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THE LEGAL STATUS OF EXECUTIVE AGREEMENTS ON AIR TRANSPORTATION

By OLIVER J. LISITZYN

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The operating privileges in foreign countries which have made possible the development of a world-wide network of American-flag air transport services rest largely upon some forty bilateral air transport agreements between the Government of the United States and foreign governments.1 The privileges of many foreign-flag air carriers to operate international services to the United States likewise depend upon the provisions of these agreements. Members of Congress and other persons have from time to time expressed the view that the validity or legal effect of these agreements is questionable, since they have all been made by executive authority without the advice and consent of the Senate requisite for the conclusion of a treaty.2

In a recent judicial proceeding, Colonial Airlines, Inc., a United States air carrier which is authorized to operate, *inter alia*, a scheduled air transport service between New York and Montreal, sought to enjoin the members of the Civil Aeronautics Board from holding hearings and having further proceedings on the application of Trans-
Canada Air Lines, a Canadian air carrier, for a competing service between the same two cities, and from issuing a permit for such service. Among the many grounds advanced by Colonial in support of its action was the alleged invalidity of the air transport agreement between the United States and Canada signed on June 4, 1949, in which the United States undertook to permit an airline designated by Canada to operate a service between Montreal and New York. The United States District Court for the District of Columbia, sitting as a three-judge statutory court, found it unnecessary, in dismissing the complaint, to pass upon the validity of the agreement. Colonial appealed to the Supreme Court, but shortly before the date of the hearing moved to dismiss its appeal. The question of the validity and legal effect of air transport agreements thus remains judicially unresolved. In view of the importance of these agreements in the air commerce policy of the United States, their legal position merits some consideration.

Air transport agreements will be discussed here primarily with reference to one aspect common to most of them, namely the qualified undertaking on the part of the United States to permit foreign airlines designated by the other party to operate regularly scheduled commercial air transport services to the United States. Questions which may be raised with respect to other aspects of the agreements, such as the provisions dealing with rates and customs duties, will not be considered here.

Two problems of the validity and effect of air transport agreements must be distinguished—the domestic and the international. An interna-

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3 TIAS 1934. See Complaint for Injunction, filed August 17, 1949, Colonial Airlines, Inc. v. Russell B. Adams et al., Transcript of Record, Supreme Court of the United States, October Term, 1949, No. 539, p. 33.
6 For example, the pertinent parts of the 1949 agreement with Canada, TIAS 1934, are as follows:

Article 2: Each contracting party grants to the other contracting party the rights specified in this Agreement and the Annex thereto for the purpose of establishing the international air services therein described, whether such services be placed in operation immediately or at a later date at the option of the contracting party to whom the rights are granted.

Article 3: Any air service described in the Annex hereto may be placed in operation as soon as the contracting party to whom the rights have been granted has designated an airline or airlines to operate such service, and has so notified the other contracting party. Each contracting party reserves the right to withdraw at any time the designation of an airline and substitute the designation of another. The contracting party granting the rights shall, subject to Article 7 hereof, be bound to give, with a minimum of procedural delay, the appropriate operating permission to the airline or airlines concerned; provided that the airline or airlines so designated may be required to qualify before the competent aeronautical authorities of the contracting party granting the rights under the laws and regulations normally applied by those authorities before being permitted to engage in the operations contemplated by this Agreement; and provided that in areas of hostilities or of military occupation, or in areas affected thereby, such operation shall be subject to the approval of the competent military authorities.

Article 7: Notwithstanding the provisions of Article 10 of this Agreement, each contracting party reserves the right to withhold or revoke permission to exercise the rights specified in this Agreement and the Annex thereto by an airline designated by the other Contracting party in the event that it is
national agreement entered into on behalf of the United States in accordance with its constitutional law is normally valid and binding under international law, even though, as will be seen below, it may be unenforceable in the domestic law of the United States without legislative action. But it does not necessarily follow that an international agreement made by the President of the United States in excess of his powers under the constitutional law of the United States is not internationally binding on the United States, however devoid of legal force it may be domestically. The international legal effect of such an agreement is further discussed below. The more immediate problem of the legal position of air transport agreements under the constitutional and statutory law of the United States resolves itself into two questions: (a) What would be the legal position of these agreements in the absence of statutory law on the subject? (b) What is the effect, if any, of existing statutory law on their legal position? These questions cannot be answered without reference to the position in the constitutional law of the United States of executive agreements in general.

Executive Agreements in Constitutional Usage

"Executive agreements" is a term commonly used to designate international agreements made by the President of the United States without the advice and consent of the Senate given by the two-thirds majority requisite for the conclusion of a treaty under the Constitution. The power of the President to make such agreements with and without the authorization or approval of Congress has been recognized by the Supreme Court, and has been exercised since the beginnings of national government. It has been the practice of Congress since 1792 to authorize by statute the making of executive agreements on a large variety of subjects.8

not satisfied that substantial ownership and effective control of such airline are vested in nationals of the other contracting party, or in case of failure by such airline or the government designating such airline to comply with the laws and regulations referred to in Article 6 hereof, or otherwise to perform its obligations hereunder to fulfill the conditions under which the rights are granted in accordance with this Agreement and its Annex.

Annex, Section II: The Government of the United States of America grants to the Government of Canada the right to conduct, by one or more airlines of Canadian nationality designated by the latter country, the international air services specified in Schedule Two hereof.


