyance, not terminated,” and have specifically held it to be not synonymous with “revocation.” “Revoke,” on the other hand, has been interpreted as meaning, “to repeal, rescind, cancel, reverse, annul, or make void by recalling or taking back.” Thus the fundamental distinction between “suspend” and “revoke” is that “suspend” implies temporariness, 

8 Western-United, Acquisition of Air Carrier Property, 8 CAB— (Serial E-772, Aug. 25, 1947). See pages 7, 18, and 47 of the majority opinion and page 40 of Landis's dissent, of the mimeographed report; Statement of CAB before President’s Air Policy Commission (Oct. 27, 1947) 203.

9 Subsequent to the C&S investigation order, the Board issued similar orders to Colonial Airlines (Serial E-375, Mar. 18, 1947); Northeast Airlines (Serial E-376, Mar. 18, 1947); Eastern Airlines (Serial E-485, Apr. 29, 1947); and All-American Aviation (Serial E-494, May 2, 1947). Board Member Lee dissented to the issuance of all orders except that issued All American. He said his reasons for dissenting were previously stated in his dissent to the C&S order and added in each case, “I cannot agree to that phase of the investigation looking toward suspension or postponement of operations of (the airline involved) without its consent.”

10 See note 9 supra.

11 The Board in interpreting the language of §401(h) has stated, “...the sound approach to the question of statutory construction presented here is to rely upon the usual and ordinary meaning of the statutory language as fully expressing the intent of Congress.” Panagra Terminal Investigation, 4 CAB 670, 675 (1944); remanded W. R. Grace & Co. v. CAB, 154 F. 2d 271 (C.C.A. 2d, 1946), cert. granted, 328 U.S. 832 (1946), cf. Pan-American-Panagra Agreement, 7 CAB— (Serial E-570, May 5, 1947). See also, Pan-Am. Airways, Grandfather Certificate, 2 CAB 111, 117 (1940) (Board interpreting language of §401(f) quotes definitions from WEBSTER and BLACK); Pan Am. Airways, Aerovias de Guatemala, 4 CAB 403, 404-405 and footnotes (1943) (Board cites definitions and interpretations by U.S. Supreme Ct.).

12 WEBSTER'S NEW INTERNATIONAL DICTIONARY 2541 (Second Edition 1945).

13 BLACK'S DICTIONARY OF LAW 1129 and cited cases (Second Edition 1910).

14 40 WORDS AND PHRASES 917 (Permanent Edition 1940).

15 Ibid.

16 Webster, op. cit. supra note 12, at 2134; 37 WORDS AND PHRASES 604 (Permanent Edition 1940).
whereas "revoke" connotes permanence. This distinction should be borne in mind in interpreting the scope of authority granted in Section 401(h).

**AMENDMENT OF CERTIFICATES**

An examination of the opinions of the CAB reveals that that part of Section 401(h) of the Act, providing that "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require . . ." has been construed many times. The wording of the section itself makes it apparent that the same finding (public convenience and necessity) must be made in the case of amendment, alteration, and modification of a certificate as in the case of suspension of a certificate.

The weight given to various elements considered by the Board in determining "public convenience and necessity" varies, however, with each type of case. In early amendment cases, the Board considered the elements of convenience and necessity in great detail. As the number and types of cases involving amendments of certificates increased, the Board merely stated that the meaning of "public convenience and necessity" had previously been outlined in detail, and, citing previous cases, named the primary questions to be considered. Subsequently, the Board, in its opinions, did not specifically list or discuss the elements of convenience and necessity, but, upon presentation of sufficient evidence, made a finding that the public

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17 Some 103 of the cases reported in Vols. 1-4, and 6 of CAB REPORTS deal with amendment of certificates under §401(h).

18 Not only does the sentence structure and punctuation of §401(h) lead to this conclusion but also such an interpretation was the intent of Congress. H.R. REP. No. 2254, 75th Congress, 3rd Sess. 7 (1938).

19 At an early date the Board recognized that amendments providing for extension of routes and addition of service required a finding of public convenience and necessity similar to that required for granting a certificate in new route applications. As a result, in this type of amendment the elements considered by the Board in determining public convenience and necessity soon became well defined. See Eastern A. L., St. Louis-Nashville-Muscle Shoals Op., 1 CAA 792 (1940); Trans-Southern Air, Amarillo-Oklahoma City Op., 2 CAB 250 (1940); and United A. L., Red Bluff Op., 1 CAA 778 (1940), "...the primary questions to be considered are, in substance, whether the new service will serve a useful public purpose, responsive to a public need; whether this purpose can and will be served as well by existing lines and carriers; whether it can be served by the applicant with the new service without impairing the operations of existing carriers contrary to the public interest; and whether any cost of the proposed service to the Government will be outweighed by the benefit which will accrue to the public from the new service."

In other amendment cases, the elements considered and given most weight by the Board vary with the type of amendment involved: Penna. Cent. Air., Youngstown-Erie-Buffalo Op., 1 CAA 811 (1940); United A. L., Additional Mail Service-Phila., 2 CAB 402 (1940); United A. L., Seattle-Vancouver Mail Service, 2 CAB 656 (1941) (amendments to meet needs of postal service); N. W. Air., Consolidation of Routes, 2 CAB 96 (1940); United A. L., Consolidation of Routes, 3 CAB 72 (1941); Eastern A. L., Consolidation of Routes, 3 CAB 97 (1941) (consolidation of routes to render improved and more efficient service); Northwest Air, Amendment of Certificate, 2 CAB 444 (1941); Western A. L., Change of Name from Western Air Express, 2 CAB 781 (1941); Catalina Air, Service to Santa Catalina Island, 2 CAB 798 (1941) (amendment to reflect change of corporate name); National Air, Redesignation of Sarasota, 4 CAB 550 (1944) (amendment to rename intermediate point); Pan-Am Grace Airways, Bolivian Op., 2 CAB 720 (1941) Pan Am Airways, Lisbon-Foynes Op., 3 CAB 238 (1941); PCA, Service to Elizabeth City, 3 CAB 370, 371 (1942) (amendments required by national defense).


convenience and necessity required or did not require the certificate amendment applied for. In a leading amendment case, Panagra Terminal Investigation, the Board reviewed in full its power to amend certificates. The Board decided that it could on its own initiative and without the petition by or consent of a carrier add new points or services to a certificate but that it did not have authority to amend a certificate to authorize “the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier’s system.”

MODIFICATION AND ALTERATION OF CERTIFICATES

There are no clear-cut decisions of the Board interpreting the power to modify and alter certificates as authorized by Section 401(h). Apparently the Board considers modification and alteration to be synonymous with, or types of, amendment. Thus, in Pan American Airways, Latin American Service, the Board found that the public convenience and necessity required an amendment of Pan American’s certificate and ordered “That paragraph (f) of such certificate be modified . . . ” to include new intermediate points. In Braniff Air, Route 15 Restriction, the Board in syllabus and body of opinion, refers to the striking of a condition in the certificate of Braniff as a modification. In its order, however, the Board states “that the certificate . . . be amended by striking from said certificate the condition. . . .” It should be noted that in no case in which Section 401(h) was applied has the Board ever failed to make a finding that “the public convenience and necessity” did or did not require its action. This has been true regardless of the minor nature of the amendment concerned or of the fact that the case before the Board lent itself to a summary proceeding. Thus, in Northeast Air., Amendment of Certificate, a case in which the applicant wished to amend its certificate to merely reflect change of corporate name, the CAB said, “While that change may be regarded as minor, . . . we find that an amendment of applicant’s certificate . . . is required by the public convenience and necessity.” All this leads to the conclusion that the Board similarly will comply with all the safeguards and requirements of Section 401(h) in invoking its authority to suspend a certificate.

