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THE LEGAL STATUS OF EXECUTIVE AGREEMENTS ON AIR TRANSPORTATION
— PART II*

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The hearings and discussions which preceded the passage of the
Civil Aeronautics Act of 1938 contain many indications of the in-
tended effect of the Act on the legal position of executive agreements
on air transportation, and confirm in some important particulars the
tentative conclusions set forth in the first part of this article. Other
significant indications of the effect of the Act are to be found in the
practice of the executive agencies.

In the years 1935-1938 numerous bills for the regulation of air
transportation were introduced in Congress and extensive hearings
were held. S. 2, introduced in the 75th Congress by Senator McCarr-
ran, made provision for the regulation of United States air carriers by
the Interstate Commerce Commission, but did not expressly provide
for similar regulation of foreign-flag air carriers. It would have re-
quired the Commission in the exercise of its duties under the act to
“take into consideration all treaties, conventions, and agreements be-
tween the United States and foreign countries.” This section had not
been included in a previously introduced version of the bill, which
merely referred to “treaties” in another section. Much controversy
was caused by a provision under which the Commission would have
been empowered to prescribe only the general route to be flown out-
side the United States by a United States air carrier. In the hearings
held on S. 2 in the spring of 1937, representatives of the Department of
Commerce criticized this provision as possibly interfering with the fix-
ing of definite routes by intergovernmental agreements, but it was de-
defended by Senator McCarran and Colonel Edgar S. Gorrell (appearing
on behalf of the Air Transport Association in support of the bill) as in
no way restricting such procedure, as shown by the following excerpts:

MR. MULLIGAN (of the Department of Commerce) ... there is
the sentiment—I know it is the sentiment of the Department of
Commerce—to arrange first for the routes, arrive at an agree-
ment for the routes to be traversed, and then to cover the operat-
ings rights by permits to be exchanged between the two govern-
ments in interest.

64 See infra.
SENATOR McCARRAN. Is not that the very spirit of this bill, as far as we can regulate it? Do you see anything in this bill that militates against it?65

SENATOR McCARRAN . . . it is clear that these international agreements in which each country fixes the route to be flown within its borders by the aircraft of the other do not furnish a precedent for an assertion by this Government of power, through the action of one of its own administrative agencies, to fix detailed routes over the territory of another government. Nor is there anything in the bill that restricts the power of this Government to establish such a “definitely located route” by international agreement. If such an agreement were made, for example, with Canada, the Commission’s certificate for operations within the United States would be confined to specific points on the airway designated in the United States, and, while the Commission’s certificate would not purport to specify the detailed route in Canada, the carrier would be bound to fly that route, since there would be no other over which a right of flight existed. The effect of the proviso is simply to recognize very properly that the detailed route to be flown in a foreign country is a matter for that country to determine either by unilateral action or by international agreement. I note that no criticism of this provision has been made by the Department of State.66

COLONEL GORRELL. The Department of State will still be able to enter into whatever treaties, conventions, or agreements may be desirable. Even if this Government established, through international agreement with another country, “A definitely located route” to be followed by our carriers in that other country, there is nothing in the bill that would restrict the operation of that agreement.67

Agreements were also discussed with reference to the failure of the bill to provide for the operation of foreign-flag airlines:

MR. MULLIGAN. From my reading of the bill, there is no reference here to the idea of foreign-flag airlines seeking these reciprocal rights. Today that is administered by the Department of Commerce. You have said nothing of it here in the bill . . . .

SENATOR TRUMAN. Is not that covered by the phrase on treaties?

MR. MULLIGAN. The treaty phrase itself would not hold it in, Senator, because what has been done to date has been done under something less than a treaty, under a so-called exchange of notes agreement. It is very similar, of course, in effect and terms.

SENATOR AUSTIN. This says “conventions and agreements.”

MR. MULLIGAN. Yes.

SENATOR AUSTIN. There might be a possible legal question raised about that language, as to whether it relates to such treaties, conventions, and agreements now in existence only, or whether the provision is also intended to include those which may hereafter be made. If that is your point, it could be very easily taken care of by two words added to the bill.68

Although the value of the above colloquies as part of the legislative history of the Civil Aeronautics Act is limited by the fact that they re-

65 Hearings on S. 2 and S. 1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Congress, 1st Sess., at 95.
66 Id., at 420-421.
67 Id., at 508. See also 439-440 and 507.
68 Id., at 97.
ferred to a bill with provisions considerably different from the version finally enacted into law, they do show that the expression "treaties, conventions and agreements" was generally understood to include executive agreements — those already in existence and those yet to be made. They also indicate that executive agreements covering services on specific routes were contemplated. As further indication of the type of agreements then in the minds of the legislators, statements of the Department of State and the Department of Commerce inserted in the record are of interest.

In a letter dated December 18, 1936, from R. Walton Moore, Counselor of the Department of State, to Senator McCarran, the Department made comments on S. 3027 and S. 3420 (predecessors in the 74th Congress of S. 2). The following excerpts indicate the nature of the ideas presented by the Department to the lawmakers:

In the Department's letter of August 1, 1935, (to Senator Wheeler) commenting on Senate bill 3027, it made particular reference to the desirability of making provision for compliance with the provisions of international aeronautical agreements to which the United States may be a party, and gave a number of illustrations as to the classes of aeronautical agreements to which the United States is a party . . . foreign aircraft have been permitted to come into the United States under the terms of an aeronautical agreement between the United States and the country in which the foreign aircraft was registered, concluded pursuant to the general authority contained in section 6 of the air-commerce act to permit the entry of foreign aircraft and airmen on a reciprocal basis.

The United States entered into an agreement with Colombia, effective February 23, 1929, under which commercial aircraft of each country are accorded the right to operate in territory of the other. The other air navigation agreements to which the United States is a party relate to noncommercial as well as commercial aircraft and contain a number of provisions relating to air navigation in general . . . . The effect of such an agreement is to accord to civil aircraft of each country the right to enter the other on individual flights without the necessity of obtaining an authorization for each flight from the government of the country to which the flight is to be made. While these agreements do not accord to air-transport lines of the one country the right to conduct regularly scheduled air-transport operations in the other country without its consent, it is to be observed that they contain a number of provisions that would be applicable in each country to the operation therein of regular air-transport lines of the other country if their entry should be authorized. . . . I do not, however, consider that the provisions of these agreements would constitute any obstacle to further negotiations between the United States and the countries with which it has the agreements, for the purpose of reaching an understanding in regard to the operation of air-transport lines. Such an understanding would supersede an existing bilateral air-navigation agreement insofar as it would be in conflict with any of its provisions . . . . It has been shown by experience that, in general, countries in which air navigation on an international scale is well developed are not willing to permit foreign air-transport lines to enter their territory unless reciprocal privileges are ac-

69 Id., at 356 et seq.
corded to their own air-transport lines. This situation frequently results in negotiations through diplomatic channels for the purpose of reaching an international agreement defining the conditions under which one or more air-transport lines of the one country may be permitted to operate in the other country. So far as this Government may be concerned such negotiations would of course be conducted through the Department of State.