8 In 1890, Solicitor General William Howard Taft found that the practice of making postal agreements under the authority of Acts of Congress, without approval by the Senate as treaties, was a well-established constitutional usage. 19 Op. A. G. 513. In 1938 Congress recognized in general terms the existence of "international agreements other than treaties to which the United States is a party" by providing for their publication in the Statutes at Large. 52 Stat. 760, 1 U.S.C. §30. For similar but less clear language in previous enactments, see 28 Stat. 616 (1886) and 49 Stat. 1551 (1936). For extensive discussions of the position of executive agreements in the history and constitutional law of the United
The making of executive agreements is thus a constitutional usage of long standing which apparently rests upon the President's vast but ill-defined powers in the fields of foreign relations and national defense.9 Neither the usage nor the decisions of courts, however, provide clear-cut guidance as to the scope of the executive agreement-making power. It is clear that the scope of the treaty-making power and the scope of the executive agreement-making power are not mutually exclusive. What may be properly accomplished by executive agreement may also be accomplished by treaty. The proposition, therefore, that a certain matter is a proper subject for a treaty does not necessarily lead to the conclusion that it is not a proper subject for an executive agreement. But it likewise does not necessarily follow that everything that may be accomplished by treaty may also be accomplished by executive agreement.

The scope of the executive agreement-making power has been the subject of continued and often bitter controversy. It has been argued, for example, that subjects which were customarily dealt with by treaties at the time of the adoption of the Constitution should continue to be so dealt with, since such must have been the intention of the Framers, while other subjects may perhaps be legitimately dealt with by executive agreement.10 The fact that the Constitution absolutely forbids a State of the Union to enter into "any treaty," but permits it to enter into an "agreement or compact" with the consent of Congress11 has been used, in conjunction with definitions of allegedly equivalent terms found in the works of Vattel, an eighteenth-century Swiss jurist whose writings were widely read in America, to imply that an executive agreement may not impose a continuing obligation on the United

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9 The Supreme Court has spoken of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." Per Sutherland, J., in U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). Although perhaps not necessary to the decision of the case, this definition of the President's position is believed to represent the considered view of the Court and to express a well-established constitutional doctrine. See U.S. v. Belmont and U.S. v. Pink, supra n. 7. The Court also said that it had recognized, in previous decisions, that the power to make such international agreements as do not constitute treaties existed as inherently inseparable from the conception of nationality, and had "found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." Id. See, in general, Corwin, The President: Office and Powers (1948), 259 et seq.


11 U.S. Constitution, Article I, Section 10.
States, but must be capable of performance by a single act.\textsuperscript{12} In recent years, much broader interpretations of the executive agreement-making power have gained ground. One view is that the President, in the exercise of his plenary power in the field of foreign relations, may make valid executive agreements on any subject on which treaties may be made; and that the distinction, if any, between executive agreements and treaties is not one of the scope of the power to make them, but of their effect in domestic law.\textsuperscript{13} Another and narrower view is that the executive agreement-making power, in the absence of statutory authority or approval, extends to all matters within the President's independent power of enforcement.\textsuperscript{14}

It is not believed that any attempt to delimit rigidly the scope of the executive agreement-making power is likely to be successful or to result in a correct portrayal or prediction of actual practice. Some writers, while refusing to regard the executive agreement-making power as co-extensive with the treaty-making power, wisely refrain from attempting to define the scope of the former.\textsuperscript{15} Particularly futile are attempts to circumscribe the present and future constitutional practice by subtle deductions, drawn from antiquarian research into the reading habits and hidden states of mind of the Framers in 1788, as to the "true" meaning of such terms as "treaty," "agreement" and "compact." It must ever be borne in mind that the Framers attempted to create an instrument of effective government, in contrast to the unworkable Articles of Confederation. And it was precisely in respect to such matters as interstate and foreign commerce, and foreign relations, that the Articles had proven to be most unworkable. The general purpose of the Framers was to establish a workable government for the Union, and any construction of the Constitution which is likely to defeat that

\textsuperscript{12} Borchard, \textit{Opinion}, supra n. 8, at 44-49, citing Weinfeld, "What Did the Framers of the Federal Constitution Mean by 'Agreements or Compacts'?" 3 U. of Chi. L. Rev. 463 (1935-36). It is clear that no such restrictive meaning has been given in practice and court decisions to the term "compact" in inter-State relations. See the critical comments of McDougal and Lans, \textit{supra} n. 8, at 226-238.

\textsuperscript{13} McClure, \textit{supra} n. 8, at 343; \textit{cf.} McDougal and Lans, \textit{supra} n. 8, at 246. It has been held that an executive agreement incidental to the recognition of a foreign government is "the supreme law of the land" in relation to inconsistent State law. \textit{U.S. v. Pink}, 315 U.S. 203 (1942). See also, for later developments, Note in 48 Col. L. Rev. 890 (1948). Executive agreements authorized or implemented by Congressional action are believed to have the same binding effect as treaties in superseding inconsistent State laws. 40 Op. A. G. 469 (1946). It is doubted that an agreement made by the President can supersede or modify the operation of an Act of Congress, unless given effect by appropriate legislation. See \textit{infra}. A treaty does supersede a prior inconsistent Act of Congress. \textit{Cook v. U.S.}, 288 U.S. 102 (1933). But \textit{cf. Wette v. U.S.}, 1 Wash. Terr. (N. S.) 288 (1870), where the court said \textit{obiter} that an executive agreement with Great Britain, not approved or authorized by Congress, providing for joint military occupation of an island the title to which was in dispute between the two nations, could modify the operation of the Organic Act of the Territory of Washington as enacted by Congress.