22 Colonial Air, Atlantic Seaboard Op., 4 CAB 392 (1943); T. W. A., Service to Lancaster, 4 CAB 426 (1943); Continental A. L., Texas Air Service, 4 CAB 478 (1945); Colonial Air, Service to Newark, 6 CAB 667 (1946); West Coast Case, 6 CAB 951 (1946) (amendments granted as part of consolidated new route case); Service to Montego Bay, 7 CAB — (Serial E-247, January 17, 1947), (The Board amended the certificate of C & S now under investigation, stating, “. . . the primary factors to be considered in dealing with such issues have been stated by us and need not be repeated here,” and made footnote reference to a 1941 opinion).
23 Panagra Terminal Case, supra note 11.
24 Id. at 673.
25 In several cases the Board has amended certificates to reflect changes which could have been made just as well by altering or modifying the certificate. Panagra, Lima-Iquitos Service, 6 CAB 293 (1944); Panagra, Service to Riobamba, 6 CAB 1079 (1946); Pan Am Airways, North Atlantic Route, 7 CAB 133 (1946). For example, in the Pan Am Case, supra, the Board amended Pan Am’s certificate to include new intermediate points, to remove a restriction, to eliminate certain intermediate points, to eliminate the naming of other intermediate points, and to remove a limitation contained in the certificate.
26 4 CAB 540 (1943).
27 6 CAB 515 (1946).
28 As long as this finding is made, §9 of the ADMINISTRATIVE PROCEDURE ACT, 60 Stat. 242 (1946), 5 USCA §1008 (Supp. 1946), would not seem to limit Board action suspending a certificate. “Public interest” and “public convenience and necessity” are given synonymous treatment under §2 of the Act, note 68 infra.
29 2 CAB 444 (1941).
REvOCATION OF CERTIFICATES

The Board has never had occasion to apply the revocation powers of Section 401(h). In the only revocation case before the Board, Section 401(g) rather than 401(h) applied. In this particular case, Tri-State Aviation Corporation had been issued a grandfather certificate, and thereafter had failed to commence operations within the 90 day period required by Section 401(g). Even though the Board had granted an extension of time in which to inaugurate service, Tri-State failed to do so. The Board therefore issued an order as provided in Section 401(g), declaring that the grandfather certificate of Tri-State "shall cease to be effective from the date of this order." 32

SUSPENSION AND REVOCATION SECTIONS IN OTHER REGULATORY ACTS

Powers similar to those of Section 401(h) had been previously granted to other Federal regulatory commissions. Section 212(a) of the Motor Carrier Act, Section 312(a) of the Federal Communications Act, Section 4(e) of the Federal Alcohol Administration Act, and Section 6 of the

30 Tri-State Aviation, Revocation of Certificate, 4 CAB 100 (1943).
31 §401(g) provides: "Each certificate shall be effective from the date specified therein, and shall remain in effect until suspended or revoked as hereinbefore provided, or until the Board shall certify that operation thereunder has ceased, . . . Provided, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service." 52 Stat. 987 (1938), 49 USCA §481(g) (Supp. 1946).
32 See note 30 supra at 103.
33 In the Panagra Terminal Case, supra note 11, at 674-676, the Board comments on the value to be derived from comparison of §401(h) with similar sections in other acts, and outlines the procedure to be followed in interpreting the powers and limitations of a section of the Act.
34 "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of the chapter, or with any lawful order, rule, regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. . . ." MOTOR CARRIER ACT, §§212(a), 49 Stat. 565 (1935), 49 USCA §312(a) (Supp. 1946).
35 "Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by Sec. 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Chapter or any regulation of the Commission authorized by this Chapter or by a treaty ratified by the United States. . . ." FEDERAL COMMUNICATIONS ACT, §§312(a), 48 Stat. 1086 (1934), 47 USCA §312(a) (Supp. 1946).
36 "A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Secretary of the Treasury deems appropriate, if the Secretary finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Secretary finds that the permittee has not engaged in the operations authorized by the permit for a period of more than 2 years; or (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order." FEDERAL ALCOHOL ADMINISTRATION ACT, §4(e), 49 Stat. 978 (1938), 27 USCA §204(e) (Supp. 1946).
Federal Power Act\textsuperscript{37} all contain provisions for suspension or revocation of the particular certificate, license, or permit granted, on a finding that the holder has willfully violated a specific provision of the applicable act, certificate issued, or order, rule or regulation of the administrative body. The Merchant Marine Act,\textsuperscript{38} which is analogous to the Civil Aeronautics Act in its subsidy aspects and in its provision for the development of foreign and domestic commerce, does not contain a section comparable to 401(h).

The result of suspension of a certificate or permit under the Motor Carrier Act is in the nature of a penalty since, as a condition precedent, there must be “willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission. . .”\textsuperscript{39} Likewise, under the Federal Alcohol Administration Act the holder of a permit may be penalized by the suspension of his permit if he has “willfully violated any of the conditions thereof.”\textsuperscript{40} Under both Acts, the choice of suspension or revocation in a given case is left to the discretion of the administrative authority. Although the Federal Power Act and the Federal Communications Act provide for the revocation of a license under certain conditions, they do not grant authority to suspend a license.\textsuperscript{41}

Some of the States granted certificates of convenience and necessity to air carriers long before Congress passed the Civil Aeronautics Act of 1938.\textsuperscript{42} They did so under constitutional provisions or general statutes regulating public utilities and motor vehicles. Most of these statutes contained revocation and suspension provisions.\textsuperscript{43} In general, the State Acts authorized the proper commission to suspend or revoke the certificate, license, or permit granted for “good cause”\textsuperscript{44} or for a specific violation of the regulatory statute or provision of the certificate.\textsuperscript{45}

\textbf{Legislative History of Section 401(h)}

It is logical to assume that the provisions of these Federal and State Acts were known to and considered by the scrivener of the proposed Federal legislation since they placed a similar provision and requirement in the Civil Aeronautics Act. At no place in the legislative history of the Act was the intention or purport of the suspension power under Section

\textsuperscript{37}“Licenses may be revoked only for the reasons and in the manner prescribed under Section 791-823 of this title, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after 30 days public notice.” Federal Power Act, §6, 41 Stat. 1067 (1935), 16 USCA §799 (Supp. 1946).
\textsuperscript{39}See notes 7 and 34 supra.
\textsuperscript{40}See note 36 supra.
\textsuperscript{41}See notes 25 and 37 supra. It is interesting to note that the FCC has accomplished the effect of suspension by vacating or rescinding a revocation order and thereby reinstating a license. \textit{Red Lands Broadcasting Asc.,} 8 FCC 479 (1941).
\textsuperscript{42}Ariz., Colo., Ill., Md., Nev., N. Mex., N. Dak., Penna., Tenn., W. Va., Wyo.; 1929 USAvR 54, and 181; 1930 USAvR 253, and 290; 1932 USAvR 185, 190, and 197; Notes, 83 ALR 338 (1933) and 99 ALR 178 (1935); Fagg and Fishman, \textit{Certificates of Convenience for Air Transport} (1932), 3 JOURNAL OF AIR LAW 226; Ryan, \textit{Economic Regulation of Air Commerce by the States}, 31 Va. L. Rev. 479, 483 (1945).
\textsuperscript{43}Ariz. Code Ann., tit. 66, §511 (1939), “The Commission may, at any time, for good cause, suspend, and upon not less than five (5) days notice to the grantees of any certificate or permit, after an opportunity to be heard, revoke or amend any certificate or permit.” (Emphasis added.)
\textsuperscript{45}Examples of “specific violation” statutes are: Ore. Comp. Laws Ann., §115-515 (1940); S. C. Civil Code §8618 (1942); W. Va. Code Ann., §1493 (Michie 1942).
401(h) specifically discussed.\(^4^6\) On September 15, 1937, the President requested the Secretary of Commerce to form an Interdepartmental Committee on Aviation Legislation to "formulate a definite policy for both foreign and domestic aviation."\(^4^7\) This committee conducted hearings and drafted a bill which it turned over to Representative Lea. Mr. Lea had the proposed legislation rearranged and redrafted with the result that H.R. 9738, which is often referred to as the Interdepartmental Committee or Lea Bill, was introduced in Congress on March 4, 1938.\(^4^8\) Except for one minor addition, Section 401(h) of the Civil Aeronautics Act of 1938 followed verbatim Section 402(k) of the original H.R. 9738.\(^4^9\) Whereas the suspension and revocation provisions of aviation bills introduced in Congress prior to H.R. 9738 differed materially from Section 401(h), the suspension and revocation provisions in all bills introduced after H.R. 9738 followed very closely the language of Section 402(k) of H.R. 9738.\(^5^0\) It is therefore probable that the Interdepartmental Committee is indirectly responsible for the wording of Section 401(h).

The report of the hearings on H.R. 9738 is devoid of any discussion of Section 401(h).\(^5^1\) One must draw his inferences from similar sections in other regulatory acts and review the hearings and committee reports on aviation bills introduced in Congress prior to H.R. 9738, to discover the basis on which the Interdepartmental Committee formulated Section 402(k), and, indirectly, 401(h).