The Department then suggested a provision authorizing the Commission to make exemptions from the regulatory part of the bill when found necessary in connection with negotiations with a foreign country for rights to conduct regularly scheduled air transport services, and went on to say:

Section 405 (d) contains a proviso to the effect that before issuing a certificate to an air carrier engaged in the transportation of passengers or property in foreign commerce the Commission shall take into consideration the provisions of any pertinent treaties and franchises and any and all privileges, rights, and obligations granted or imposed by any foreign country. It is suggested that the words "treaties" and "treaty" appearing in the proviso might well be omitted as unnecessary in the event that favorable action should be taken on the proposed new section relating to observance of treaties, conventions, and international agreements contained in the amendments to the bill which accompanied your letter to this Department.

The letter further suggested another proviso to the effect that nothing in the Act should be construed to prevent the negotiation of an agreement between the United States and a foreign country concerning the operation of air transport lines, and continued:

As explained in the Department's letter of August 19, 1935, to Senator Wheeler, and in the present letter, the United States has become a party to international conventions and agreements containing provisions of importance relative to air navigation. It is expected that the negotiation of further international conventions and agreements on the subject will be found necessary. Your committee will doubtless realize the importance of the observance of the provisions of such agreements, in view of the fact that any action taken by the Interstate Commerce Commission in conflict with these agreements might result in complaints being received from the Governments with which they have been entered into.

Applications of air transport lines of one country for authority to operate in territory of other countries are, as indicated above, usually the subject of negotiations conducted through diplomatic channels. As the Department of State is the agency of the Government which is charged with the conduct of foreign affairs, it is believed to be desirable that it be made clear that such negotiations shall, whenever necessary, be conducted by the Secretary of State.

Written comment on the bill by J. M. Johnson, Assistant Secretary of Commerce, dated March 11, 1937, favored intergovernmental negotiation of agreements on air routes and contained the following statement:

The Government, at the present time and for more than a year past, has been conducting a negotiation involving the establishment of a very important foreign air route and service. An issue that
remains to be resolved is whether one of the terminals of the route, which will traverse a number of foreign countries, will be in the United States, or in a certain foreign country.\textsuperscript{70}

The above-quoted statements establish beyond doubt the fact that Senator McCarran and the other legislators concerned with the Civil Aeronautics bills were well aware that some executive agreements granting reciprocal operating privileges to foreign-flag air carriers were already in effect, and that other executive agreements, dealing specifically with privileges for regularly scheduled airlines, were under negotiation or in contemplation. In further elucidation of this fact, attention must be called to the provisions in the so-called “air navigation agreements” which, as stated by the Department of State in the above-quoted letter, purported to grant to foreign non-scheduled air carriers the privilege of commercial entry into the United States on individual flights without the necessity of obtaining prior authorization for each flight. It may be noted that such non-scheduled operations by foreign air carriers, if of common-carrier character, are clearly within the scope of Section 402 of the Civil Aeronautics Act and may not be exempted by the Board under Section 416 from the economic regulatory provisions of the Act.\textsuperscript{71} The privileges of foreign air carriers with respect to such operations under the air navigation agreements would have been, therefore, more difficult to reconcile with the powers of the Board under Section 402 than the privileges of foreign air carriers with respect to regularly scheduled services under the air transport agreements, none of which relieves the foreign air carriers from the requirement of obtaining a permit from the Board before commencing operations. Yet no member of Congress appears to have at any time objected to the continued existence of the air navigation agreements.\textsuperscript{72}

In the Spring of 1938 hearings were held on considerably modified versions (S. 3760 and H. R. 9738) of the McCarran bill. An interdepartmental committee on civil aviation took a leading part in preparing the new draft, and its representatives appeared before the Senate and House Committees. The new draft provided for a new agency, the Civil Aeronautics Authority, to administer the regulatory provisions, and provided for the issuance of permits to foreign air carriers as in Section 402 of the present Act. The provision on treaties, conventions and agreements was strengthened in language to read as in present Sec-

\textsuperscript{70} Id., at 78. The statement evidently referred to the negotiation of the arrangement with the United Kingdom, Canada and Ireland for the trans-Atlantic route, which culminated in the issuance of reciprocal permits in April, 1937. See supra n. 47.

\textsuperscript{71} Section 416 authorizes the exemption of classes of “air carriers,” but makes no provision for the exemption of “foreign air carriers,” from the economic regulatory provisions of the Act. The term “air carriers,” according to the definitions contained in Section 1 of the Act, does not include “foreign air carriers.”

\textsuperscript{72} It is understood that in fact no foreign or United States operator proposing to conduct an international non-scheduled common carrier air transport service has attempted to make the claim that any air navigation agreement to which the United States is a party relieved him from the necessity of obtaining prior authorization for such service under the law of the country into which the service was to be operated.
tion 1102, requiring the Authority to perform its functions "consistently" with the obligations assumed by the United States in such instruments, rather than merely to take the latter "into consideration." A new Section 802 would have expressly given the Secretary of State the authority to "conclude such agreements as may be satisfactory to the Authority and the President." Clinton M. Hester, who testified on behalf of the interdepartmental committee where he had been the chairman of the drafting subcommittee, compared the new provisions with those in H. R. 7273 (the old House version corresponding to S. 2) as follows:

Other important functions, such as the issuance of certificates and permits for overseas and foreign air transportation, will affect international relations and national defense. Therefore, it was believed essential that these functions be exercised under the direction of the President, in whom the Constitution vests such functions, rather than by an agency completely independent of the President, as is the Interstate Commerce Commission.

The Air Commerce Act of 1926 forbids any foreign aircraft to operate within this country. While the authority of the Secretary of Commerce under that act to permit the operation of foreign private aircraft in this country is clear, his authority to permit the operation of a foreign air carrier to this country is in doubt. Consequently, a provision has been inserted in the present bill providing that no foreign air carrier shall operate to the United States unless it secures from the Authority a permit to do so. The issuance of such permits would be subject to the approval of the President.

No provision is contained in H. R. 7273 providing authority for the conclusion of agreements with foreign countries relating to the establishment of air routes and services. The authority to conclude binding agreements of this kind is not clear under existing law. Consequently, a provision was inserted in the present bill which would authorize the Secretary of State to negotiate with foreign countries with a view to entering into such agreements and to conclude such agreements as may be satisfactory to the Authority and the President.