\textsuperscript{14} Wright, \textit{The Control of American Foreign Relations} (1922). 237; \textit{Levitan, supra} n. 8, at 204. \textit{Cf.} the view expressed in 1926 by Under Secretary of State Grew, \textit{cf.} Hackworth, \textit{Digest of International Law}, 402; and Borchard, \textit{Opinion, supra} n. 8, at 66. \textit{Cf.} McDougal and Lans, \textit{supra} n. 8, at 199, 202, 205.

\textsuperscript{15} 2 Hyde, \textit{International Law Chiefly as Interpreted and Applied by the United States} (2d rev. ed., 1945), at 1416-1418.
purpose must be rejected. In this, indeed, has been the secret of the longevity of the Constitution. This view is far from novel; the Supreme Court has expressed it repeatedly, from the days of Marshall and Story to those of Stone. Thus, in 1816, Mr. Justice Story, speaking for the Court, said:

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself.\footnote{Martin v. Hunter's Lessee, 1 Wheat. 304 (1816), at 326.}

Three years later, the same view was expressed by Chief Justice Marshall:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language . . . we must never forget that it is a constitution we are expounding.\footnote{McCulloch v. Maryland, 4 Wheat. 316 (1819), at 407.}

The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. . . . This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means, by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.\footnote{Id., at 415.}

More than a century later, the Court, through Mr. Justice Stone, said:

But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it
is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.\textsuperscript{19}

It may be proper, therefore, to regard the executive agreement-making power as extending to all the occasions on which an international agreement is believed by the Chief Executive to be necessary in the national interest, but on which resort to the treaty-making procedure is impracticable or likely to render ineffective an established national policy. The test here suggested is the only one that adequately accounts for the variety of situations in which the President, with or without the approval of Congress, has resorted to the executive-agreement procedure.\textsuperscript{20} It also accounts for the increasing frequency of resort to the executive-agreement method in recent years, with the growth of complexity in international affairs and of pressure of work in the Senate. Recent counts have yielded the following figures of treaties and executive agreements made since 1789:\textsuperscript{21}

<table>
<thead>
<tr>
<th>Period</th>
<th>Treaties</th>
<th>Executive Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>1789-1839</td>
<td>60</td>
<td>27</td>
</tr>
<tr>
<td>1839-1889</td>
<td>215</td>
<td>238</td>
</tr>
<tr>
<td>1889-1939</td>
<td>524</td>
<td>917</td>
</tr>
<tr>
<td>1939-1945</td>
<td>43</td>
<td>300</td>
</tr>
</tbody>
</table>

Of the last 100 instruments (in numerical order) published in the Treaties and Other International Acts Series in 1949, 94 were executive agreements and only 6 were treaties.\textsuperscript{22} The treaty-making procedure involves several steps, the most time-consuming of which, in

\textsuperscript{19} U.S. v. Classic, 313 U.S. 299 (1941), at 316. See, further, with specific reference to the commerce power (as example of a field in which constitutional practice has extended far beyond eighteenth-century needs), Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877), at 9; North American Co. v. Securities & Exchange Commission, 327 U.S. 686 (1946), at 705. For non-judicial expressions of the same view, see Patterson, Presidential Government in the United States (1947), 7-14.

\textsuperscript{20} It is of interest that the President, on his own authority, has made several agreements the performance of which required, or might have required, legislative action. Thus, the acquisition by executive agreement of the Horse Shoe Reef from Great Britain (Canada) in 1850 was conditional upon an undertaking to maintain, at the expense of the United States, a lighthouse, which could not be done without legislative action. 1 Malloy, Treaties, 663. In 1941, the President, by executive agreement, undertook the defense of Iceland without expense to Iceland and promised compensation for all damages occasioned to the inhabitants by the military activities of the United States. EAS 232. On the other hand, when the Chicago Interim Civil Aviation Agreement was accepted as an executive agreement, a reservation was made by the United States as to "constitutional processes" with respect to the obligation to share the expenses of the international organization which was to be set up under the agreement. EAS 487. No such reservation was attached to the Chicago International Civil Aviation Convention, subsequently ratified as a treaty, which contained a similar obligation. TIAS 1591.

\textsuperscript{21} Borchard, Opinion, supra n. 8, at 50-51, and sources there cited.

\textsuperscript{22} See list in Department of State, Publications, January 1, 1950 (Publication 3728), 32-40.
practice, is the consideration of a treaty in the Senate.\textsuperscript{23} In contrast, an executive agreement may be made to come into force on the date of signature, if it requires no subsequent legislative action. The treaty-making procedure, therefore, may simply fail in cases where the national interest requires prompt action or where the subject-matter of the agreement makes frequent amendment necessary.