The Airmail Act of 1934\(^5^2\) provided for the appointment of a Federal Aviation Commission to study the situation in aviation transportation and make recommendations to the President, which in turn were to be given to Congress. The Commission reported in January of 1935, and recommended that "All regular domestic scheduled transport operations should require a certificate of convenience and necessity, to be issued by the commission hereinafter proposed. Such a certificate should not be cancelled except for good cause without equitable compensation to the holder."\(^5^3\) In a report of the hearings on H.R. 9738, which in turn contains no discussion of §401(h).\(^5^1\)

\(^4^6\) The hearings before the Interdepartmental Committee were never published. Members of the Interdepartmental Committee testifying before the Committee on Merchant Marine and Fisheries in support of H.R. 9738 did not discuss §401(h), note 47 infra. Since §401(h) so materially differs from the suspension and revocation sections contained in prior bills, the only direct source of information concerning the legislative intention of this particular section is the Hearings on H.R. 9738, which in turn contains no discussion of §401(h).

\(^4^7\)Hearings before Committee on Merchant Marine and Fisheries on Sec. 4 of H.R. 9710, 75th Cong., 3rd Sess. (1938) 3, 20-22.

\(^4^8\) 83 CONG. REC. 2897 (1938). To the effect that the Interdepartmental Committee drafted H.R. 9738, see 83 CONG. REC. 6504 (1938), and Hearings, infra note 51, at 36 and 48. For a general discussion, see RHYNE, CIVIL AERONAUTICS ACT ANN. (1939) c. 8 and 9, and Appendix A. For a reporter's account of Congressional action leading to the passage of the CIVIL AERONAUTICS ACT, see Am. Av., Jan. 15; Feb. 1, 15, 1938, p. 1 et seq., Am. Av., Mar. 1, 1938, p. 12, Am. Av., Mar. 15, 1938, p. 3, Am. Av., Apr. 1, 15; May 1, 15; June 1, 15; July 1, 15, 1938, p. 1 et seq.

\(^4^9\) The words "in support of or in" were inserted in the last sentence of §401(h) between "memorandum" and "opposition," supra note 5. This change in the wording of §401(h) was approved by the conference committee of the House and Senate on S. 3845, 83 CONG. REC. 8843, 8849 (1938).

\(^5^0\) Exception, S. 3659 introduced by Senator McCarran Mar. 11, 1938, 83 CONG. REC. 3229 (1938). Compare Sections 305(k) of S.2 (Jan. 6, 1937), 305(k) of H.R. 4600 (Feb. 10, 1937), 305(j) of H.R. 5234 (Mar. 2, 1937), and 305(j) of H.R. 7273 (May 27, 1937) to Sections 402(k) of H.R. 9738 (Mar. 4, 1938), 402(k) of S. 3760 (Mar. 30, 1938), 401(h) of S. 3845 (Apr. 14, 1938), and 401(h) of S. 3864 (Apr. 18, 1938). The Interdepartmental Committee conducted its hearings from Oct. 6 to 25, 1937, Hearings, infra note 51, at 133 and 279.

\(^5^1\) Hearings before the Committee on Interstate and Foreign Commerce on H.R. 9738, 75th Cong., 3rd Sess. (1938).

\(^5^2\) §§20 and 21, 48 Stat. 938 (1935), 39 USCA §469 (r) & (s) (1937).

discussing this recommendation, the Commission stated, "A certificate once granted should have the quality of a non-exclusive franchise to the extent of being made cancellable only for good cause or with equitable compensation." During the two years following the report of the Federal Aviation Commission several aviation bills were introduced, none of which was enacted into law.

Perhaps the best comment on the purport of Section 401(h) is found in the hearings of S. 3027, a bill introduced by Senator McCarran on January 10, 1935, which provided for regulation of air transportation under the Interstate Commerce Commission. Mr. C. R. Smith, then President of American Airlines, read in its entirety to the committee conducting the hearings Section 405(m) of S. 3027, a section similar to Section 401(h) of the Act, but patterned after the suspension and revocation section of the Motor Carrier Act, and commented as follows:

"It seems to me that if the ICC is given the authority to suspend or revoke certificates under different conditions, it perhaps would be possible to say that certificates issued to the airplane operators should be indefinite unless they are suspended for cause. I think that has been the practice in other forms of transportation... as I understand it, in most States a bus line has an indefinite franchise and perhaps the railroads have the same thing. There would be no occasion to issue a certificate for a limited time as long as the Commission is given authority to cancel it."

From a consideration of the meager legislative history and a general knowledge of the language and interpretation of similar provisions in Federal and State regulatory acts, the logical assumption is that the understanding of members of the air transportation industry and the recommendation of the legislators was that under the new Federal Aviation Law no action would be taken which would affect either temporarily or permanently the operating rights of a holder of a certificate, except for good cause.

Consistent with this understanding, the Interdepartmental Committee, in the case of suspension of a certificate, chose to specifically define good cause as being "if the public convenience and necessity so require." The Committee apparently recognized the difference between suspension and revocation to be one of degree and felt that suspension could be used constructively as well as punitively. They therefore separated and distinguished suspension from revocation by making the precedent findings for each different. Unlike the suspension and revocation provisions in any other Federal or State regulatory act, Section 401(h) of the Act therefore provides for suspension for one cause, "if the public convenience and necessity so require," and for revocation for a different cause, "for intentional failure to comply with any provision... order, rule or regulation, etc." As a result, temporary action, suspension, is taken upon a finding subject to broad and varied interpretation, and permanent action, revocation, is taken for a narrow and specific reason.

Mr. C. M. Hester, the first administrator of the Civil Aeronautics Authority, explained at the inception of the Act, "When once granted, however,

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54 Id. at 56.
55 Hearings before Subcommittee of Committee on Interstate and Foreign Commerce on S. 3027, 74th Cong., 1st Sess. (1935).
56 See note 34 supra.
57 See note 55 supra, at 50.
58 See note 5 supra.
59 Amendments had been offered to §305(k) of S.2, which were followed in H.R. 5234 and H.R. 7273, authorizing amendment only of a certificate if such amendment were found to be "consistent with the public convenience and necessity." 83 CONG. REC. 6741 (1938).
60 See note 5 supra.
a certificate will give the airline a permanent right at the particular operation, subject only to revocation for a violation of the Act." Likewise, Board member Oswald Ryan, writing in April, 1939, stated, "Certificates of public convenience and necessity give a holder a permanent right to the operation authorized, subject only to revocation for violation of the Act." Thus those charged with interpreting the Act at the outset understood Section 401(h) to mean that although the effectiveness of a certificate was ended by suspension, the "permanent right" granted therein could not be impaired by suspension, but could be terminated only by revocation. Apparently the present members of the Board feel that this interpretation is still valid.

Lee's Dissent to Chicago & Southern Investigation Order

Because the C & S case presents the initial interpretation of the suspension powers under Section 401(h), it is unfortunate that the decision of the Board ordering investigation is not unanimous. Board member Lee dissented, stating that he was opposed to an investigation with suspension as an object in the absence of actual operation by C & S over the entire route. He felt that since estimates could not be relied on, C & S should have at least three years to develop the route, that being the length of time indicated by the Board as being necessary for adequate testing of the worth of a route. Mr. Lee felt that the Post Office Department had ample funds to subsidize the operation, and thought that future development and the necessity for maintaining the international position of U.S. airlines would substantiate the decision to do so. He stated further that the two alternatives facing the Board after investigation, should the Board decide to suspend the certificate, are either temporary suspension or continued suspension. In Mr. Lee's opinion, continued or indefinite suspension would raise the legal question "as to whether the Board could effect what would amount to revocation of a certificate through its power to suspend." He pointed out that revocation may be accomplished only as provided in the Act and suggested that the Board "may find itself in an embarrassing position" if the conditions requiring suspension of the certificate "continued indefinitely."

The question of whether indefinite suspension amounts to revocation is answered in part by the fact that the permanent certificate issued C & S is for no definite term, but is indefinite in duration; therefore, an order of

60 10 Air Commerce Bulletin 35 (Aug. 15, 1938). Mr. Hester's comments are of added significance because he was chairman of the drafting subcommittee of the Interdepartmental Committee which drafted H.R. 9738, Hearings, supra note 51, at 48.
62 This interpretation is consistent with the language of §401(g), supra note 31, providing that "Each certificate . . . shall continue in effect until suspended or revoked."
63 Mr. Lee does not discuss the alternatives facing the Board should continuance of service after the trial period be found to be inadvisable. Board action would then be complicated by the necessity of protecting the interests of labor and the rights of the users of the transportation. See the following cases in which the Air Line Pilots Assc. has intervened: Western A. L., Acquisition of Inland A. L., 4 CAB 654 (1944); Am. Air, Control of Am. Export Air, 6 CAB 371 (1945); National-Caribbean-Atlantic Control Case, 6 CAB 671 (1946); Western-United, supra note 8. See also last sentence of §401(h), supra note 5 and §401(k) of the Act, 52 Stat. 987 (1938), 49 USCA §481(k) (Supp. 1946) (Any interested person may file a protest or memorandum pro or con alteration, amendment, modification, suspension or revocation of a certificate or abandonment of a route).
64 Dissent of Lee, Member, supra note 6, at 14.
65 Ibid.
indefinite suspension when vacated would leave such a certificate still in effect. Mr. Lee, by endeavoring to ascertain at what future date the certificate of convenience and necessity might be terminated by "suspension until further order of the Board" is apparently ignoring fundamental definitions.