Mr. Boren. I would like a little clarification on that point. If the Secretary enters into a reciprocal agreement to permit the air carriers of the two countries to land on each country's shores, we will say that agreement then, as I understand your statement, would be subject to the review of the Authority and final OK of the President before it would be a binding agreement. I want to be certain about that, Mr. Hester.

Mr. Hester. They would. I will ask Mr. Fagg to answer that question.

Mr. Fagg. Probably the agreement that would be made would be of a general nature dealing with the aircraft of one country as against another; any specific agreement with an individual carrier would be arranged by permit between each individual country.

Mr. Boren. The point I wanted absolutely clear was that it would not be possible for the Secretary of State to negotiate a binding agreement that might supersede the powers of the Authority to issue the permit.
MR. FAGG. That is clear. It would not, sir.

MR. HESTER. It would not.\footnote{73}  

The above passages show that the relation between executive agreements and the permits for individual foreign air carriers continued to be envisaged in precisely the same terms as during the 1937 hearings on S. 2 (see Mr. Mulligan's statement quoted \textit{supra}). This concept had been applied in the arrangement for the trans-Atlantic route in April, 1937, and is the concept implicit in every executive agreement concerning scheduled air transport services made since the passage of the Civil Aeronautics Act. The agreement contains general undertakings as to the privileges to be mutually granted to airlines on specified routes or otherwise; the permit to the individual airline is issued by the Board under the direction of the President.

Section 802 of the bill as reported by the Committees, authorizing the Secretary of State to make agreements subject to the Authority and the President, was eliminated on the floor of the Senate, after Senator White objected to the section because it would give "no authority which the President of the United States or the executive arm of the Government does not now have as inherent in the executive authority of the United States," and because it seemed "to be a very definite limitation upon the clear authority of the Executive in negotiating international agreements." When Senator McCarran attempted to defend the section as "not taking from the President any power, permitting him to retain every power he has, and giving him more, too," Senator White objected to the concurrent power to approve the agreements which would be given to the Authority, saying that "the only body that should have any voice with respect to a negotiation conducted by the President of the United States and its conclusion is the Senate itself." When Senator McCarran offered to strike out the provision for approval of the agreements by the Authority, Senator White replied: "Except that I do not believe that the paragraph adds a single thing to the powers which are inherent in the Chief Executive. As a matter of fact, not a line of this is necessary." On a division, section 802 was stricken out by a majority of one vote.\footnote{74}

\textit{After} the action had been taken, Senator Pittman said that every agreement is a treaty, and that section 802 was unnecessary and represented a trend away from the Constitution, but suggested that the section should be carefully studied in conference and perhaps not entirely eliminated.\footnote{75}

The Conference report, adopted by both Houses, contained the present language of section 802, which, instead of expressly authorizing

\footnote{73} \textit{Hearings on H.R. 9738} before the House Committee on Interstate and Foreign Commerce, 75th Congress, 3rd Sess., at 36-41.\footnote{74} \textit{83 Congressional Record} 6853, 6854, 6858 (May 13, 1938).\footnote{75} \textit{Id.}, at 6858. It may be noted that Senator Pittman had previously signed, as the Delegate of the United States, the International Silver Agreement of 1933, which was not submitted to the Senate as a treaty and which was brought into force by the action of the President alone. 4 Trenwith, \textit{Treaties}, 5507, 5516.
the Secretary of State to make agreements, merely requires him 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." The history of Section 802 thus confirms the conclusion that the term "agreements" refers to instruments other than "treaties" and means or includes executive agreements.

Despite Senator Pittman's remarks, which did not necessarily represent anyone's opinion but his own, and Senator White's reference to the powers of the Senate, which apparently was not intended to deny the existence of an executive agreement-making power, the legislative history of the Civil Aeronautics Act of 1938 seems to warrant the following conclusions:

1. The Act was not specifically intended to confer upon the Executive an agreement-making power which he did not previously have.
2. The term "agreement" in Sections 802 and 1102 refers to, or includes, executive agreements.
3. The legislators were aware that among the executive agreements then in existence or in contemplation were agreements by which the United States undertook to grant admission to the air carriers of certain foreign countries, for either non-scheduled or scheduled commercial services, as the case may have been.
4. The Act was not intended to discontinue or limit the practice of making executive agreements such as those described in the paragraph just preceding, but by reference to "agreements" in Sections 802 and 1102 in effect recognized the practice and acquiesced in its continuance. Congress recognized that by executive agreements of the above-described type the United States had assumed, and could assume, certain obligations, and directed the Board to exercise its functions consistently with such obligations. No distinction was intended to be made in this respect between bilateral and multilateral agreements.
5. It was probably not the intention of Congress to acquiesce in the making of executive agreements by which the United States would undertake to permit foreign air carriers to operate without compliance with the procedural requirements of Section 402, including the requirement that there be in force a foreign air carrier permit issued by the Board authorizing such operation. None of the air transport agreements made by the United States contains such an undertaking.

These conclusions support and strengthen the conclusions previously drawn from the language of the Act and its judicial construction.

**Practice Under the Civil Aeronautics Act**

In practice, the passage of the Act seems to have resolved any doubts that the Executive branch may have had as to the propriety of entering

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76 *Congressional Record* 8864.
into air transport agreements. Such agreements, containing undertakings to grant operating privileges to foreign airlines, were concluded by the Executive with France on July 15, 1939,77 and with Canada on August 18, 1939.78 It may be noted, further, that the making of air navigation agreements which might be construed as granting to foreign non-scheduled air service operators the privilege of entry without specific prior authorization likewise continued. Air navigation agreements of this type were made with Canada on July 28, 1938,79 and with France on July 15, 1939.80 No such agreements, however, appear to have been made since the outbreak of World War II. The Chicago Interim Agreement of December 7, 1944, contained no comparable provisions.81

Although the making of executive agreements on air transportation after the passage of the Civil Aeronautics Act constituted practical construction of the Act by the Department of State, presumably with the approval of the President, the Civil Aeronautics Authority conceived some doubts as to the legal status of such agreements and requested an opinion from its General Counsel (L. Welch Pogue, who later became Chairman of the Board), which was rendered on October 18, 1939.82

In the opinion of the General Counsel, no executive agreement, as distinguished from a treaty, could be made which would have "the legal effect of dispensing with the notice and hearing, and the exercise of the Authority's judgment, called for by section 402 of the Act." This conclusion evidently is not contrary to the practice of making executive agreements containing general undertakings to admit foreign airlines, but not dispensing with the procedure of issuing permits under section 402 to individual carriers. "The exercise of the Authority's judgment" (which, in view of Section 801, is of merely advisory value) is not necessarily prevented by this practice. In the reasoning leading to this conclusion, however, some extreme statements of doubtful soundness were made which would lend support to the view that no executive agreements by which the United States undertook to admit foreign air carriers could be validly made. These statements, apparently based on the belief, contradicted by the legislative history of the Act, that Congress had not contemplated the making of such executive agreements as distinguished from agreements on general "freedom of innocent passage," etc., included the prediction that it might be difficult to persuade foreign governments to enter into such agreements because "such moral obligation as might be created by such an