Even the proponents of a strict construction of the executive agreement-making power admit that its limits are not clear or inflexible, and that an historical test is necessary.\textsuperscript{24} They express fear, however, that the power, unless strictly circumscribed, may lead to executive abuses.\textsuperscript{25} It is believed that this fear, though not entirely unfounded, overlooks several cogent considerations. History indicates that hostile public opinion or determined Congressional opposition to agreements really deemed to be objectionable generally prevents the making of such agreements or leads to their early termination. This is true not only because Congress has the power of the purse, but also because the Chief Executive is not likely to conclude an executive agreement if there is danger of inconsistent action (or inaction) by Congress. Congressional opposition was at least partly responsible for the denunciation by the United States in 1946 of the Chicago Air Transport Agreement.\textsuperscript{26}

It is not intended, however, to suggest that there may be no instances of improper use of the executive agreement-making power. The treaty clause of the Constitution is not meaningless. The Executive would be acting improperly if he attempted to commit the United States, perhaps irrevocably, to a major change in national policy by an international agreement made on his own authority, or if he entered into an agreement imposing on the United States an obligation which he knew, or had reason to believe, to be unenforceable. The difference between proper and improper uses of the executive agreement-making power is not to be sought, however, in fine-spun antiquarian distinc-

\textsuperscript{23} For examples of delay in the Senate of treaties dealing with aviation matters, see \textit{infra}.

\textsuperscript{24} "As already observed, the Constitution neither provides a clear definition of the proper subject-matter of treaties nor provides for the existence, let alone the scope, of executive agreements. Time and circumstances, however, provide guidance on these questions. We know approximately what kind of questions have historically been embraced by each form and what therefore are their proper spheres." Borchard, \textit{Opinion, supra} n. 8, at 65. Professor Borchard undertakes on his own authority to distinguish "good" from "bad" usage, and to characterize decisions of the Supreme Court as wrong. \textit{Id.}, at 51, 76-78. Cf. the view expressed by John Bassett Moore in 1905 to the effect that the law of the Constitution was "not more to be found in the letter of that instrument than in the practice under it." Moore, "Treaties and Executive Agreements," 29 Pol. Sci. Q. 385 (1905), at 417.

\textsuperscript{25} Borchard, \textit{Opinion, supra} n. 8, at 55.

\textsuperscript{26} The notice of denunciation was given on the day the Senate gave its advice and consent to the ratification of the Convention, July 25, 1946. 15 Department of State Bulletin 236 (1946); TIAS 1591. This action was preceded by lively criticism of the Agreement in the Senate. See \textit{infra}. 
tions, but in the needs of the nation; and it is to be given effect not by judicial, but by political procedures.  

However broad may be the scope of the executive agreement-making power, the effect of an executive agreement in the domestic law of the United States may well be susceptible of judicial limitation. Treaties, although they are said by the Constitution to be the supreme law of the land, may be denied operative effect as domestic law in the absence of implementing legislation.  

They may be superseded, as domestic law, by subsequent inconsistent Acts of Congress. There can be little doubt that executive agreements are subject to similar limitations as to effect. Furthermore, while a treaty, if self-executing, can supersede a prior inconsistent statute, it is very doubtful whether an executive agreement, in the absence of appropriate legislation, will be given similar effect.

CONTROL OF FOREIGN AIRCRAFT IN THE ABSENCE OF LEGISLATION

Until the enactment of the Air Commerce Act of 1926, admission of foreign aircraft into the United States was not regulated by statute. It is apparent, however, that the national interest might be adversely affected by the unregulated operation and landing of such aircraft in the United States. In the absence of statutory law, did the President have the power to control the entrance of foreign aircraft? And did he have the power to undertake by agreement with foreign states to admit aircraft of their nationality into the United States? These questions were not much discussed, and such practice as existed with respect to civil aircraft was not conclusive. Operation of aircraft of any kind in or across the Panama Canal Zone without written authorization from the Chief Executive of the Zone was prohibited by an Executive Order dated August 7, 1913. In 1914 a Proclamation Relating to the Neutrality of the Panama Canal Zone forbade public or private aircraft of belligerent powers to be operated in or over the Zone. From 1920 on, “air navigation between the United States and Canada was governed by informal arrangement, usually renewed every six months and made reciprocal in 1927.” There could hardly be any doubt of the exist-

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29 See, e.g., The Head Money Cases, 112 U.S. 580 (1884); Chae Chan Ping v. U.S., 130 U.S. 581 (1889).
31 Even the proponents of a broad construction of the executive agreement-making power do not claim such an effect for an executive agreement unsupported by Congressional action. McClure, supra n. 8, at 343; McDougal and Lans, supra n. 8, at 317. Cf. supra n. 13.
33 See also Padelford, supra n. 32. at 129; and 4 Hackworth, Digest of International Law, 389.
34 4 Hackworth, Digest of International Law, 383. It is to be noted that the arrangement was apparently not reciprocal before the passage of the Air Commerce Act of 1926. It does not appear whether, during this period, the United States undertook to admit Canadian aircraft.
ence of such powers with respect to military aircraft. The President had long exercised the authority to grant or refuse admission to units of foreign military forces, and had made executive agreements providing for such admission.35