It is further submitted that the wording of the order itself, construed with the definition of the word "suspend" clearly implies that Board action is temporary and that the Board, upon application, or on its own initiative will ascertain from time to time whether the public convenience and necessity warrants withdrawal or amendment of the suspension order. Ample protection in the form of legal remedies is afforded C & S should the Board refuse to act.

Section 2 of the Act embodies the declaration of policy and enumerates the factors to be considered by the Board "as being in accordance with the public convenience and necessity." Apparently, Mr. Lee's colleagues feel that the considerations in other subsections of Section 2 of the Act, in the present case far outweigh the "future needs" consideration of subsection 2(a) on which it must be assumed Mr. Lee bases his position. The problems raised by Mr. Lee are not so much legal questions as they are statements of his disagreement with the other members of the Board concerning the emphasis to be placed upon the various elements of public con-

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66 See notes 11-16 supra.
67 §1106 of the Act, 52 Stat. 1027 (1938), 49 USCA §676 (Supp. 1946), provides that the remedies granted by the Act are merely supplementary to the "remedies now existing at common law or by statute." For an unjustifiable refusal on the part of the Board to permit C&S to make a showing of the requirements of public convenience and necessity C&S could invoke such remedies as mandamus. See generally, 2 VOM BAUR, FEDERAL ADMINISTRATIVE LAW (1942) 670-672. Any order of the Board, positive or negative, except those issued to a foreign air carrier and subject to approval by the President under §801, note 2 supra, is subject to judicial review under §1006 of the Act, 52 Stat. 1024 (1938), 49 USCA §646 (Supp. 1946). See, Note by Grinnell "Limitations to Appeal Under the Civil Aeronautics Act," infra, this issue.
69 Ibid.
70 Dissent of Lee, Member, supra note 6, at 4-6 (Mr. Lee mentions and emphasizes the word "future" 6 times).

The following dialogue does much toward explaining the views of the majority of the Board as compared with those of Mr. Lee.

Mr. Hinshaw: "Would you describe for the committee the reason for that order of suspension?"

Mr. Landis: "Yes. It is not an order of suspension. It is an order of investigation to determine whether an order of suspension should be issued. It is based on a preliminary determination by the Board that the situation looks so serious that perhaps there ought to be suspension.

"Meanwhile, Mr. Putnam is not continuing his effort to push his route beyond Habana.

"The reason for the issuance of that order I think can be briefly summarized. The anticipated costs of the C&S operation, as distinguished from those that were presented to the Board originally which had led to the issuance of the certificate, seemed to be very high — so high that it might not be worth while for the American government to press that operation, inasmuch as there were competing routes there, and that a comparable service would be provided by these competing carriers, even though not quite so good as that proposed by C&S.

"But in these questions of public convenience and necessity, it seems to me that cost weighed against gain is an element. We cannot neglect cost, and if a carrier incurs costs far in excess of those that were anticipated when the certificates were granted, we ought to have a perfect right to say, 'Well, now, under these conditions, the public convenience and necessity does not demand flying that route if the costs are so excessive.'" Hearings before Committee on Interstate and Foreign Commerce on Bills Relative to Overseas Air Transportation, 80th Cong., 1st Sess. 1239 (1947). Mr. Putnam's comments on the C&S investigation order; id. at 1098-1112.
venience and necessity set forth in the policy section of the Act. 71

CONCLUSION

"Public convenience and necessity" has been considered and commented on by the CAB so frequently that its elements have become well defined. 72 It is interesting to note that the five factors considered by the CAB in issuing the order of investigation in the C & S case are obviously elements of convenience and necessity.

Administrative bodies, unlike the courts, are not bound by the legal principles of stare decisis and res adjudicata, and therefore may reverse themselves more easily than can the courts when the facts so warrant. 73 By using such a procedure, an administrative tribunal is able to take the initiative in constructive action to the benefit of the public and the industry regulated, and to correct its mistakes expeditiously, and by so doing to establish a reputation for fairness and justice. 74 In the present case, the majority of the Board feels that it is justified in reversing the Board's former position. A finding of public convenience and necessity by the

71 Other questions raised by Mr. Lee, with brief comments follow: (page references are to dissent to C & S order except item 5, which is additional basis for Mr. Lee's dissent to the Colonial, Northeast and Western orders, supra note 9).

1. "... the public interest is measured not so much in terms of the cost to the public of supporting a particular service, as in terms of the necessity of supporting the minimum route system for maintaining the prestige of this country and its position of leadership in international aviation." P. 7. The guide for Board action is §2 of the Act, note 68 supra. Is Mr. Lee invading the province of Presidential action to control the international route pattern as provided for in §801, note 2 supra?

2. "... the only two alternatives with which the Board will be faced if ... it decides to suspend the route certificate ... are temporary suspension or continued suspension." P. 13. Is this a logical conclusion in view of the fact that Board action will be predicated on the requirements of "the public convenience and necessity"? See §401(h), note 5 supra.

3. "The other alternative would be for the Board to suspend the route indefinitely, which means abandonment." P. 14. Board action is directed to the certificate and not a route. Even so, can a route be abandoned which has never been developed or operated? See Letter, note 3 supra.

4. "... if the Board does not have the power to continue the suspension of a certificate indefinitely it may find itself in an embarrassing position. ..." P. 14. It is right and proper that the Board should be continually embarrassed if it is to correct its errors and mistakes and adapt regulatory measures commensurate to the rapid developments and changes in air transportation. See note 74 infra.

5. "I cannot agree to that phase of the investigation looking toward suspension or postponement of operations of (the airline involved) without its consent." This statement appears to be in direct contradiction to the Board's decision in the Panagra Terminal Investigation, supra note 11. Also, is not Mr. Lee again disregarding the requirement of Board action to suspend within the dictates of "public convenience and necessity," supra item 2 of this footnote?

72 See note 19 supra. For comments of member of Interdepartmental Committee concerning factors to be considered in granting a certificate, see Hearings, note 51 at 149-150. See Note (1940) 11 Air L. Rev. 405.

73 1-13 INTERSTATE COMMERCE ACTS ANN., Index, Res Adjudicata; 1 VOM BAUR, FEDERAL ADMINISTRATIVE LAW (1942) 162; Parker, Administrative Res Adjudicata (1945), 40 Ill. L. Rev. 56 (actually trial de novo on new or after discovered facts).

74 LANDIS, THE ADMINISTRATIVE PROCESS 69, 78 (1938). These aspects of administrative procedure are especially applicable to Board procedure because of the developmental and promotional requirements of the Act. Tipton, Regulation of Air Transport, State, Federal, Local, Including Taxation, Prospects and Problems in Aviation 172, 185 (1945). For the influence of engineering developments on the over-all route pattern, see SMITH, AIRWAYS (1942) c. 25 and Western-United Acquisition, supra note 8, at 18 where the Board states: "To take full advantage of the technological developments of air transportation the Board in recent months has been called upon to make numerous adjustments in route patterns."
Board warranted the issuance of the certificate, and the amendment thereto, but now, in the light of new facts and developments, may warrant suspension.

From the foregoing discussion, one may conclude that the C & S case is a typical example of the type of situation to which Section 401(h) was intended to apply. Revocation may be invoked only by way of a penalty, as there must be a failure to comply with an order of the Board as a condition precedent to the revocation of a certificate. The Interdepartmental Committee, in formulating Section 401(h) to authorize suspension of a certificate upon a finding "if the public convenience and necessity so require," granted a greater latitude of action to the Civil Aeronautics Board in suspending certificates than is enjoyed by any other similar Federal Administrative body. Since the Board is unhampered by any penalty aspect of suspension, it is able to "alter, amend, modify, or suspend" a certificate to keep abreast of changing conditions as reflected in "public convenience and necessity" and thereby better fulfill the requirements of the policy section of the Act, and promote the sound development of air transportation.

