

THE COLONIAL AIRLINES CASE: TREATIES AND EXECUTIVE AGREEMENTS RELATING TO AVIATION*

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On June 4, 1949, representatives of the United States and the Dominion of Canada concluded an arrangement providing for the operation of air transportation services between the two countries. Under this arrangement, which superseded an agreement reached in 1945, American air carriers were authorized to operate sixteen air routes between the United States and Canada, and ten routes were to be operated by Canadian carriers.

Among the routes granted to the United States was a direct route between New York and Toronto, replacing the existing American route from Buffalo to Toronto. This new route directly paralleled the existing Canadian route from Toronto to New York. Canada, on the other hand, received a direct route from Montreal to New York, paralleling the existing route which had been operated for many years without competition by Colonial Airlines, Inc.

Shortly after the conclusion of the agreement was announced, Colonial Airlines filed a complaint against the members of the Civil Aeronautics Board, asking that the Board be restrained from carrying out the provisions of this agreement and that the agreement be declared null and void.¹

Among the grounds alleged as a basis for such relief was Colonial's contention that the agreement, which had been entered into as an executive agreement, was in fact a treaty, and that since it had not been presented to the Senate for ratification, it had been concluded in violation of the Constitution.

The answer to the question whether the arrangement with Canada was validly entered into by an executive agreement might be based upon either (1) considerations involved in the international relations of the United States generally, or (2) the practice in the field of aviation.

* The author expresses his indebtedness to Mr. Henry L. Hill, Lecturer in Air Law, Northwestern University Law School, for his help in revising the final text of the article.

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1. Colonial Airlines, Inc. v. Adams, 87 F. Supp. 242 (D.D.C. 1949).

The present article deals only with the second aspect of the problem, the first aspect requiring treatment in a separate work.

It is to be emphasized that the recent trend purporting to limit the scope of the Senate's power regarding the foreign relations of the United States in all fields is perhaps even more distinct in the field of aviation than in others. This may in part be attributed to the dilatory handling of these matters by the Senate. The slowness of the Senate's action has been pointed out in relation to treaties as well as to executive agreements requiring a joint resolution of Congress. Thus, for example, Professor John H. Wigmore gave "a striking instance of the Senate's brazen neglect of its duty to the Nation's international interests." On May 24, 1928, President Coolidge transmitted to Congress a note from the Secretary of State asking for a joint resolution appropriating not more than two hundred and fifty dollars annually to meet the expenses of the United States' participation in the International Technical Committee of Aerial Legal Experts. The proposal was not open to the slightest doubt or controversy. However, during the session then in progress and the succeeding two sessions of Congress, no action was taken by the Senate. At last, after three years had elapsed, the resolution was passed by the Senate on February 10, 1931.²

The answer to the principal issue raised in the *Colonial* case, whether this was the sort of agreement which could be entered into by executive agreement, depends largely upon the practice and precedents in the field of aviation, in addition to the general American legal system relating to foreign affairs. For this reason, a general review of the international arrangements which the United States has concluded in the field of aviation is necessary, in order to demonstrate which matters are customarily regulated by executive agreements and which are reserved to treaties.³

A. TREATIES RELATING TO AVIATION

In addition to the international agreements dealing directly and solely with aviation matters, some provisions of other treaties are connected with aviation, *e.g.*, double taxation conventions and peace treaties.

2. *The Federal Senate's Neglect of the Nation's International Interests*, 26 ILL. L. REV. 798 (1932); 3 J. AIR L. 283 (1932).

3. For a table of the international arrangements of the United States relating to aviation, see 1951 U.S. Av. Rep. iv-xiv.

1. *Double Taxation Conventions*

The first arrangement of this kind (no longer in force) was concluded with France in 1932 by treaty.⁴ Article III of the Convention reads as follows:

Income which an enterprise of one of the contracting states derives from the operation of aircraft registered in such state and engaged in transportation between the two states, is taxable only in the former state.⁵

The United States has entered into double taxation conventions with ten countries; all of them were concluded by treaty. Their provisions relating to aviation are similar to that already cited, although most of the recent conventions eliminate the words, “. . . and engaged in transportation between the two states. . . .”