With respect to civil aircraft, the question of existence of such powers does not seem to have given rise to much controversy,36 perhaps because there was no occasion for it. An historical parallel could be found in the exercise by the Presidents, in the absence of statutory authority, of control over the laying of cables, power lines, pipe lines and similar installations connecting the United States with foreign countries.37 It is apparent that control over the operation of foreign aircraft within the United States is even more necessary in the national interest than control over cables, power lines and pipe lines. Aircraft are not only means of communication; they are also means of observation, and of transportation of passengers and goods. They may also be used as means of attack, or of training for attack. Considerations of national defense would suffice to justify the exercise by the President of control over the entrance and operation of foreign civil, as

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35 See, e.g., Tucker v. Alexandroff, 183 U.S. 424, 435 (1902), where the Supreme Court said: “While no act of Congress authorized the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States.” See also the several agreements with Mexico concerning the pursuit of Indians across the border, made in 1882, 1883, 1884, 1886, 1890, 1892 and 1896, 1 Malloy, Treaties, 1144, 1145, 1157, 1158, 1162, 1170, 1174 and 1177; and Simpson, supra n. 8, at 81-82. For other instances see 2 Moore, Digest of International Law, 389-400, and 2 Hackworth, Digest of International Law, 304-306, 323-324, whence it appears that requests for admission of foreign military units have generally been referred to the authorities of the States through which the units were to pass, for acquiescence by such authorities. In 1923 the Department of State felt that for constitutional reasons similar acquiescence was “essential” for the admission of foreign military aircraft. Id., 324-325; cf. 4 id. 386. The practice of referring the requests to State authorities for their acquiescence was probably founded on the constitutional guarantee (U.S. Constitution, Art. IV, Sec. 4) that the United States shall protect each State against invasion. It would seem to have no bearing on the admission of civil aircraft.

36 The Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority dated October 18, 1939, in which the effectiveness of undertakings contained in air transport agreements was doubted on the ground of inconsistency with certain provisions in the Civil Aeronautics Act (see infra), conceded that in the absence of legislation “the President would have the power to make agreements with foreign countries relating to the access to this country of foreign aircraft,” on the basis of “the general power of the Executive to prohibit physical contact with our territory in a manner prejudicial to the interests of the United States.” See infra, n. 82.

37 Control over the laying of submarine cables was intermittently exercised from 1869 until the Kellogg Act of 1921 (42 Stat. 8) expressly conferred the power of control on the President. With respect to foreign-owned cables it was never successfully challenged in the courts. 2 Moore, Digest of International Law, 452-466; U.S. v. La Compagnie Francaise, etc., 77 Fed. 495 (1896); 22 Op. A.G. 13 (1898). With respect to a cable owned by a United States corporation with a Federal charter, the power was successfully challenged in the lower Federal courts, which held that the corporation had by statute a Federal franchise which the President was powerless to disregard. U.S. v. Western Union Tel. Co., 272 Fed. 811 (1921); 272 Fed. 893 (1921). See, in general, 4 Hackworth, Digest of International Law, 247-256. On power lines, see the opinion of Attorney General McReynolds, 30 Op. A.G. 217 (1913), citing numerous previous opinions dealing with cable-laying; on pipe lines, see the opinion of Attorney General Cummings, 38 Op. A.G. 163 (1955). See also 4 Hackworth, Digest of International Law, 352-353.
well as military, aircraft. Broader considerations of national interest, such as the desirability of preventing monopoly practices and of gaining reciprocal privileges in foreign countries, could be invoked as additional grounds for the exercise of such control.\textsuperscript{38} The silence of Congress could hardly be taken as indicating that it intended foreign aircraft to be free to operate in the United States without restrictions of any kind.\textsuperscript{39}

The authority to make executive agreements by which the United States undertook to admit foreign aircraft could be regarded as incidental to the power to control the admission of such aircraft. But even if the view were taken that the President had no power to control the entrance of foreign civil aircraft, it could be argued that he had the authority to enter into an undertaking to admit such aircraft, since nothing in the existing law laid down a contrary policy or would have prevented the enforcement of such an undertaking.\textsuperscript{39a} In either case, the enactment of inconsistent legislation by Congress would have in all probability made the agreements unenforceable, but would not have necessarily terminated them as international obligations of the United States.

**THE AIR COMMERCE ACT OF 1926**

The Air Commerce Act of 1926 \textsuperscript{40} empowered the Secretary of Commerce, by Section 6 (c), to authorize foreign non-military aircraft to be navigated in the United States, subject to the condition of reciprocity and the prohibition of cabotage, and provided in Section 6 (b) that such aircraft might be navigated in the United States only if so authorized. By Section 6 (a) the navigation of foreign military aircraft in the United States was made subject to the authorization of the Secretary of State.

The power of the Secretary of Commerce to authorize the navigation of foreign non-military aircraft was not made subject to judicial review, or to any set of procedural rules, or to a "fair hearing," and must be considered as an executive or administrative function.\textsuperscript{41} All

\textsuperscript{38} The policies of prevention of monopoly, preservation of opportunities for American-owned cables, and control over rates had been the motives for the President's assertion of power to control the laying of cables by foreign companies. See 2 Moore, *Digest of International Law*, at 455.

\textsuperscript{39} Cf. the absence of statutory restrictions on the admission of foreign troops. See *supra* n. 35.

\textsuperscript{39a} The Executive had previously asserted authority to enter into international commitments which could be carried out within the framework of existing law. An example is the practice of making agreements on most-favored-nation treatment in the matter of customs duties in the absence of statutory authority but in conformity with legislative policy. See the agreement of 1923 with Brazil, 4 *Treaties*, 3969; and a discussion and list of such agreements in McClure, *supra* n. 8, at 174-176.