LOUIS E. BLACK, JR.*

LIMITATIONS TO APPEAL UNDER THE CIVIL AERONAUTICS ACT

In Waterman Steamship Corp. v. Civil Aeronautics Board,1 the Circuit Court of Appeals for the 5th circuit held that an order of the Board, approved by the President, concerning an air carrier engaged in foreign air transportation may be appealed to a circuit court under the Civil Aeronautics Act of 1938.2 An order of the Board concerning 15 applications for certificates of convenience and necessity to operate as air carriers from the United States to points in South America denied such a certificate to the petitioner, Waterman Steamship Corp.3 After the Board's order was approved by the President in accordance with Section 801 of the Civil Aeronautics Act,4 and rehearing denied, petitioner appealed to the circuit court under Section 1006(a) of the Act.5 Chicago and Southern Airlines, which had been granted a certificate, petitioned to intervene and joined the respondent CAB in denying the right of appeal.6

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1 159 F. 2d 828 (C.C.A. 5th, 1947); cert. granted 67 S. Ct. 1736 (1947).
3 Additional Service to Latin America, 6 CAB 857 (1946).
4 "... Copies of all applications in respect of such certificates and permits shall be transmitted to the President before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof." 52 Stat. 1014 §801, 49 USCA §601 (Supp. 1946).
5 "Any order, affirmative or negative, issued by the Authority (Board) under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the circuit court of appeals. ..." 52 Stat. 1024 §1006(a) 49 USCA §646 (Supp. 1946). See Hearings before Committee on Interstate and Foreign Commerce on H.R. 9738, 75 Cong., 3d Sess. 46 (1938), where Mr. Hester indicates the purpose of giving appeal directly to the circuit court was, "In order to eliminate the expense and delay of conducting litigation in the District Courts dealing with judicial review of administrative orders, provisions are made in the present bill for appeals from orders of the Authority direct to the circuit court of appeals.
6 Respondent and intervenor pleaded in the alternative, that the motion of the petitioner be dismissed, or that the respondent Board's order be affirmed. The statute does not provide for joinder of any specific parties. The court accepted intervenor's argument that general rules of joinder should control and allowed Chicago and Southern to intervene on the basis of Morgan v. United States, 304 U.S. 1 (1938); State of Texas v. I.C.C., 258 U.S. 158 (1922). The intervenor also raised issues of timeliness of appeal and lack of service to Chicago and Southern, as an indispensable party, as grounds for denying Waterman the
In holding the Board's order subject to review, the court stressed the difference between certificates issued to United States air carriers and permits issued to foreign air carriers. From the language of the statute it concluded that the plain meaning of the words was to exclude appeal only in the case of a foreign air carrier. The court refused to accept the argument that the required approval made the order an exercise of executive discretion in foreign affairs, rather than an action of the Board, and thus removed from judicial review. Similarly, it rejected the assertion that possible presidential reversal of the court's decree rendered the court's action inconclusive and thus no case or controversy was presented.

The holding in the Waterman case is precisely contrary to that in Pan-American Airways v. Civil Aeronautics Board. Under facts which posed the precise question involved, the court there concluded that the constitutional authority of the President in the conduct of foreign affairs, his sole access to secret information, and the approval required of him by Section 801 of the Act, made him, not the Board, the final arbiter, and judicial review of such executive discretion would be opposed to constitutional provision and settled judicial policy. The Board was conceived to be merely an advisory agent to the President. Since the President might refuse to right of appeal. The court held that by entertaining Waterman's motion to reconsider, the Board retained authority over the order and the denial of the motion should be considered the final "entry of such order" from which the sixty day period for appeal required by §1006(a) should run. The appeal was well within this limit. The court admitted that Chicago and Southern was an indispensable party and had a right to be heard, but since there was no provision for service upon specified parties under §1006(a) of the Act, and since Chicago and Southern had voluntarily appeared, there was no basis for denying appeal on a question of parties.

7 "(2) 'Air carrier mean(s) any citizen of the United States who undertakes . . . to engage in air transportation. . . .' "(19) 'Foreign air carrier means any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." 52 Stat. 977 §1, 49 USCA §401 (Supp. 1946).

8 "Since no foreign air carrier is here concerned and no order has been made concerning such a carrier, the one exception Congress has made does not apply." Waterman Steamship Corp. v. CAB 159 F. 2d 828, 830 (C.C.A. 5th, 1947).

9 121 F. 2d 810 (C.C.A. 2d, 1941). Although appeal was sought by Pan-American Airways as an intervenor in the Pan-American case, and by Waterman as the unsuccessful applicant for a certificate of convenience in the Waterman case, the courts made no distinction and addressed themselves to the identical question with the contrary results indicated. See Notes (1941) 10 Geo. Wash. L. Rev. 227; (1941) 30 Geo., L. J. 182; (1941) 12 Air L. Rev. 406; (1947) 47 Col. L. R. 1080.

10 A temporary certificate for foreign and overseas transportation had been issued to American Export Airlines. The certificate covered certain routes also operated by Pan-American Airways. After issuance of the temporary certificate to American Export, Pan-American filed a petition in the circuit court attacking the decision of the Board. Thereupon the Board filed a motion to dismiss the review on the ground that the court lacked jurisdiction to review the issuance or denial of a certificate which had been approved by the President under §801 of the Act.

11 As expressed by Judge Hand, "It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. The review of the order authorizing the issuance of the certificate is so dependent upon considerations resting in executive discretion that it cannot be regarded as authorized by Section 1006(a)." Pan-American Airways v. CAB, 121 F. 2d 810, 814 (C.C.A. 2d, 1941), cited supra note 9. Also see U. S. Const. Art I §§1 and 2; United States v. Belmont, 301 U.S. 324 (1937); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

approve an order of the Board which was issued in compliance with the court’s decree in review of an earlier order, the court’s action would not have binding effect and no case or controversy would be presented.\(^{18}\)

On the basis of the language of the statute alone, it cannot be convincingly argued that the right of appeal has been denied in this situation. Throughout the Civil Aeronautics Act the distinction is clearly drawn between an American air carrier engaged in foreign air transportation and a foreign air carrier.\(^{14}\) The wording of Section 801 requires presidential approval in both types of transportation,\(^{16}\) but only the latter is made an exception to the right of appeal.\(^{18}\)

Close examination of the statutory pattern, moreover, seems to justify a literal interpretation of the provisions for appeal and requires a denial of the arguments advanced in the Pan-American case. In the first place, the Board is established as an independent, quasi-judicial body to issue or deny certificates and permits of convenience and necessity.\(^{17}\) Ordinarily, the President has no voice in the issuance or denial of these orders. However, in cases where air transport outside the United States is involved, or where a foreign air carrier is concerned, Congress recognized the access to information exclusive to the Executive in his unique position as concerns foreign affairs, and required his approval of any such orders.\(^{18}\) For this

which judicial review was denied under the Tariff Act of 1940. The decision was undoubtedly correct in that case, since §1336 of the Tariff Act provides that the commission “investigates” and “reports” to the President, and the President “by proclamation” sets the recommended rates. However, under the Civil Aeronautics Act, by subsection 401(d) (1), “The Board shall issue a certificate... if it finds that the applicant is fit, willing, and able, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.” 52 Stat. 987, §401, 49 USCA §481 (Supp. 1946). Orders made are orders of the Board acting independently of the executive office. §801 recognizes only that certain orders are subject to presidential approval. The President is given power to frustrate some orders, but not to issue them. See 83 Cong. Rec. 6854 (1938) (where a proposed amendment giving the President greater power to remove the officers of the CAB was defeated on the grounds that the CAB was intended to be an independent organization).

\(^{13}\) See Gordon v. United States, 117 U.S. 697 (1895), (Where the question presented was whether the Supreme Court had power to review a decision of the Court of Claims under the Court of Claims Act. By §14 the act provided that no money should be paid out of the Treasury for any claims allowed by the Court of Claims until the Secretary of the Treasury should have approved the payment, and Congress should have appropriated the money for such claim. It was held there was no power of review in this situation).

\(^{(2)}\) ‘Air Carrier’ mean(s) any citizen of the United States who undertakes... to engage in air transportation.”

\(^{(19)}\) ‘Foreign Air Carrier’ mean(s) any citizen of the United States who undertakes... to engage in foreign air transportation.”

\(^{(21)}\) . . . foreign air transportation... mean(s) the carriage by aircraft of persons or property... between... (c) 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 means of transportation.” 52 Stat. 977 §1, 49 USCA §401 (Supp. 1946).

§401 in part reads, “No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board...” 52 Stat. 987 §401, 49 USCA §481 (Supp. 1946), while §402 reads in part, “No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board...” 52 Stat. 991 §402, 49 USCA §482 (Supp. 1946).

\(^{15}\) ‘The issuance, denial, transfer, amendment, cancellation, suspension or revocation of... any certificate authorizing an air carrier to engage in overseas or foreign transportation... or any permit issuable to any foreign air carrier under Section 402 shall be subject to the approval of the President.” 52 Stat. 1014 §801, 49 USCA §601 (Supp. 1946).