2. *Treaties of Peace*

The treaties of peace with Bulgaria,⁶ Hungary,⁷ Italy,⁸ and Rumania,⁹ all concluded after World War II, deal with various aspects of military and commercial aviation.

3. *Other Treaties Relating Only in Part to Aviation*

The treaty signed with Mexico on October 6, 1936¹⁰ provides for the return of stolen or embezzled motor vehicles, trailers, airplanes and parts thereof.

4. *Air Mail Arrangements*

The Universal Postal Union Convention of Buenos Aires, replacing previously concluded air mail arrangements,¹¹ was ratified by the United States in accordance with the treaty procedure in 1940.¹²

4. U.S. TREATY SER., No. 885 (Dep't State 1932); 49 STAT. 3145 (1935); 1937 U.S. AV. REP. 403. See Article III, relating to aviation.

5. At present, a new convention between the United States and France is in force. U.S. TREATIES & OTHER INT. ACTS SER., No. 1982 (Dep't State 1949).

6. U.S. TREATIES & OTHER INT. ACTS SER., No. 1650 (Dep't State 1947); 61 STAT. 1915 (1947). Part III deals with military aviation. Article 29 is concerned with commercial aviation.

7. U.S. TREATIES & OTHER INT. ACTS SER., No. 1651 (Dep't State 1947); 61 STAT. 2065 (1947). The pertinent provisions are Part III and Article 33.

8. U.S. TREATIES & OTHER INT. ACTS SER., No. 1648 (Dep't State 1947); 61 STAT. 1245 (1947). See Part IV and Article 82.

9. U.S. TREATIES & OTHER INT. ACTS SER., No. 1649 (Dep't State 1947); 61 STAT. 1757 (1949). See Part III and Article 31.

10. U.S. TREATY SER., No. 914 (Dep't State 1936); 50 STAT. 1333 (1937).

11. The original international arrangement for air mail was signed by thirty-two countries, including the United States, in September, 1927. 75 LEAGUE OF NATIONS TREATY SER., No. 840 (1928). It was superseded, two years later, by the Universal Postal Convention of London.

12. Rhyne, *Legal Rules for International Aviation*, 31 VA. L. REV. 267, 276 (1945).

5. *International Public Air Law Conventions*

The first¹³ international air convention entered into by the United States was the Inter-American Habana Convention on Commercial Aviation, signed on February 20, 1928.¹⁴ This Convention, concluded by treaty, dealt quite extensively with many of the problems arising out of air travel in the Western Hemisphere.¹⁵

The next convention entered into by the United States (with reservations) was also concluded by treaty. This was the Sanitary Convention for Aerial Navigation of 1933,¹⁶ which was modified by the Convention of 1944 (the "U.N.R.R.A." Aviation Sanitary Convention).¹⁷

Finally, there was the Chicago Convention of 1944.¹⁸ It was transmitted to the Senate by President Roosevelt for its "advice and consent," which was granted in 1946.¹⁹

6. *Private Air Law Conventions*

There have also been a number of agreements concerning private air law which the United States has entered into by means of the treaty procedure. The first of these was the Warsaw Convention of 1929,²⁰ which was intended to unify the regulations concerning international air transportation. Next came the two Rome conventions of 1933. The first concerned the unification of certain rules relating to damage caused by aircraft to parties on

13. Because of the isolationist policy of the Senate, the United States did not ratify the Paris Air Navigation Convention of 1919, concluded under the auspices of the League of Nations. In later years, many authors called upon the United States to join. See, for example, Colegrove, *The International Aviation Policy of the U.S.A.*, 2 J. AIR L. 447 (1931).

14. U.S. TREATY SER., No. 840 (Dep't State 1928); 1932 U.S. Av. Rep. 298.

15. Latchford, *The Habana Convention on Commercial Aviation*, 2 J. AIR L. 207 (1931). The Habana Convention went further than that of Paris in that it recognized the commercial freedom of the air in Article XXI (cabotage being excluded by Article XXIII, however).