\textsuperscript{40} 44 Stat. 568.

\textsuperscript{41} The pertinent language of Section 6(c) of the Air Commerce Act as enacted was as follows: "If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Secretary of Commerce may authorize aircraft registered under the law of
though the extent to which an executive officer is subject to the control of the President in the performance of a statutory function is not clearly defined in American constitutional law, it is believed that in the exercise of this power the Secretary of Commerce was bound to act consistently with the national policy as determined by the President in a matter so closely related to national defense and foreign relations. This policy could be laid down by the President in an executive agreement. The condition of reciprocity prescribed by the Act strengthens this conclusion, since negotiations with a foreign country may be necessary to determine the existence of reciprocity, and an agreement may be the best means of assuring its maintenance.

The practical construction of the Air Commerce Act of 1926 is indicated by the conclusion of executive agreements relating to the reciprocal admission of foreign non-military aircraft. In the period between 1926 and the enactment of the Civil Aeronautics Act of 1938, numerous air navigation agreements and a few air transport agreements were entered into by the action of the Executive. The air navigation agreements typically included reciprocal grants of privileges of transit, landing, and commerce for aircraft on non-scheduled flights. An agreement with Colombia accomplished by exchange of notes on February 23, 1929, provided that American commercial aircraft were to be allowed to fly and land along the coasts of Colombia, while Colombian commercial aircraft were to receive similar privileges along the coasts of the United States and in the Canal Zone. These privileges were not limited to non-scheduled operations. An arrangement between the United States, the United Kingdom, Ireland and Canada for regular trans-Atlantic services was negotiated in the course of diplomatic discussions which took place between 1935 and 1937. This arrangement, not embodied in any single document, has never been made

the foreign nation and not a part of the armed forces thereof to be navigated in the United States . . .” It was held by the Attorney General that under Reorganization Plan No III (54 Stat. 1231) this power, not expressly mentioned in the Plan, devolved upon the Administrator of Civil Aeronautics, rather than upon the Civil Aeronautics Board, because it was essentially administrative. 40 Op. A.G. 136 (1941).

42 See Corwin, supra n. 9, at 94-114, 148-149, and sources there cited.

43 Although the reasons for the Secretary’s decisions on particular applications were generally not made public, there are indications that considerations of national defense entered into the decisions in some cases. See statement of Clinton M. Hester, appearing for the Interdepartmental Committee on Civil Aviation, March 23, 1938, Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Congress, 3d sess., at 148

44 Reciprocity may, of course, be found to exist in the absence of agreement; nevertheless, it is significant that statutory authority to grant privileges to foreign nationals on the condition of reciprocity had been the basis for executive arrangements for reciprocal treatment with respect to such matters as copyright protection, trade marks, visa fees, tonnage duties, certificates of admendment of vessels, customs duties, ship load lines, and taxes on shipping income. McClure, supra n. 8, at 58 60, 79, 85, 153-154, 156, 163; 5 Hackworth, Digest of International Law, 413-414.

45 These agreements are listed in 4 Hackworth, Digest of International Law, at 383-384.

public in full, but was implemented by the issuance in April, 1937, of 15-year permits to Pan American Airways by the United Kingdom, Ireland and Canada, and to Imperial Airways by the United States, and has been repeatedly cited and applied in the decisions of the Civil Aeronautics Board, which has referred to it as an "exchange-of-notes agreement." 

Despite this consistent practice, the propriety of undertaking generally, by executive agreement, to admit the aircraft of a foreign nation was occasionally denied or doubted. The needs of the nation prevailed over these doubts.

THE CIVIL AERONAUTICS ACT OF 1938

The Civil Aeronautics Act of June 23, 1938, passed after extended hearings held over a period of years on a number of bills for the regulation of commercial aviation, transferred from the Secretary of Commerce to the newly created Civil Aeronautics Authority the power to authorize the navigation in the United States of foreign non-military aircraft. Far more important was the comprehensive provision, contained in Title IV, for the economic regulation of air transportation. By Section 402 a foreign air carrier was forbidden to engage in foreign air transportation (defined in Section 1(21) as "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between ... a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation") without a permit issued by the Civil Aeronautics Authority (Board). The Board "is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the

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47 See, e.g., Pan American Airways Company (of Delaware), 1 C.A.A. 118 (1939); Airways (Atlantic) Limited, 2 C.A.B. 181 (1940); British Overseas Airways Corporation, 2 C.A.B. 763 (1941). Cf. 4 Hackworth, Digest of International Law, 386. It has been stated by Mr. Stephen Latchford, Adviser on Air Law in the Department of State at that time, that Section 6(c) of the Air Commerce Act of 1926 was relied upon as authority for entering into the negotiations which culminated in this arrangement. 12 Department of State Bulletin 1104 (1945).


49 52 Stat. 973.

50 Sec. 1107(i) of the Act, amending the Air Commerce Act of 1926, 44 Stat. 568. By Reorganization Plan No. III, transmitted to Congress on April 2, 1940, 54 Stat. 1231, as interpreted by the Attorney General, 40 Op. A.G. 136 (1941), this power was transferred to the Administrator of Civil Aeronautics, an official who reports to the Secretary of Commerce.