\(^{16}\) See note 5, supra. See 83 Cong. Rec. 6764 (1938) (where Section 1006(a) was amended from... “an order in respect of foreign air transportation...” to read, “except an order in respect of any foreign air carrier.”).\(^{17}\)

\(^{17}\) See 83 Cong. Rec. 6854 (1938). See note 12, supra.

\(^{18}\) See note 15, supra.
reason, he is empowered to halt any activities authorized by the Board which he considers subversive to our international policies. It is assumed that the President will confine himself to acting on this basis, and will not encroach upon functions which by congressional enactment have been placed in the administrative agency.\textsuperscript{19}

On this basis, the function of the court seems clear. The Board considers the requirements of the statute, national economics, the necessity and convenience to the public, and the ability of the carrier to give adequate service, in deciding whether or not to issue the requested certificate or permit. The President approves or vetoes such orders of the Board upon purely international phases of such issuance. The court is the guardian of the rights of the parties under the decisions of the Board, and is authorized to affirm, modify, or reverse such orders. The court, however, is not to pass upon the President's action. It has no concern with international questions, but is merely reviewing the actions of the Board to require compliance with the law.\textsuperscript{20} The argument that there is no case or controversy is invalid because the President's approval or denial of orders of the Board is based on considerations entirely separate from those on which the court acts. The court is presented with a question of law, i.e. whether the decision of the Board has conformed to the law as defined by the Civil Aeronautics Act, or whether it has been capricious and arbitrary, and its decision will determine that question of law, whether or not the President will subsequently disapprove the Board's order which results from the court's decree.\textsuperscript{21}

If the foregoing interpretation of the statute is correct, there remains to justify the denial of appeal only in the case of a foreign air carrier. If the court is reviewing only the actions of the Board, it would seem just as important that the Board act within its legal limits in the issuance or denial of permits to foreign air carriers, as in the issuance of certificates to air carriers engaged in foreign air transportation.\textsuperscript{22} If it is possible to consider the authorizing of a foreign air carrier to operate between the United States and other countries as more closely involved with foreign

\textsuperscript{19} But see Additional Service to Latin America, 6 CAB 857 (1946), where the President denied the issuance of a certificate to Pan-American Airways, and directed that it be issued to Western Airlines, Inc. Although this substitution of carriers may have been made on the basis of international considerations, in that Pan-American had incurred the disfavor of the governments through which the proposed route would extend, it seems more likely that this is a clear case of the President overstepping the limits of his office and taking a position on matters which are properly for the determination of the administrative agency. While the propriety of a presidential recommendation is not questioned, it would seem that the Board, as an independent organization, is under no obligation to accept it. The language of the opinion, however, that the President "has reached conclusions which require the following changes..." and "In view of the President's determination..." and "The President having concluded... it is necessary..." seem to indicate that the Board considered itself bound by the President's action.

\textsuperscript{20} This is the holding of the Waterman case, which, in confining the court's review to the actions of the Board, largely eliminates the question of whether the President is acting independently in his own right as the sole representative of the country in foreign affairs, United States v. Belmont, 301 U.S. 324 (1937), or under specific delegation of power from Congress in its right to regulate foreign commerce. U.S. Const. Art. I, §§.

\textsuperscript{21} Federal Power Commission v. Pacific Power and Light Co. et al., 307 U.S. 156 (1939), (Where it was unsuccessfully argued that an order denying an application of a public utility for permission to sell its assets was not reviewable because only the Commission and not the court could relieve from the statutory prohibition).

\textsuperscript{22} It was argued by Waterman that if appeal were denied an illegal order of the Board would be rendered valid and non-reviewable by presidential approval. Is it not the same case as regards a foreign air carrier where appeal is denied?
affairs than the authorizing of a domestic air carrier to operate between the
United States and other countries, the statutory policy may be justified.
The power to regulate commerce, both interstate and foreign, was delegated
to Congress by the Constitution.23 Judicial interpretation has defined
foreign commerce as including the licensing of domestic organizations to
operate outside of United States territory as well as the licensing of foreign
organizations to operate within this country.24 It is also well recognized
that Congress may, within limits, delegate this regulatory power to the
Executive or to an administrative agency.25 This power of delegation broadens
where international considerations are involved,26 and where questions
of foreign affairs overlap questions of foreign commerce, it has been
held that Congress may delegate the whole field to the President.27 The
conclusion is irresistible, therefore, that in the exercise of its power to
regulate commerce, Congress made a complete delegation to the Civil Aeronautics Board of the regulation of purely domestic air carrier problems.
In the case of American air carriers operating outside the United States,
Congress gave the President the power to thwart certain orders of the
Board. For the reasons shown, however, the orders issued remain those of
the Board, and judicial review is proper and is required by the language of
the Act. In the case of a foreign air carrier, however, Congress must
have intended a complete delegation to the President since denial of appeal
cannot be justified on any other grounds. If a complete delegation was
made, the President's decision would be final, the determinations of the
Board could only be considered advisory, and judicial review would be
futile.28
On the basis of the above reasoning, the conclusion reached in the
Waterman case seems to be the better interpretation of the appeal provisions

23 "To regulate Commerce with foreign Nations, and among the several

24 Gibbons v. Ogden, 22 U.S. 1 (1824) ("No sort of trade can be carried on
between this country and any other, to which this power does not extend").
Board of Trustees of University of Illinois v. United States, 289 U.S. 48 (That
no one has a vested right to carry on foreign commerce with the United States).

25 Miller v. New York, 109 U.S. 385 (1883) (Congress may delegate power
to the Secretary of War to determine whether a proposed bridge will be a serious
obstruction to navigation and to make necessary modifications). United States
v. Curtiss Wright Corp., 299 U.S. 304 (1936) (Joint Resolution of Congress al-
lowing President to proclaim embargo on shipment of war materials to nations
at war in the Chaco upheld against assertion of unlawful delegation of power).

(Delegation of regulatory power to Federal Trade Commission). Houston East and
West Texas Ry. Co. v. United States, 234 U.S. 342 (1914) (Delegation of regulat-
ory power to Interstate Commerce Commission). But cf. A. L. A. Schechter
Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v.
Ryan, 293 U.S. 388 (1934) (where delegations to the President were held invalid
for lack of declarations of policy and definite standards by Congress).

27 United States v. Rosenberg, 150 F. 2d 788 (C.C.A. 2d, 1945) cert. den. 326
U.S. 762 (1945). Delegation to President of authority to prohibit exportation
of war supplies, 52 Stat. 714, 50 USCA Appendix §701, whenever he "determines
it is necessary in the interest of national defense to do so . . . " upheld against
attack of unlawful delegation. The Schechter case and the Ryan case, note 25,
supra, were distinguished on the ground that they related to purely internal
affairs.

28 United States v. Curtiss Wright Corp., 299 U.S. 304 (1936). See note 25,
Rosenberg, 150 F. 2d 788 (C.C.A. 2d, 1945). (Both cases concerned the same stat-
ute, 54 Stat. 714, 50 USCA Appendix §701. See note 26 supra.)

29 Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Pan-American Air-
ways v. Civil Aeronautics Board, 121 F. 2d 810 (C.C.A. 2d, 1941). See notes 11
and 12 supra.
of the Civil Aeronautics Act. The approaching consideration of the problem by the Supreme Court will necessitate a choice between the conclusions reached in the Waterman and the Pan-American cases.

The suggested interpretation seems to answer the problems and inconsistencies which, it is claimed, will arise in the practical application of the appeal provisions of the Act. So long as the court and the President observe the limitations upon their participation in the application of the Act, there will be no conflict of function. Affirmative orders of the Board, although approved by the President, may still not be in conformity with the Civil Aeronautics Act, and appeal is proper to protect those interested parties who will suffer by the improper order of the Board. The President's approval means only that he consents to such order on the basis of foreign policy and does not preclude a finding by the court that

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29 See Hearings before Committee on Interstate and Foreign Commerce on H.R. 9738, 75th Cong, 3rd Sess. (1938). Further support for this position is to be found in the Hearings before Committee on Interstate and Foreign Commerce on Bills Relative to Overseas Air Transportation, 80th Cong, 1st Sess. (1947). At page 1280, Chairman Landis of the Civil Aeronautics Board, in response to a suggestion that if the President can modify orders of the Board, and substitute carriers, that the interested parties should have a hearing before the President, replied: "If that is to be the President's power, perhaps some type of hearing, not before the President personally, of course, but before his appropriate agent might be in order, but I wonder if that is the purpose of Section 801. . . . My feeling is that certainly you want an overriding power of the President to supervise the actions of the Civil Aeronautics Board in this field, because there may be very broad considerations of policy that commend a type of action of which he alone can be aware and can appreciate the significance. But the alteration of decisions, other than a chipping off of certain portions of them by a partial veto, I do not think is contemplated by Section 801. That does not contemplate that kind of proceeding in my opinion."