16. U.S. TREATY SER., No. 901 (Dep't State 1934); 1934 U.S. Av. Rep. 265; 1935 U.S. Av. Rep. 185; 5 J. AIR L. 486 (1934).

17. U.S. TREATY SER., No. 992 (Dep't State 1945); 59 STAT. 991 (1945); 1945 U.S. Av. Rep. 312. The United States signed and ratified this convention in accordance with the treaty procedure in 1945.

18. U.S. TREATIES & OTHER INT. ACTS SER., No. 1591 (Dep't State 1944); 61 STAT. 1180 (1947); 1945 U.S. Av. Rep. 244.

19. Waldo, *Sequels to the Chicago Aviation Conference*, 11 LAW & CONTEMP. PROB. 609 (1946).

20. U.S. TREATY SER., No. 876 (Dep't State 1929); 49 STAT. 3000 (1934); 1934 U.S. Av. Rep. 239; 8 J. AIR L. 299 (1937).

the surface,²¹ and the second related to the precautionary attachment of aircraft.²²

The above does not exhaust the list of conventions on private air law concluded by the United States by means of treaties,²³ the most recent being the Convention on the International Recognition of Rights of Aircraft of 1948.²⁴ Unlike the preceding conventions, the 1948 agreement is not one of international unification, but of mutual recognition of security and property rights established by the law of the nationality of the aircraft.²⁵

7. *Arrangements Relating to Military Aviation*

In 1941 the United States signed an agreement with Mexico to facilitate the reciprocal transit of military aircraft. It was concluded by treaty²⁶ and thus constitutes an exception, since arrangements dealing with military aviation have generally been concluded by executive agreements.

B. EXECUTIVE AGREEMENTS

After the conclusion of the first air agreement with Canada, the Department of State announced (in August, 1930) that negotiations with various states concerning the conclusion of air agreements similar to that signed with Canada were in progress. Commenting on this announcement, Professor Colegrove wrote:

. . . while most European bilateral air agreements are in the form of treaties, the Department of the State expects to negotiate its understandings in the less permanent form of executive agreements. In view of the treaty-wrecking habits of the Senate, this procedure may be well advised. Moreover, executive agreements can be revised by a simple exchange of notes without having to report a new treaty and a new ratification.

21. 1933 U.S. Av. Rep. 284; 8 J. AIR L. 312 (1937).

22. 1933 U.S. Av. Rep. 293; 8 J. AIR L. 335 (1937).

23. The convention for the unification of certain rules relative to assistance and salvage of or by aircraft at sea was concluded at Brussels in 1939. Report of American Delegation to the 4th International Conference on Private Air Law, U.S. CONFERENCE SER., No. 42 (Dep't State 1938). Simultaneously an additional insurance protocol to the Surface Damage Convention of Rome was signed, 1938 U.S. Av. Rep. 275.

24. Annotated text in 16 J. AIR L. 70 (1949); text in 1948 U.S. Av. Rep. 554.

25. The convention was ratified by the Senate in 1949. 95 CONG. REC. 11645, 11647 (1949). See also Sweeney, *Convention on the International Recognition of Rights in Aircraft—Early Ratification Desirable*, 16 J. AIR L. 61 (1949).

26. U.S. TREATY SER., No. 971 (Dep't State 1941): 55 STAT. 1191 (1941).

The disadvantage of executive agreements lies in the very virtue . . . namely the lack of treaty status and permanency. Under Art. VIII, the arrangement with Canada can be terminated by either party on 60 days' notice.²⁷

The method of entering into bilateral aviation arrangements by executive agreements has been consistently followed since it was first settled upon by the State Department. No arrangement of this sort has been transferred to the Senate according to treaty procedure. Some of them, such as the Bermuda agreement, may be placed among the most important arrangements ever concluded by the United States. And many of these agreements have a much more permanent character than the one with Canada, which was commented upon by Professor Colegrove.