51 Under Reorganization Plan No. IV, transmitted to Congress on April 11, 1940, 54 Stat. 1234, the regulatory powers of the Authority have been exercised by the Civil Aeronautics Board. For this reason, the term "Board" is used infra in place of "Authority."
public interest."\(^5\) The Board must give public notice of an application for a permit, and must set it for public hearing.\(^5\) By Section 2 the Board is directed to consider certain stated policies, "among other things," as being in the public interest.

Under Section 801 of the Act, the issuance and denial of, as well as other types of action by the Board with respect to, foreign air carrier permits issuable under Section 402 (except "grandfather" permits) are subject to the approval of the President. Orders of the Board in respect to foreign air carriers subject to the approval of the President under Section 801 are, by Section 1006(a), exempted from judicial review. Section 802 directs the Secretary of State to "advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services."

By Section 1102 the Board is directed, inter alia, to exercise and perform its powers and duties under the Act "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries."

What is the impact of the Civil Aeronautics Act of 1938 upon the legal status of executive agreements on air transportation? The language of the Act is believed to justify the following conclusions:

1. Congress did not in terms authorize the making of executive agreements.

2. Congress recognized that there were, or could be, agreements other than treaties by which the United States assumed international obligations affecting air transportation, "including air routes and services," and that such agreements could be either bilateral or multilateral executive agreements. This conclusion follows from the use of the term "agreement" in addition to the terms "treaty" and "convention" in Section 1102, and from the use of the term "agreements" in Section 802, where it stands alone. The term "agreement" would be meaningless in Section 1102 if it included nothing in addition to the type of instruments described by the terms "treaty" and "convention." It may be noted, in this connection, that during the same session Congress provided by statute for the publication of "international agreements other than treaties" in the Statutes at Large.\(^5\) The fact that in Section 802 the term "agreements" stands by itself, while in Section 1102 it accompanies the terms "treaty" and "convention," is strong evidence that Section 802 was designed to apply only to "agreements" as distinguished from treaties.

\(^5\) Section 402(b) of the Act (with the word "Board" substituted for "Authority"). Section 402(c), known as a "grandfather clause," exempted from the standards of Section 402(b) permits replacing those issued by the Secretary of Commerce under the Air Commerce Act of 1926 and in effect on May 14, 1938.\(^5\) Section 402(e) of the Act.

\(^5\) The word "Board" is substituted for "Authority."

\(^5\) See n. 8 supra.
from "treaties" and "conventions," and that the term "agreement" is not coextensive with the terms "treaty" and "convention." Such differentiated use of these terms in the same statute is virtually conclusive proof that the term "agreement" in Section 1102 is not meaningless.\textsuperscript{56}

It is highly improbable, moreover, that Congress in 1938 was unaware of the fact that the term "treaty" has been commonly used to designate an instrument submitted to the Senate for its approval under the treaty clause, as distinguished from an executive agreement. It follows that the term "agreement" was probably designed to describe, or to include, an executive agreement. The expression "any foreign country or foreign countries" in Section 1102 is a clear indication that both bilateral and multilateral agreements were contemplated.

(3) Congress did not attempt to limit the power asserted by the President to enter into executive agreements affecting air transportation, and to assume obligations by such agreements, but gave implied approval to this assertion of power in its full extent.

(4) The Board may not lawfully make an order under Section 402 which would be inconsistent with an obligation assumed by the United States in a valid executive agreement. If there is an obligation to issue a permit to a designated foreign air carrier, failure to do so would be a violation of the Board's statutory duty, even if the record, apart from the international agreement, would require a finding that the proposed service is not in the public interest, or that the applicant is not fit, willing, and able to perform such service. The statute makes compliance with an international obligation the overriding consideration on both of these issues. There is no ambiguity and no inconsistency in Section 402 and 1102 on this point. Section 1102 is a limitation on the powers of the Board under Section 402, but in no sense compels the Board to attempt the performance of two inconsistent tasks. There is, therefore, no room for application of artificial rules of construction, such as the rule that the more specific provision must prevail over the more general.\textsuperscript{57}

The argument that the application of Section 1102 would make the procedures prescribed in Section 402 useless is a far-fetched \textit{reductio ad absurdum} that is not justified by the facts. It will be noted that the existing air transport agreements leave large areas of determination to the discretion of the authorities of the United States, by providing, for example, that the designated foreign airline must or may be required to qualify before the competent aeronautical authorities under applicable laws, and that one of the parties to the agreement may withhold a permit if it is not satisfied that the substantial ownership and effective control of the airline is vested in the nationals of the other party.\textsuperscript{58} There may be room for the determination of the terms, conditions and dura-

\textsuperscript{56} Cf. Latchford, in 12 Department of State Bulletin 1104, 1105 (1945).

\textsuperscript{57} For an attempt to deprive Section 1102 of its meaning by the application of this rule see the Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority, dated October 18, 1939, infra n. 82.

\textsuperscript{58} See, e.g., the terms of the agreement of June 4, 1949, between the United States and Canada, supra n. 6.
tion of the permit, and even for the interpretation of the agreement itself.\(^5\) Even if no reservation of any discretionary powers were made in an agreement, a finding by the Board that the record, apart from the agreement, would not have justified the issuance of a permit might serve a useful purpose, as for example by inducing the President to take steps to abrogate or modify the agreement. Actually, in view of the powers of the President under Section 801, the value of the Board’s findings is in any event merely advisory.