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77 EAS 153.
78 EAS 159.
79 EAS 129.
80 EAS 152; cf. agreement with Liberia of June 14, 1939, EAS 166.
81 EAS 469; but cf. Article 5 of the Chicago International Civil Aviation Convention ratified as a treaty, TIAS 1591.
82 For the text of this Opinion Memorandum see Senate Doc. No. 173, 79th Congress, 2d sess., at 6 et seq. Printed also in Hearings on Executive A, Convention on International Civil Aviation, before the Senate Committee on Foreign Relations, 79th Congress, 1st sess., at 49 et seq., and in Hearings on S. 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 206 et seq.
agreement could not possibly be binding upon any President other than the one making it," a prediction belied by the subsequent history of the negotiation of such agreements. It will suffice to note here that these statements were not reiterated by the Civil Aeronautics Board in any of its opinions.83

The making of executive air transport agreements was resumed in December, 1944, and has continued since.84 There is ample justification for the policy of not resorting to the treaty-making procedure in the negotiation of international arrangements on air transportation. Since such arrangements usually contain specific provisions for services on particular routes and between particular terminals, they must be flexible and subject to modification without much delay. Many of the agreements made by the United States in recent years have already been amended, in some instances repeatedly.85 The difficulties that would have arisen had the attempt been made to use the treaty-making procedure are indicated by the time required for the making of treaties concerning aviation. The Havana Convention on Commercial Aviation, signed on February 20, 1928, was not approved by the Senate until February 20, 1931;86 the International Sanitary Convention for Aerial Navigation, signed on April 6, 1934, was approved by the Senate on June 5, 1935;87 the Chicago Convention, opened for signature on December 7, 1944, was approved by the Senate only on July 25, 1946;88 the Convention on International Recognition of Rights in Aircraft, signed on June 19, 1948, was not approved by the Senate until August 17, 1949, although there was not opposition.89

By the end of World War II the United States was in a uniquely advantageous position with respect to international air transportation. It alone had adequate numbers of modern transport aircraft to inaugurate almost immediately a world-wide network of commercial services. Airways equipped with the most up-to-date communication facilities

83 For further discussion of the views of the Board as to the validity and legal effect of the air transport agreements, see infra.
84 For a list of such agreements see supra n. 1.
85 Thus, the agreement of 1939 with Canada, EAS 159, was modified, supplemented, or renegotiated in 1940 (EAS 186), 1943 (EAS 314), 1945 (EAS 457), 1947 (TIAS 1619) and 1949 (TIAS 1934). The Bermuda Agreement with the United Kingdom, signed on February 11, 1946 (TIAS 1507), was modified in 1946-1947 (TIAS 1640), 1947 (TIAS 1641) and 1948 (TIAS 1714). Other agreements that have been amended include the following: Denmark, 1944 (EAS 430), amended in 1945 (TIAS 1519); France, 1946 (TIAS 1679), amended in 1950 (PR No. 819); Iceland, 1945 (EAS 463), amended in 1945 (TIAS 1821); Ireland, 1945 (EAS 460), amended in 1947 (PR No. 457); Italy, 1948 (TIAS 1902), amended in 1950 (TIAS 2081); Philippines, 1946 (TIAS 1577), amended in 1948 (TIAS 1844); Portugal, 1945 (EAS 500), amended in 1947 (TIAS 1656); Spain, 1944 (EAS 432), amended in 1950 (PR No. 680); Sweden, 1944 (EAS 431), amended in 1945 (TIAS 1550); Switzerland, 1945 (TIAS 1576), amended in 1949 (TIAS 1529).
88 TIAS 1591. In the meantime a provisional international civil aviation organization had been set up under the Chicago Interim Agreement accepted by the United States as an executive agreement. EAS 469.
89 95 Congressional Record 11645, 11647 (August 17, 1949).
and navigational aids, and manned by U. S. Army and Navy personnel, extended through many countries to most parts of the world. The need for means of fast transportation and communication had been accentuated by the destruction of many surface transportation facilities and by the relief requirements in many parts of the world. The United States was in a strong bargaining position, with immense quantities of surplus war material available for disposal, and with many nations in need of financial assistance. American air carriers thus had incomparable opportunities for entrenching themselves in international air transportation. These opportunities could be fully utilized only through obtaining commercial operating rights in a large number of countries on a reciprocal basis. The multilateral Air Transport Agreement, sponsored by the United States at the Chicago Conference, had a cool reception and would not have sufficed to open the skies of the world to United States airlines. The bilateral air transport agreements, on the other hand, negotiated while the United States was in a superb bargaining position, have opened to American-flag air carriers a majority of the European nations, as well as most of the desirable routes elsewhere. This could not have been achieved through the slow process of treaty making.

The policy considerations in favor of the executive-agreement procedure have been well summed up by the President's Air Policy Commission:

*Executive agreements vs. treaties.* Past experience has proven that executive agreements are better than treaties for covering international air transport rights. It is only because the Department of State, working closely with the Civil Aeronautics Board, effectively negotiated bilateral agreements with some 34 nations that we have a world-wide pattern of operating rights. These agreements came into effect upon signature, thus permitting immediate inauguration of services. Treaties would have required ratification in most instances by the legislative bodies of the two signatory states. The inevitable delay in getting the ratification of 34 treaties would have kept our air lines out of action so long that foreign competitors would have had a commanding leadership from the start. Due to prompt action on our part, that leadership is now ours.

Because of changing conditions, it will almost certainly be necessary to amend the existing agreements with various countries from time to time. We should not incur the risks we would run from delay if these agreements were in treaty form and could be amended only by the treaty process.90

The Department of State has repeatedly stated the view that executive agreements, either bilateral or multilateral, providing for recipro-

90 *Survival in the Air Age, A Report by the President's Air Policy Commission* (1948), 119-120. See, to the same effect, letters from the Secretary of State, the Secretary of Commerce, and the Chairman of the Civil Aeronautics Board printed in *Hearings on S. 1814* before the Senate Committee on Commerce, 79th Congress, 2d sess., at 338-341.
cal granting of operating privileges, could be validly made, apparently on the ground that such agreements are authorized by statute.\textsuperscript{91}

Attorney General Clark, in a letter to the Secretary of State dated June 18, 1946,\textsuperscript{92} upheld the validity of existing commercial aviation agreements to which the United States was a party as made by the President “under the authority vested in him by the Constitution and statutes, including the Civil Aeronautics Act of 1938.” After briefly reviewing the pertinent provisions of the Act (Sections 801, 802, and 1102), the Attorney General stated that these provisions “make it clear that the Congress contemplated the consummation of agreements with foreign nations relating to international civil aviation.” He concurred in the position taken by the Department of State that “the jurisdiction of the Civil Aeronautics Board in connection with the granting of permits is not affected by any of the civil-aviation agreements which have been concluded, and that the Board in each case must still decide whether the applicant carrier is a suitable air line for performance under the requested permit and whether the issuance of the permit would meet the other requirements of the statute;” and also that the Board under Section 1102 must act “consistently with any obligation assumed by the United States” in an agreement with a foreign nation, “and, therefore, within the broad policy declared in the agreement,” the ultimate decision, under Section 801, being made by the President.