An important reason for the expansion of executive agreements in the field of aviation is the fact that the repeated efforts to regulate the enjoyment of all five freedoms of the air by a multilateral convention have, unfortunately, failed. The discussions at Chicago in 1944 and at Geneva in 1947 were not successful, and it is not likely that such a convention will be agreed upon in the near future. Mr. T. Burke observed rightly that:

Experience shows that, aside from certain mutually desirable basic principles, the tendency of the governments is to reserve definitive commitments for country-to-country [bilateral] negotiations.²⁸

The number of air agreements entered into by the United States is impressive. During the twenty year period ending in 1951, nearly one hundred and fifty agreements were effectuated. This figure, however, does not represent the totality of American air relations with foreign countries. It has been a common practice for American carriers to enter directly into agreements with foreign governments (particularly, in South America, but in a few cases also in Europe), with the consent and backing of the State Department, but without the official intervention of the United States Government.²⁹

The agreements concern all the various aspects of aviation. They range from arrangements regulating the entirety of the

27. *The International Aviation Policy of the United States*, 2 J. AIR L. 447, 460-461 (1931).

28. *Influences Affecting International Aviation Policy*, 11 LAW & CONTEMP. PROB. 598, 602 (1946).

29. An interesting study of the agreements concluded between Pan American Airways and foreign governments is presented by Walter H. Wager (in French) in 13 REVUE GENERALE DE L' AIR 76 (1950).

relations between two countries connected with air navigation to agreements concerning simply one particular route or airport. Many of them have been entered into by a simple exchange of notes, but some were concluded in a more solemn form. As in the case of treaties, some have been agreements which did not concern aviation alone. The agreements may be classified by subject matter.

1. *Agreements Concerning Military and Defense Matters*

Most of these arrangements were concluded during World War II; some relate only to Air Force missions.

Certainly, the most famous agreement of this type was the Naval and Air Bases arrangement with Great Britain, effected by an exchange of notes dated September 2, 1940 between the British Ambassador and the Secretary of State.³⁰ Under this agreement, the United States obtained a ninety-nine year lease for immediate establishment and use of naval and air bases and facilities in specified places, in exchange for naval and military equipment and material which the United States Government transferred to His Majesty's Government (50 obsolete destroyers).

The agreement aroused much discussion. The Attorney General affirmed the legality of the transaction, stressing the fact that the acquisition of the bases by the United States did not involve any "promises . . . to be performed in the future."³¹ However, some authors were of a contrary opinion. Professor Borchard³² thought that the exchange was hard to explain on legal grounds, but stated that Congressional approval might be deemed secured in the appropriations for the bases and in the Lend-Lease Act of March, 1941.³³ Criticism was also expressed by Professor Briggs³⁴ and other commentators.

Some agreements of a military nature were concluded by the United States with Canada. These dealt with the defense of

30. U.S. EXEC. AGREEMENT SER., No. 235 (Dep't State 1941); 55 STAT. 1599 (1941).

31. Jackson, *Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers*, 39 OPS. ATT'Y GEN. 484, 487 (1940).

32. *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L. L. 690 (1940).

33. *Shall the Executive Agreement Replace the Treaty?*, 38 AM. J. INT'L L. 637-643 (1944).

34. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L. L. 569 (1940).

Newfoundland,³⁵ the Alaska Military Highway³⁶ and the post-war disposition of defense installations.³⁷

Moreover, agreements providing for the sending of United States military aviation missions were concluded with six South American countries; an agreement with Denmark concerned the defense of Greenland;³⁸ another with Great Britain related to the defense of Newfoundland;³⁹ and an agreement with Liberia provided for the construction of an airport in that country.⁴⁰

2. *Agreements Relating to Aeronautical Trade*

The first arrangement dealing with the reciprocal acceptance by the contracting parties of certificates of air worthiness for aircraft imported as merchandise was concluded, in 1931, with the Union of South Africa. It was accomplished by means of a note from the American Minister to the Minister for External Affairs of the Government of South Africa and the latter's note in reply.⁴¹ Soon seven similar agreements were entered into, all before World War II.

3. *Arrangements Relating to Pilots' Licenses*

Before 1939, the United States had concluded special agreements with six countries, recognizing the right of each contracting party to issue pilots' licenses to nationals of the other party.