(5) Even in the absence of Section 1102, the sweeping powers lodged in the President by Section 801 would imply the power to make and carry out executive agreements containing undertakings to grant operating privileges to foreign airlines. It must be noted that the President, under Section 801, has the power to disapprove the denial, as well as the issuance, of a foreign air carrier permit. Such disapproval is apparently intended to operate as a direction to the Board to issue the permit. Otherwise the power of disapproval of the denial would be meaningless. This construction of Section 801 has been adopted by the Supreme Court with reference to the power of the President to disapprove the denial of certificates of public convenience and necessity under Section 401 to American applicants proposing to engage in overseas or foreign air transportation,\(^6\) and has been consistently followed by the Board.\(^1\)

It applies \textit{a fortiori} to decisions on applications for foreign air carrier permits which, by Section 1006 (a), are expressly exempt from judicial review. In exercising his powers under Section 801 the President is not bound by the record before the Board, but is free to turn for advice and confidential information anywhere he pleases, the Board being merely one of his advisers, whose recommendations are entitled to no particular weight. The President’s powers are not quasi-judicial, but political, and were given to him as the organ best fitted to weigh policy considerations connected with the conduct of foreign relations and national defense of the United States.\(^2\) Since the President is thus free to give effect to his own policy, regardless of the views of the Board, he has the power to enforce any international obligations that he may assume by an agreement. By implication, he is authorized to make such agreements as being within the general statutory policy of leaving


\(^1\) See, e.g., American Airlines, Inc., Mexico City Operation, 3 C.A.B. 415 (1942); Additional Service to Latin America, 6 C.A.B. 857 (1946); “Skycruise” Case, Orders E-2920, decided June 1, 1949, approved June 9, 1949.

\(^2\) See, for statements made in the course of the legislative history of the Act, Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, 76th Congress, 3d sess. at 36-40, 147-148; Hearings on S. 3760 before the Senate Committee on Interstate Commerce, 76th Congress, 3d sess., at 6-7; Congressional Record 6726 (May 12, 1938).
final determination of the issues of the national interest and of the fitness, willingness and ability of an applicant to the discretion of the President. The question of undue prejudgment does not arise, since the President is not required to confine himself, in reaching the decision, to the record made before the Board, or to attach any particular weight to that record. The President, for instance, as the director of the nation's foreign relations, may determine that the national interest in general, and the promotion of American air transport interests in particular, requires the exchange of air transport operating privileges with foreign nations on either a bilateral or a multilateral basis, without regard to the economic and technical characteristics of particular routes or particular carriers. Subject to the condition of reciprocity laid down in Section 6 (c) of the Air Commerce Act of 1926, he may decide to grant operating privileges to a foreign air carrier as a gesture of friendship, or for political reasons entirely unconnected with air transportation, even though such privileges may cause losses to United States air carriers. In all such cases, adversely affected United States air carriers may be compensated for their losses, if necessary, by mail pay on a “need” basis under Section 406 of the Act. Even in the absence of Section 801, the President's views of the public interest, presented to the Board through appropriate procedures, would be entitled to great, though perhaps not conclusive, weight, as the most authoritative and coordinated determination by the Executive branch of the Government of what the needs of the foreign policy and national defense of the United States require. Section 801 in effect gives conclusive weight to this determination.

(6) Either Section 801 or Section 1102, standing alone, would amply support the authority of the President to enter into executive agreements affecting air transportation, and would enable such agreements to be carried out within the framework of the Act. Taken together, and in the light of Section 802, they place this authority virtually beyond all doubt. Nevertheless, it may be noted that the President, unlike the Board, is not required by the statute to act consistently with the obligations assumed by the United States in an agreement. There is, therefore, a theoretical possibility of a conflict between the Board's statutory duty under Section 1102 not to make an order denying operating privileges to a foreign air carrier entitled to such privileges under an international agreement, and the Board's duty to follow the direction of the President in its actions with respect to such privileges, should the President direct the Board to act in violation of the obligations of the United States under the agreement.

(7) It is difficult to conceive of a situation in which the questions of the validity and effect of an executive agreement purporting to impose on the United States an obligation to grant operating privileges to a foreign air carrier could be raised as justiciable issues, in view of the

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powers of the President under Section 801 and the exemption from judicial review of orders in respect to foreign air carrier permits, unless Section 801 were held to be invalid or a conflict were to arise between the Board acting under Section 1102 and the President acting under Section 801 — contingencies very unlikely to occur.

Although the conclusions here set forth seem to be justified by the language of the Act, as judicially construed, some doubts may conceivably persist as to what were the real intentions of Congress in passing the Act in 1938. In particular, did Congress actually contemplate the making of executive agreements under which the United States would be bound to grant operating privileges to foreign airlines? The reference to "air routes and services" in Section 802 would seem to indicate that such agreements were within the contemplation of Congress; but it might be urged that this expression was perhaps intended to refer merely to the establishment and maintenance of navigational facilities, weather services, traffic regulations, and the like. Is there anything in the legislative history of the Civil Aeronautics Act that throws light on the actual legislative intent?

(To Be Continued)