Mr. C. A. Wolverton, Chairman of the House committee agreed: "Your view in that respect and my own are identical. At the time that the act was drawn, I think all that was contemplated was what you have indicated, that the President should have the right, in the event of some over-all question of foreign policy that would cause him to act in the interest of the country, to do so. But, when I see an application passed upon and approved by the Civil Aeronautics Board and a recommendation made on the basis of evidence produced before the Board, and then, without any hearing it is changed and given to another line, it is difficult for me to see how the question of foreign policy would dictate that one company should not have it and another company should have it, if it is limited to questions of public policy. I have no hesitancy in saying that it was my understanding of the act when it was originally drawn that such power was given to the President as having an over-all knowledge of the foreign situation and that foreign affairs alone would dictate the approval or disapproval."

And after expressing his disagreement with Judge Hand in the Pan-American case, Mr. Landis, at page 1285, adds: "Let me say this, that if prior to the American Export [Pan-American] case, I had to advise the President as to what his powers were, I would have said that they were to approve or disapprove and not to initiate new decisions."

30 There are two possible objections to the constitutionality of §1006(a). Is the delegation by Congress to the President in the case of a foreign air carrier invalid for lack of defined policy and standards? United States v. Curtiss Wright Corp., 299 U.S. 304 (1936); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Is denial of access to the courts a proper regulatory measure within congressional power to regulate foreign commerce? Cf. Terral v. Burke Construction Co., 257 U.S. 529 (1922) ("... a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts. . . .") But see §1106: "Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 52 Stat. 1027 §1106, 49 USCA §76 (Supp. 1946). Does this provide for appeal by a foreign air carrier to the district court under Section 24 of the Judicial Code? 36 Stat. 1027, 28 USCA §41.

31 See Waterman Steamship Corp. v. CAB, 159 F. 2d 828, 831 (C.C.A. 5th, 1947).
the Board's order was contrary to the law. Similarly, for affirmative orders of the Board which are disapproved by the President, appeal to the court might well result in a modification of the order, or a substitution of carriers, which new order might be approved by the President. And even though the President declines to approve a new order of the Board which might be issued as a result of the court's reversal of an earlier order, the appeal should lie to give all parties the full benefit of the law. Negative orders of the Board which are approved by the President should also be subject to review. Here again, the President's approval means only consent, and it might well be that he would approve an affirmative order issued by the Board after a holding by the court that the negative order was not in accordance with the law.

The most persistent objection to the suggested interpretation comes in the case of the President's disapproval of a negative order of the Board. It is argued that the broad language of Section 801, requiring the President to indicate his approval or disapproval of all orders of the Board, affirmative or negative, is inconsistent with the suggested interpretation that the scope of the President's approval or disapproval is limited to considerations of foreign affairs. If application for a certificate or permit is denied by the Board, it is said, there is nothing upon which to apply considerations of foreign policy, and thus the requirement of presidential action under these circumstances must mean action by the President based on considerations other than foreign policy alone. There is no inconsistency, however, if it is considered that the language in Section 801, requiring presidential action even in the case of a negative order of the Board is a requirement for the President to make recommendations in cases where he disapproves of a negative order of the Board. Approval of a negative order merely means consent by the President. Considerations of foreign policy do not conflict with the Board's order. Disapproval, however, indicates that foreign considerations require a different result, and in this case the President is expected to make appropriate recommendations. If such recommendations involve secret information, the Act provides by Section 1104 for the security of such information.

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32 It may be argued that an order of the Board which is disapproved by the President is not a final order of which there can be judicial review, but that upon such disapproval the order is reabsorbed into the administrative machinery for final determination. Even if this is true, it does not help in answering the apparent inconsistency between the broad language of §801 and the more limited power of the President which has been suggested here.

33 "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate... or any permit... shall be subject to the approval of the President." 52 Stat. 1014 §801, 49 USCA §601 (Supp. 1946).

34 Additional Service to Latin America, 6 CAB 857 (1946). See note 19 supra.

35 "Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of the Act or information obtained by the Board or the Administrator of Civil Aeronautics pursuant to the provisions of this Act, stating the grounds for such objection. Whenever such objection is made, the Board shall order such information withheld from public disclosure when, in its judgment, a disclosure of such information would adversely affect the interests of such person, and is not required in the interest of the public. The Board is authorized to withhold publication of records containing secret information affecting national defense." 52 Stat. 1026 §1104, 49 USCA §674. For examples of the application of §1194 see TACA-S.A. El Salvador-Foreign Air Carrier Permits 3 CAB 234 (1941); Pan-American Airways Company—Temporary Certificate of Public Convenience and Necessity—Lisbon-Foynes Operation 3 CAB 238, 240 (1941); Northeast Airlines, Inc. Mail Rates for Route No. 27, 4 CAB 181, 182 (1942).

The basic question is not whether there is any appeal at all of orders of the CAB requiring presidential approval, but whether appeal of these orders is
The decision in the Waterman case seems to reflect a more complete understanding of the statutory pattern of the Civil Aeronautics Act and makes possible an application of the Act in such manner as to achieve more just and equitable results than would be possible under the more restrictive view taken in the Pan-American case.8

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SOME PRINCIPAL ASPECTS OF THE ICAO MORTGAGE CONVENTION

The Legal Committee of ICAO which had been created to take the place of CITEJA held its first meeting in Brussels in September 1947 and approved the "Draft Convention on the International Recognition of Rights in Aircraft" set forth on page 500 of this issue of the JOURNAL. This draft will be submitted to the ICAO Assembly at its meeting next year.1 It represents the efforts of twenty-nine nations and international organizations which began in 1931 to provide a system for financing the purchase of aircraft and spare parts that would afford the maximum guarantee throughout the world to the security of the transactions involved.2

The present draft seeks to fulfill this objective while involving a minimum of interference with the national laws of each Contracting State.

Included in §1006(a) providing for appeal to a circuit court, rather than being left to the district courts as a matter of their general jurisdiction, an alternative suggested by §1106: See note 30, supra. If the statute creating an administrative agency does not provide for review, district courts may nevertheless entertain review as an exercise of their general jurisdiction. See American School of Magnetic Healing v. McAnulty, 187 U.S. 94 (1902); David L. Moss Co. v. United States, 103 F. 2d 395, 397 (C.C.P.A., 1939). If the statutory review is for some reason inadequate, review may still be entertained. United States v. Griffen, 303 U.S. 226 (1938), Shannahan v. United States, 303 U.S. 596 (1938), Shields v. Utah Idaho Central Railroad Co., 305 U.S. 177 (1938). But see Jackson v. Cravens, 238 Fed. 117, 120. (C.C.A. 5th, 1916), "... When a statute provides a new, specific, and complete remedy, and fully covers the subject matter, the provisions of the statute will be looked to alone, and resort will not be had to prior existing remedies as cumulative." Cf. Sykes et al. v. Jenny Wren Co., 78 F. 2d 729 (C.C.A. Dist. Col. 1935). Myers et al v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938) (Administrative relief must be exhausted before resort to other remedies).

The decision in the Pan-American case was based on the premise that as far as orders requiring the approval of the President are concerned, the Board acts only in an advisory capacity, and that the orders as approved by the President are acts of executive discretion. Even assuming this to be a correct premise, and assuming that the analogy to the tariff cases is proper, a limited appeal would seem to exist. In Carl Zeiss, Inc. v. United States 76 F. 2d 412 (C.C.P.A. Customs 1935) it was held that where public notice relates to one commodity, and the proclamation of the President relates to another, there has been such a lack of compliance with the statutory provisions as to render the increase in duty void. William A. Foster and Co., Inc. v. United States, 20 C.C.P.A. Customs 15 (1933) assumes that a modification of more than the statutory 50% in the existing tariffs could be invalidated on review. These holdings as applied to the Civil Aeronautics Act would seem to indicate that under Judge Hand's premise in the Pan-American case, an appeal would lie as to questions of hearing, notice, and the absolute requirements under Section 401 (f) of the Act, such as the right of the carrier "to add to or change schedules," and that certificates for foreign air transportation must permit the handling of mail.