35. U.S. EXEC. AGREEMENT SER., No. 235 (Dep't State 1941); 55 STAT. 1599 (1941).

36. The protocol of March 17, 1942 stipulated that the Highway follow the airports along the air route. U.S. EXEC. AGREEMENT SER., No. 246 (Dep't State 1942); 56 STAT. 1458 (1942). A later arrangement dealt with flight strips. U.S. EXEC. AGREEMENT SER., No. 381 (Dep't State 1942); 57 STAT. 1375 (1942).

37. U.S. EXEC. AGREEMENT SER., No. 391 (Dep't State 1943); 57 STAT. 1429 (1943); *amend.* U.S. EXEC. AGREEMENT SER., No. 444 (Dep't State 1944); 58 STAT. 1565 (1944) and U. S. TREATIES & OTHER INT. ACTS SER., No. 1531 (Dep't State 1946); 60 STAT. 1741, 1751 (1946). Payment for these installations was also handled by executive agreement. U.S. EXEC. AGREEMENT SER., No. 405 (Dep't State 1944); 58 STAT. 1290 (1944).

38. U.S. EXEC. AGREEMENT SER., No. 204 (Dep't State 1941); 55 STAT. 1245 (1941).

39. U.S. EXEC. AGREEMENT SER., No. 235 (Dep't State 1941); 55 STAT. 1599 (1941).

40. U.S. EXEC. AGREEMENT SER., No. 275 (Dep't State 1942); 56 STAT. 1621 (1942).

41. U.S. EXEC. AGREEMENT SER., No. 28 (Dep't State 1931); 47 STAT. 2678 (1931); 3 J. AIR L. 290 (1932).

4. *Air Navigation and Transportation Agreements*

This type of agreement, which is the most frequent and the most important, was first entered into with Colombia in 1929.⁴²

The next agreement, concluded with Canada, also in 1929,⁴³ was a model for many other arrangements. Before its execution, Canadian-American air relations had been regulated by internal rule-making,⁴⁴ the rules often conforming to the substance of diplomatic notes exchanged between the two governments. The agreement, entered into by an exchange of notes, regulated the admission of civil aircraft of one country into the other and contained provisions concerning the issuance of pilots' licenses and the acceptance of certificates of airworthiness.

The next country with which the United States concluded an air navigation agreement was Italy.⁴⁵ The arrangement was similar to the one with Canada.⁴⁶

Many other arrangements followed,⁴⁷ their flow being interrupted only by World War II. After the Conference of Chicago, many were modeled on the standard bilateral agreement recommended by the Chicago Convention. Many more recent agreements have been based on the provisions of the Bermuda Agreement.

Some agreements concluded in recent years are more detailed

42. 1929 U.S. Av. Rep. 271. The agreement related to the operation of commercial aircraft in the Canal Zone.

43. U.S. EXEC. AGREEMENT SER., No. 2 (Dep't State 1929); 47 STAT. 2575 (1929); 1929 U.S. Av. Rep. 273.

44. See Latchford, *American-Canadian Air Relations Prior to 1929*, 2 J. AIR L. 341 (1931).

45. U.S. EXEC. AGREEMENT SER., No. 24 (Dep't State 1931); 47 STAT. 2668 (1931); 1932 U.S. Av. Rep. 317; 3 J. AIR L. 109 (1932).

46. See Latchford, *Air Navigation Arrangement between the United States and Italy*, 3 J. AIR L. 75, 78 (1932). Among other things, this agreement accorded the citizens of one of the contracting parties the right to operate within the other country for non-industrial and non-commercial purposes, civil aircraft registered in the first country, and also the right to carry passengers or cargo in traffic between the two countries in the operation of a regular air transport line. The establishment of such a line, however, was to be subject to prior consent of the respective governments on the basis of reciprocity. The cabotage rights were reserved.