As already indicated, the Board had some doubts in 1939 about the legal position of executive agreements which purported to bind the United States to grant operating privileges to foreign air carriers. It has never made its own, however, the more extreme negative views expressed in the Opinion Memorandum of the General Counsel dated October 19, 1939.\textsuperscript{93} The attitude of the Board appears to be as follows:

(1) The Board recognizes the validity of executive agreements by which the United States undertakes to grant operating privileges to foreign airlines, and considers such agreements to be binding on the United States.\textsuperscript{94}

\textsuperscript{91} See, e.g., letter of Acting Secretary of State Grew to Senator Bilbo, June 9, 1945, 12 Department of State Bulletin 1101 (1945); testimony of Edward G. Miller, Assistant to the Under Secretary of State, in Hearings on S. 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 152, 140-141, and letter of the Secretary of State, id., at 838; and testimony of J. Paul Barringer, Deputy Director, Office of Transport and Communications, Department of State, in Hearings pursuant to S. Res. 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Congress, 1st sess., at 1485 et seq.


\textsuperscript{93} See supra n. 92.

\textsuperscript{94} Trans-Canada Air Lines, Montreal-New York Service, Serial E-4019, decided March 14, 1950, approved March 29, 1950, at 5, on the authority of the opinion of the Attorney General, supra n. 92. See also, for example, Airways (Atlantic) Limited, 2 C.A.B. 181, 187 (1940); Trans-Canada Air Lines, Toronto-Buffalo-New York Route, 2 C.A.B. 616, 618 (1941); Northwest Airlines, Inc., Additional Service to Canada, 2 C.A.B. 627, 630 (1941); Canadian Colonial Airways, Ltd., 3 C.A.B. 50, 55, 64 (1941); Swedish Intercontinental Airlines (S.I.L.A.), 6 C.A.B. 631, 632-633 (1946); Royal Dutch Air Lines (KLM), 6
(2) Although the Board has never acted inconsistently with what it has understood to be the obligations of the United States under any agreement, and has on many occasions pointed out that the action it took was consistent with such obligations, it has taken the position that there is nothing in Section 1102 "which dispenses with the re-
quirement of section 402 (b) that we find that the services to be operated . . . are required by the public interest and that such carrier is fit, willing, and able to perform such services." It has refrained from holding that the obligation contained in an executive agreement is conclusive upon it on the issue of the public interest or on the issue of an applicant's fitness, willingness and ability, and has been careful to set forth in its opinions the data in the record tending to support the conclusions that the proposed service is in the public interest and that the applicant is fit, willing, and able to perform it. In the case of the application of three Venezuelan airlines for permits, at a time when both the United States and Venezuela were parties to the Chicago Air Transport Agreement, the Board posed the question whether the Agreement required the contracting parties to "give each other any number of routes upon which the five freedoms are to be exercised . . . and to permit all carriers from any contracting state to exercise those freedoms on such routes as may be granted to any contracting state," and said: "To answer these questions in the affirmative, in our judgment, would mean that this executive agreement would override the statutory provisions of section 402 of the Civil Aeronautics Act of 1938, and possibly also section 801. Serious doubt exists as to whether executive agreements can be given such an effect. But we do not find it necessary to decide this issue, because we believe that a proper interpretation of the Air Transport Agreement does not lead to such an affirmative answer." Two chairmen of the Board have

C.A.B. 815 (1946); Aerovias Nacionales de Colombia, S.A., 7 C.A.B. 149 (1946), and particularly the concurring opinion (necessary for the decision) of Member of the Board Young, id., at 155; Línea Aerea Taca de Venezuela, C.A., 7 C.A.B. 317 (1946); Scandinavian Airlines System, 8 C.A.B. 676, 679-680 (1947); Servicios Aereos Cruzeiro do Sul, Ltda, Brazil-United States Service, Serial E-3896, decided December 22, 1949, approved February 8, 1950. See, further, letter from L. Welch Pogue, Chairman of the Civil Aeronautics Board, May 10, 1946, Hearings on S. 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 340. The Board and its members have extensively participated in the negotiation and making of air transport agreements. See, e.g., C.A.B., Annual Report, 1946, at 7. The Chairman and Vice Chairman of the Board were members of the United States Delegation at the Chicago Conference of 1944 at which the multilateral Air Transport Agreement was made (see International Civil Aviation Conference, Final Act and Related Documents, Department of State Publication 2282 (1945), at 30), and all five members of the Board participated in the Bermuda Conference of 1946 at which the bilateral agreement with the United Kingdom was made (TIAS 1507).


99 Trans-Canada Air Lines, Toronto-Buffalo-New York Route, 2 C.A.B. 616, 618 (1941). In Trans-Canada Air Lines, Montreal-New York Service, supra n. 94, at 4-5, the Board said: "We have consistently held that an applicant must meet the tests set up in section 402(b) of the Act before it can be granted a foreign air carrier permit."

made statements of a somewhat equivocal nature. In 1946, L. Welch Pogue, in his testimony before the Senate Committee on Foreign Relations, said: "If there is any difference in emphasis between myself as general counsel and myself as Chairman of the Board it is that in passing upon a standard of public interest under section 402 I would be legally right in saying that I found the public interest but I paid great weight, practically compelling weight, to any international agreement that may be in force, to which I am referred by section 1102: and then again I do not want to overburden or overplay this point." In 1949, Joseph J. O'Connell, Jr., testifying before the Senate Committee on Interstate and Foreign Commerce, took a similar position, and stated, in effect, that he would consider an executive agreement practically, but not completely, controlling. He indicated that the Board in at least one case had had doubts about the fitness, willingness, and ability of an applicant under a bilateral agreement to fly the route, and had given the matter "long and careful consideration." Referring to this testimony, the Board subsequently said: "It is apparent from an examination of the Chairman's testimony that he did not state that an air transport agreement was absolutely binding."