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1 ICAO News Release, October 13, 1947.
2 PICAO Doc. 1859, LE/44, June 17, 1946, page 14. For historical background, see the following: Latchford, Pending Projects of the International Technical Committee of Aerial Legal Experts, (1946) 40 Am. J. Int'l L. 280, 294; Private International Air Law, (1945) 12 Dep't State Bull. 11; Coordination of CITEJA with the New International Civil Aviation Organizations, (1945) 12 Dep't State Bull. 310.
Because of the nature of international commercial aircraft financing, which involves million-dollar aircraft often purchased in fleets of four or more together with spare parts which cost from 20% to 50% of the total cost, and because of the highly mobile character of aircraft and the operational hazards to which they are subject, it is desirable to afford maximum protection to those who finance such purchases. From the standpoint of such financial institutions it is important that their rights, and the priority of those rights in point of time, be recognized in those countries through which the aircraft will travel. It is also considered desirable to have each aircraft of the fleet being financed made jointly liable for the entire loan on the fleet. This is known as the fleet mortgage and the relationship of each aircraft to the debt is roughly analogous to the joint liability of the co-signers of a promissory note where each co-signer is jointly liable for the face amount although the lender cannot collect more than the full amount of the note. From the standpoint of the aircraft purchaser or operator it is desirable to have provision for the recognition of mortgages on spare parts because otherwise he would have to have sufficient funds to purchase them outright or forego the purchase of any new equipment since a fleet of aircraft is of little value without spare parts with which to maintain it in operation. However, both this and the fleet mortgage principle have presented difficulties as indicated below.

It will be noted that Article I provides that each Contracting State undertakes to recognize various security rights, as well as property rights, in aircraft when they have been recorded. Nothing would seem more basic in Anglo-American law and yet it must be remembered that this document was developed at the international level and at the start of discussions in 1931 only three countries recognized the existence of aircraft mortgages. Recording is not made mandatory — there is a complete absence of penal provisions in the Convention — but since recordation of a right is made a prerequisite to its recognition by other Contracting States, it is obvious that this will be compelling enough to insure recordation when the aircraft is to operate abroad. The Paris draft had contained elaborate provisions for recordation but these were abandoned and now it is simply to be in conformity with the law of the Contracting State whose nationality the aircraft possesses. One possible disadvantage is that the foreign creditor must now inquire into the local law to determine how he must record his right, rather than turning to the Convention for the answer.

Before considering the substance of Article I it should be pointed out that the applicability of the entire Convention is somewhat limited by Article IX. By that article, with the exceptions there noted, the Contracting States will not be obliged to apply the Convention within their own territory to aircraft there registered. Thus if an aircraft registered in Norway is being financed by a French bank by means of an hypothéque which has been duly recorded in Norway and a local creditor in Norway brings execution proceedings, Norway will not be bound to apply any but
Articles III and VII of this Convention. However, if Article I is interpreted as requiring any right there mentioned to be constituted, as well as recorded, in conformity with the law of the Contracting State whose nationality the aircraft possesses, then the right must necessarily be one which is recognized under the national law of that State or by virtue of its conflict of laws doctrine, and will be protected even though the Convention does not apply. While this would seem to be the more logical interpretation, it is interesting to note that the Legal Committee of ICAO did not clearly place this interpretation on Article I, and only mentioned recordation as a prerequisite to recognition of the right.\textsuperscript{10} As a practical matter financial institutions will probably use credit instruments and methods of financing which are certain to be recognized by the State where the aircraft is registered, depending on the Convention for protection when the aircraft is outside the State of its nationality.

The language of Article I would seem broad enough to cover virtually every kind of right in aircraft.\textsuperscript{11} A certain amount of "legislative history" may eventually be available in the form of Legal Committee reports and Assembly discussions which will be helpful in resolving doubts.\textsuperscript{12} A literal reading of paragraph one would seem to include all credit instruments now in use. Mortgages and hypothecques are specifically mentioned in (1)(d); trust receipts, under which the lender normally takes title,\textsuperscript{13} would seem to be covered by (1)(a). The equipment trust, a special type of device under which the lender has title, and conditional sales are contemplated by both (1)(c) and (1)(d). The equipment trust has been used occasionally probably because so few countries recognize the aircraft mortgage and because it may be applied to new equipment financing without becoming subject to the after-acquired property clauses of most general corporate mortgages.

The fleet mortgage would clearly seem to be possible under Article I. If it is, then Article V(4) may virtually preclude attachments by local creditors of an aircraft mortgaged under this plan since each plane is jointly liable for the entire amount secured, and unless the mortgage has been reduced to the point where it is equal to or less than the value of one aircraft no one will assume the charges. This was early believed to be one of the disadvantages of the fleet mortgage but it was pointed out that the air carrier would only become indebted to local creditors to any extent through purchases or by causing accidental damage. In the first case, the general creditor would probably not be relying on so transient an object as a transport aircraft for security but would rather have his eye on local fixed property belonging to the carrier.

In the case of tort claims, these ordinarily would be satisfied out of insurance, plus local assets if necessary. However, to provide greater protection for the tort claimant, by Article V(5), the mortgage, as well as all other rights mentioned in Article I, may not, if the law of a Contracting State so provides, be set up to an extent greater than 80\% of the sale price of the aircraft taken in execution as against persons who have sustained injury or damage on the surface caused by the aircraft or by any other aircraft encumbered with the same fleet mortgage.\textsuperscript{14}

The second paragraph of Article I makes the effect of recording, as to third persons, depend on the law of the State where recorded. Thus, it is

\textsuperscript{9} Assuming both are signatory States.
\textsuperscript{10} Report and Commentary of the Legal Committee of ICAO on the Draft Convention Concerning the International Recognition of Rights in Aircraft, See, pages 505-511 of this issue of the JOURNAL especially 507.
\textsuperscript{11} Except it appears impossible to mortgage aircraft under construction.
\textsuperscript{12} See note 10, supra.
\textsuperscript{13} \textit{Jones, Chattel Mortgages & Conditional Sales}, (6th ed. 1933) §33(c).
\textsuperscript{14} Except when insured. If execution takes place in the State of registration the per cent may be lower by virtue of Art. IX.
left to that State to determine the rank of the recorded rights and to settle controversies that may arise in recordation. But no State may admit any charge taking priority over the rights mentioned in Article 15 except those mentioned in Articles III and V(6). This means that taxes, public charges and other fiscal claims cannot be accorded priority, even as to aircraft of the States own nationality. And even those of Article III must be prosecuted within three months or recorded to preserve them. In this connection, paragraph six of Article III seems to be a further refinement of Article IX and restricts incidents such as salvage claims to those arising outside the territory of registry.

One of the most difficult subjects encountered in connection with the Convention was the question of spare parts located outside the State of the nationality of the aircraft. It was particularly difficult because of the number of countries that do not recognize a mortgage on chattels. The present Article VIII was developed with this background. The State where the aircraft is registered must recognize the right recorded there as extending to spare parts before other Contracting States are required to recognize it. The local creditors and prospective creditors where the parts are located are given additional "appropriate public notice" besides that afforded by recordation. It will probably be necessary for Congress either to amend the Civil Aeronautics Act of 1938 to provide for the recording of spare parts associated with aircraft engaged in foreign commerce since the recording provisions of that Act include only U.S. registered aircraft, or to enact a complete Federal chattel mortgage law, like the ship mortgage act, applicable to aircraft and spare parts.

Article VI when read together with Article V(4) seems to give a result which is a compromise between the French doctrine of la purge, recognized in many countries, and the Anglo-American concept of judicial sales. Under the French doctrine when a chattel is seized by an attaching creditor and caused to be sold at a judicial sale the purchaser of the chattel gets a title free and clear of all liens. The senior lien holder is paid first but if the proceeds of the sale do not cover his claim he is neither paid in full nor permitted to hold his security. This doctrine is limited by Article V(4) which provides that no sale can be effected unless all charges senior to the claim of the executing creditor are covered by the proceeds or "assumed" by the purchaser — not merely subject to them.

These are the major provisions of the draft, the remaining articles dealing primarily with matters of procedure and are, for the most part, self-explanatory. The draft is distinguished from previous drafts by its simplicity, stating only the main principles, probably because it was found to be impossible to reconcile the peculiarities of every legal system. However, the Brussels Convention on Maritime Mortgages and Privileges of 1926 is similar in its simplicity yet it has served satisfactorily as a basis of international granting of credit among nations parties thereto.

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15 Art. III (7).  
17 But air traffic violations presumably can; Art. X.  
18 Art. IX and III (7).  
19 Art. III (3) and III (5).  
21 Furthermore, most spare parts may be admitted and kept under customs supervision in accord with Art. 24(b) of the International Civil Aviation Convention; see also Art. 27, 1945 USAvR 251.  
24 The United States is not a party to the Brussels Convention of 1926. For text see, Treaty Information Bull., No. 19 at 22 (U.S. Dep't of State 1931). See also, 6 BENEDICT, ADJUDICATION 78 (6th ed. 1941).  
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