It is submitted that the Board's position on the legal effect of obligations assumed by the United States in an executive agreement is needlessly ambiguous. The existing air transport agreements do leave, of course, considerable discretion to the Board acting under the direction of the President, as already pointed out, and do not purport to dispense with the procedure prescribed by Section 402. There could be no quarrel with the Board's mentioning this fact. It is believed, however, that the Board cannot, in view of the language of Section 1102 of the Act, combine a recognition of the validity of the executive agreements with a refusal to regard the obligations contained in such agreements as binding upon it. Section 1102 directs the Board to give an overriding effect to the policy of compliance with the international obligations of the United States. The Board might be justified in departing from this policy, if at all, only if it were specifically directed to do so by the President under Section 801.

The Board has not been entirely consistent in its practice as to the weight to be attached to the policy expressed in an executive agreement. In the case of Trans-Canada Air Lines, Toronto-Buffalo-New York Route, the Board refused to consider evidence bearing on the application of Trans-Canada Air Lines for a permit for a Toronto-Buffalo service on the ground that "it would be contrary to the public interest for us to grant an authorization to a Canadian company for services which it was contemplated by the agreement would be given

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98 Hearings on Executive A, Convention on International Civil Aviation, before the Senate Committee on Foreign Relations, 79th Congress, 1st sess., at 135-136. See also id., at 141.
99 Hearings pursuant to S. Res. 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Congress, 1st sess., at 1497-1500.
100 Trans-Canada Air Lines, Montreal-New York Service, supra n. 94, at 4.
101 2 C.A.B. 616 (1941).
to an American carrier . . ." 102 The Board thus based its finding as to the public interest in this instance solely on the terms of the executive agreement with Canada, although its finding in the same case that a Toronto-New York service by Trans-Canada would be in the public interest was buttressed by recital of supporting evidence extraneous to the executive agreement which had allocated this route to a Canadian carrier. Since both affirmative and negative decisions of the Board with respect to applications for foreign air carrier permits are subject to the provisions of Sections 801, 1006(a) and 1102 of the Act, it is not perceived why the Board did not feel free to consider the executive agreement as conclusive a basis for an affirmative as for a negative finding as to the public interest. 103 In 1946, the Board disapproved, as being adverse to the public interest, an agreement between TWA and Air France on schedules and rates submitted for its approval under Section 412 of the Act, on the sole ground that the executive agreement between France and the United States fully covered the matters dealt with in the inter-company agreement and "that any agreement which contains provisions which impose or might impose restrictions which are greater than or different from those provided by a governmental agreement, is contrary to established public policy as set forth in the governmental agreement and consequently adverse to the public interest." 104 The Board has on occasion felt free to give controlling weight to one of the criteria of the public interest and public convenience and necessity set forth in Section 2 of the Act, to the exclusion of others. After finding that a proposed service was required by the needs of national defense, the Board has sometimes refused to consider evidence as to the other aspects of public convenience and necessity or of the public interest, such as commercial and postal needs, because consideration of such evidence could not have changed the decision and would have merely delayed the inauguration of the needed service. 105 If the Board believes that it is authorized to attach controlling weight, even to the exclusion of all other evidence, to the needs of national defense, which are enumerated in Section 2 on the same level as other criteria of public convenience and necessity and of the public interest, it is hard to understand why it has hesitated to attach at least as much weight to the policy of compliance

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102 Id., at 618.
103 As already pointed out, any loss resulting to an American air carrier from the issuance of a foreign air carrier permit may be compensated by mail pay. Supra, n. 63.
104 Agreements Between Ressou des Lignes Aeriennes Francaises (Air France) and Transcontinental & Western Air, Inc., 7 C.A.B. 163, 165 (1946). Section 412, unlike Section 402, does not require the Board to hold hearings, but it clearly contemplates an exercise by the Board of its judgment as to whether the inter-company agreement is in the public interest. Decisions of the Board under Section 412, unlike those under Section 402, are not subject to the approval of the President.
with the international obligations of the United States, as it is clearly
directed by Section 1102 to do.\footnote{106}

The doubts of the Board led it to state in its Annual Report for
1942 that the effect of executive agreements "upon the powers and
duties of the Board under Section 402 of the Act is not clear," and to
recommend that Congress amend Section 402 "so as to (1) provide
that the Board may regard an obligation assumed in an agreement
between the United States and a foreign country relative to the estab-
ishment of foreign air transportation services as sufficient evidence to
support a finding that such service will be in the public interest; and
(2) to relieve the Board of the necessity of finding in such a case that
the applicant for the service is fit, willing and able to perform the air
transportation involved."\footnote{107} A provision of this type (which would
have also dispensed with hearings in cases covered by the agreements)
was included in H.R. 1012 introduced in the 78th Congress, 1st ses-
sion, and was termed by the House Committee on Interstate and For-
eign Commerce "a clarifying amendment,"\footnote{108} but was omitted from the
revised version of the bill (H.R. 3420).\footnote{109}

**CRITICISM IN CONGRESS**

Misgivings were voiced in Congress over the Chicago Air Trans-
port Agreement of 1944 and the Bermuda Agreement of 1946 with the
United Kingdom, and the propriety of making multilateral agreements
such as the Chicago Air Transport Agreement was extensively dis-
cussed in 1945 during the hearings on the Chicago Convention.\footnote{110} In
1946, a bill designed to curb the President's power to enter into execu-
tive agreements on air transportation was introduced by Senator Mc-
carran (S. 1814), and hearings on it were held in the Senate Commit-
tee on Commerce.\footnote{111} The Committee, by a majority of 17 to 1, adopted
on April 15, 1946, a resolution in which it declared that agreements

\footnote{106} It is to be noted that the Board has pointed out that the enumeration of
the criteria of the public interest in Section 2 is not exhaustive, as indicated by the
use of the expression "among other things," *American President Lines, Ltd., et al.,
Petition,* 7 C.A.B. 799, 802 (1947). The Board has mentioned as being among
the criteria of the public interest "the desirability of maintaining the existing
cordial relations between the two countries," *Aerovias Nacionales de Colombia,
S.A.,* 7 C.A.B. 149, 154 (1946); has said that even in the absence of an agree-
ment the granting of a permit may be required by "principles of international
reciprocity," *Compania Cubana de Aviacion, S.A.,* 6 C.A.B. 807, 811 (1946);
and has issued temporary permits to Mexican air carriers authorizing them to
use border airports in the United States when the adjoining Mexican airports
were unserviceable because it was "in accord with the good neighbor policy of
the United States," *Aero-Transportes, S.A.,* 6 C.A.B. 159, 161 (1944), and id.,
383, 385 (1945); see also *Lineas Aereas Mexicanas, S.A.,* 6 C.A.B. 155 (1944)
and 299 (1945).


\footnote{109} *House Report No. 784,* 78th Congress, 1st sess.

\footnote{110} *Hearings on Executive Agreement on International Civil Aviation,*
before the Senate Committee on Foreign Relations, 79th Congress, 1st sess.

\footnote{111} *Hearings on S. 1814* before the Senate Committee on Commerce, 79th
Congress, 2d sess. Identical bills were introduced in the 80th Congress (S. 11)
and in the 81st Congress (S. 12). See *infra,* n. 118.
such as the Bermuda Agreement were not binding on the United States and should not be made except in the form of treaties approved by the Senate.\textsuperscript{112} This resolution, which was not brought to the floor of the Senate for discussion or vote, had, of course, no legal effect and did not succeed in dissuading the Executive from continuing to make bilateral agreements similar to the Bermuda Agreement.\textsuperscript{113} Opposition in the Senate was partly responsible, however, for the withdrawal of the United States from the Chicago Air Transport Agreement.\textsuperscript{114}

The Congressional Aviation Policy Board, in its Report,\textsuperscript{115} "recognized that the executive agencies are in a position to designate routes in bilateral agreement negotiations," but recommended that "more effective machinery should be set up in the State Department and the Civil Aeronautics Board, by legislation if necessary, to govern such procedures and insure full protection of the Government and of the United States flag international carriers."

The agreement of June 4, 1949, with Canada,\textsuperscript{116} whereby the United States undertook to permit a Canadian airline to fly the Montreal-New York route, led to renewed agitation in the Senate against the practice of making executive agreements containing such undertakings. During June, 1949, in the hearings on the problems of the airline industry the propriety of this practice was again discussed and doubted.\textsuperscript{117} In a letter to the President dated July 28, 1949, forty-nine Senators, later joined by some others, criticized the methods and results of the negotiations with Canada, but did not challenge the validity of the agreement. The Senate Committee on Interstate and Foreign Commerce reported a bill (S. 12) which would amend Section 802 of the Civil Aeronautics Act by adding the following language:

No agreement with any foreign government restricting the right of the United States or its nationals to engage in air-transport operations, generally granting to any foreign government or its nationals or to any air line representing any foreign government any right or rights to operate in air transportation or air commerce other than as a foreign air carrier in accordance with the provisions of the Civil Aeronautics Act of 1938, or respecting the formation of or the participation of the United States in any international organization for regulation or control of international aviation or any

\textsuperscript{112}Senate Doc. No. 173, 79th Congress, 2d sess. The Committee specifically adduced in support of its views only two authorities—Professor Borchard (on the general constitutional question) and the Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority, supra n. 82.

\textsuperscript{113}An agreement with Egypt was signed on June 15, 1946, TIAS 1727, and eight other such agreements were made during the balance of the year. The President upheld the validity of such agreements in his message to the Senate on June 11, 1946, in which he urged approval of the International Convention on Civil Aviation made at Chicago, 14 Department of State Bulletin 1079 (1946). For the opinion of the Attorney General dated June 18, 1946, see supra n. 92.

\textsuperscript{114}See supra n. 26.

\textsuperscript{115}National Aviation Policy, Report of the Congressional Aviation Board pursuant to Public Law 287, 1948, Senate Rep. No. 949, 80th Congress, 2d sess., at 27. See supra, nn. 3 and 6.

\textsuperscript{116}Hearings pursuant to S. Res. 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Congress, 1st sess., at 1473-1521.
phases thereof, shall be made or entered into by or on behalf of the
Government of the United States except by treaty.\footnote{118}
This bill, which is identical with bills introduced in the 79th and
80th Congresses, is apparently intended, in the view of its proponents
and some of its opponents, to prevent the making of executive agree-
ments on air transportation such as are now in existence, by requiring
that all such agreements be submitted to the Senate for approval as
treaties.\footnote{119} Actually, it is clear that the language of the bill would
accomplish no such purpose, for the following reasons:

(1) None of the existing air transport agreements purports to
restrict "the right of the United States or its nationals to engage in
air-transport operations." Under international law, there is no right
to engage in air transport operations in foreign territory without the
consent of its sovereign. The air transport agreements, far from re-
stricting any such non-existent "right," provide for the granting by
foreign states of privileges to United States airlines which they might
not otherwise obtain.

(2) None of the existing air transport agreements, as possibly
distinguished from some air navigation agreements, purports to exempt
any foreign government or airline from the necessity of qualifying as
a foreign air carrier under the Act if it wishes to operate air trans-
port services to the United States.\footnote{120}

(3) The United States is not now a party to any executive agree-
ment respecting the formation of, or participation in, any international
organization for regulation or control of international aviation or any
phases thereof.\footnote{121}

There is serious doubt that Congress can effectively restrict the
authority of the President to enter into executive agreements insofar
as this authority rests upon the President's inherent power to conduct
the foreign relations of the United States.\footnote{122} It is believed, however,
that Congress, in the exercise of its constitutional powers over foreign
commerce and other matters, may by statute make the obligations con-

\footnote{118} S. 12, and \textit{Senate Rep. No. 482}, 81st Congress, 1st sess.
\footnote{119} \textit{Senate Rep. No. 482}, 81st Congress, 1st sess., at 7. As this article was
going to press, the Senate, on December 15, 1950, passed the bill after it had
been called on the consent calendar. S. 12 has been reintroduced in the 82nd
Congress.
\footnote{120} Cf., however, provisions permitting foreign airlines to fly non-stop over
United States territory, such as are found in the Air Services Transit Agree-
ment made at Chicago, EAS 487, and in the air transport agreement with France,
Article VII, TIAS 1679. Cf. Section 6(c) of the Air Commerce Act as amended
by Section 1107(e) (5) of the Civil Aeronautics Act, and Section 1(3) of the
latter. See Wiprud, \textit{supra} n. 48, at 264 et seq.; Latchford, article in \textit{12 Department
of State Bulletin} 1104 (1945).
\footnote{121} The provision in S. 12 on this point is clearly an anachronism inherited
from the bill introduced in the 79th Congress, when the United States took part
by executive agreement in the Provisional International Civil Aviation Organiza-
tion, replaced in 1947 by the present organization under the Chicago Convention
approved by the Senate as a treaty, TIAS 1591.
\footnote{122} See letters from the Department of State and the Department of Justice,
tained in executive agreements on air transportation unenforceable in the United States, as by prohibiting the entry of foreign aircraft. If the authority to make such agreements is regarded as resting solely on statute—hardly a tenable view—Congress may withdraw such authority, without necessarily terminating the agreements made while the authority existed.\footnote{123}

**THE INTERNATIONAL POSITION OF EXECUTIVE AGREEMENTS**

What is the international legal position of the executive agreements on air transportation? There is no indication that the parties to such agreements, including the Government of the United States, have taken the view that they are anything but valid international agreements containing obligations binding upon both parties.\footnote{124} The view frequently asserted by the opponents of these agreements that executive agreements are only “morally” binding, if at all, and then only for the duration of the term of office of the President who has made them,\footnote{125} is a myth that finds no support whatever in the practice or official utterances of the Government of the United States, and is not in consonance with the general principle of international law that international agreements create obligations for states and not merely for individual officials.\footnote{126} There is more support in practice for the position that an executive agreement authorized by statute is terminated by the passage of inconsistent legislation. Thus, in 1894 Brazil was notified that an Act of Congress had the effect of immediately terminating a reciprocal trade agreement which provided for termination on notice. Secretary of State Gresham pointed out, in

\footnote{123}Cf. the testimony of Edward G. Miller, of the Department of State, in *Hearings on S. 1814* before the Senate Committee on Commerce, 79th Congress, 2d sess., at 132 et seq.

\footnote{124}On the views of C.A.B., see *supra* n. 94. The preamble of the agreement with India signed on November 14, 1946, TIAS 1586, refers to the contracting governments as “parties to the Interim Agreement on International Civil Aviation and the International Air Services Transit Agreement, both signed at Chicago on the seventh day of December, 1944, the terms of which agreements are binding on both parties.” Although the agreements referred to, which were accepted as executive agreements by the United States, EAS 469 and EAS 487, are not “air transport” agreements, there is no reason to believe that a different attitude would be taken toward the latter by the Department of State.

\footnote{125}See, e.g., Opinion Memorandum of the General Counsel of the Civil Aeronautics Authority, *supra* n. 82, and Senate Rep. No. 482, 81st Congress, 1st sess., at 6 (apparently on the authority of Professor Borchard, cf. his *Opinion*, *supra* n. 8, at 66).

\footnote{126}See McDougal and Lans, *supra* n. 8 at 381 et seq., esp. 346, and sources there cited. Many executive agreements have been not terminable under their own provisions within the Presidential term in which they were made. Thus, the air transport agreement with France of July 15, 1939, EAS 153, was terminable on two years’ notice—i.e., not before the expiration of the Presidential term in which it was made. The agreement of April 6, 1939, between the United States and Great Britain, EAS 145, established joint control over Canton and Enderbury Islands for a period of fifty years. It may be within the intention of the parties to an agreement that it should be terminable at will or on the occurrence of a certain condition, but such an intention cannot be implied from the mere fact that the agreement has been made by executive authority. Cf. 5 Hackworth, *Digest of International Law*, 430-438. The position that the United States may assume obligations by executive agreements was evidently taken by Congress in Section 1102 of the Civil Aeronautics Act of 1938. See *supra*.}
justification, that the agreement had been negotiated subject to the terms of United States and Brazilian legislation which "were well known to the executive departments of both Governments, and were recognized by them as the basis of their action." This practice may be explained as being based on a claim of implied consent of both parties to the termination of the agreement by the passage of inconsistent legislation. It is by no means clear, however, that other governments have assented to such a claim, or that the governments with which air transport agreements have been made have in fact impliedly consented to their termination by the passage of inconsistent legislation. All of the existing air transport agreements provide in terms for termination on notice.

Even a holding by some competent organ to the effect that the air transport agreements have not been made by proper constitutional authority might not suffice to release the United States automatically from the international obligations which they purport to contain. The international legal effect of treaties or agreements made by or at the direction of a head of state or a foreign minister ostensibly on behalf of his state but without authority in the law of the state has been a subject of much controversy in the literature of international law. The Permanent Court of International Justice, in the *Eastern Green-land* case between Denmark and Norway, referring to an oral statement made by the Norwegian Minister for Foreign Affairs to the Danish Minister to the effect that the Norwegian Government would not make any difficulties for Denmark in the settlement of the question of Danish sovereignty over the whole of Greenland, considered it "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs," although Norway had earnestly contended that the Minister had no constitutional authority to enter into such a commitment. Several of the legal officers of the Department of State have expressed the view that the United States might be internationally bound by executive agreements even if made in excess

129 Permanent Court of International Justice, *Publications*, Series A/B, No. 53, at 70-71; see also the opinion of Judge Anzilotti, dissenting on other grounds, id., at 91-92; cf. id., Series C, No. 62, at 545 et seq., No. 63, at 878 et seq., and 1411 et seq.
of authority. This view is in consonance with the position taken much earlier that a foreign government is not entitled to go behind the President's assertion of authority or to question it. In practice, a Foreign Office cannot and does not study the constitutional law of all the nations with whose governments it deals; it must necessarily rely to a large extent upon the representations and assertions of power made by the recognized spokesmen for such nations. In the United States, the President speaks for the nation in all matters pertaining to foreign relations. It would be difficult for the United States to deny that a foreign government might justifiably rely upon the authority of the President to enter into binding commitments on air transportation by executive agreement, in view of the long-continued practice of making and carrying out executive agreements on a large variety of subjects, the absence of any decisions to the contrary, the apparent approval of the practice by all three branches of the Government, and the part performance of most such commitments by one or both of the parties.

CONCLUSIONS

(1) The practice of making executive agreements on air transportation is a constitutional usage which does not rest upon statutory authority, but which has been recognized, acquiesced in, and in effect approved by Congress.

(2) The United States may assume valid international obligations in bilateral or multilateral executive agreements on air transportation, including obligations to grant operating privileges to foreign air carriers, normally terminable only by express or implied consent of the parties.

(3) The Civil Aeronautics Board, in the performance of its powers and duties under the Civil Aeronautics Act of 1938, including Section 402, is under a statutory duty not to take any action which would result in a breach of any obligation assumed by the United States in an executive agreement, but it is possible that it may be excused from the performance of its duty by specific direction of the President acting under Section 801 of the Act.

(4) Congress has the power to prevent, by appropriate legislation, the performance by the United States of obligations assumed in executive agreements on air transportation.

130 Memorandum of the Solicitor for the Department of State Clark, January 14, 1911, 5 Hackworth, Digest of International Law, 393; testimony of Green H. Hackworth, Legal Adviser of the Department of State, 1944, Hearings on S. 1385 before a Subcommittee of the Senate Committee on Commerce, 78th Congress, 2d sess., at 230. See contra, testimony of Edward G. Miller, of the Department of State, 1946, Hearings on S. 1814 before the Senate Committee on Commerce, 79th Congress, 2d sess., at 132, 142-143.

131 Secretary of State Jefferson to M. Genet, November 22, 1793, 4 Moore, Digest of International Law, 680; Secretary of State Foster to the President, December 7, 1892, citing the action of Secretary of State Seward in 1865 with respect to the withdrawal of a notice of termination of the arrangement of 1817 with Great Britain concerning armaments on the Great Lakes, 5 id. 169-170.