47. For example, in 1932 an air agreement with Germany was effected. U.S. EXEC. AGREEMENT SER., No. 38 (Dep't State 1932); 47 STAT. 2721 (1932); 1932 U.S. Av. Rep. 310. Since no regular aerial navigation between the two countries in the near future could be contemplated at that time, the most important reason for this agreement was the fact that American tourists sometimes brought their airplanes to Germany, and the practice of exchanging diplomatic notes every time was cumbersome. See Wegerdt, *The German-American Agreement Concerning Air Navigation*, 3 J. AIR L. 648 (1932).

than the older ones. In addition to providing rules relating to the admission of aircraft, they establish the capacity of the aircraft, procedures relating to rates, routes to be followed, and terminals (often, in annexes to the agreements). Some agreements, implementing previous ones, merely establish routes and terminals. About fifty agreements of this kind were concluded by the United States. Of these, the agreement of February 11, 1946 with Great Britain,⁴⁸ known as the Bermuda Agreement, is the most outstanding.

The principal features of the Bermuda Agreement are indicated in a joint statement of the British and United States Governments advocating conclusion of a multilateral international and additional bilateral agreements based upon the principles of the Bermuda Agreement, including particularly:

- (A) fair and equitable opportunity to operate air services on international routes and the creation of machinery to obviate unfair competition by unjustifiable increases of frequencies or capacity;
- (B) the elimination of formulae for the predetermination of frequencies or capacity or of any arbitrary division of air traffic between countries and their national airlines;
- (C) the adjustment of Fifth Freedom traffic with regard to:
 - (1) traffic requirements between the country of origin and the country of destination,
 - (2) the requirements of through airlines operation, and
 - (3) the traffic requirements of the area through which the airline passes after taking account of local and regional services.⁴⁹

In accordance with Article II of the agreement, the air services agreed upon were to be performed by air carriers designated by the parties. Each party was to treat the air carriers of the other as its own, so far as the use of airports and other facilities was concerned, and to recognize the certificates and licenses issued by the other party.

Important stipulations were embodied in the Annex to the agreement, which provided for routes and rate control procedures. Seven routes were established for the United Kingdom and thirteen for the United States.

48. U.S. TREATIES & OTHER INT. ACTS SER., No. 1507 (Dep't State 1946); 60 STAT. 1409 (1946); 1946 U.S. Av. Rep. 108; *amend.* U.S. TREATIES & OTHER INT. ACTS SER., No. 1640, 1641 (Dep't State 1947); 61 STAT. 3089, 3092 (1947); U.S. TREATIES & OTHER INT. ACTS SER., No. 1714 (Dep't State 1948); 62 STAT. 1345 (1948).

49. 1946 U.S. Av. Rep. 420.

The agreements concluded by the United States with other countries prior to the Bermuda Agreement were, in general, less comprehensive. Usually they did not grant specific commercial rights for scheduled air transportation services, and the establishment of a regular route required the further consent of each contracting party. The agreement of February, 1946 thus created a new type of arrangement.

The conclusion of the Bermuda Agreement by means of an executive agreement aroused adverse criticism on the part of some senators, who considered the regulation of air relations between two of the leading air powers of the world of such importance as to require "the advice and consent" of the Senate. The Senate Committee on Commerce submitted a report and a resolution to the Senate in which it was said:

Whereas witnesses and counsel representing major American interests . . . have testified as to the prejudicial effect of such agreement to the United States . . . as well as the illegality of such agreements unless approved as treaties as prescribed by the Constitution . . .

Resolved, That the Committee on Commerce advise the Senate that it is the opinion by this committee—

- (1) That no agreements of this character should be made except in the form of treaties to be considered and ratified by the Senate; that any executive agreement which purports to grant to any foreign country the right to have an air line or air lines nominated by it operate to or from United States territory without public hearing in advance and the determination of public interest by the Civil Aeronautics Board called for under section 402 of the Civil Aeronautics Act, is inconsistent with not only the Constitution but the letter and spirit of said Act, and therefore illegal and void, and that any and all proceedings thereunder should be forthwith terminated by appropriate notice to the Governments concerned.
- (2) That, notwithstanding the International Air Transport Agreement and the bilateral agreements above mentioned this government is not bound by such agreements so long as the same have not been ratified as treaties, but the Civil Aeronautics Board and the President continue to have the duty and the obligation of passing, without prejudgment, upon the questions whether any proposed operation by a foreign-flag air line is in the public interest, as defined in the Civil Aeronautics Act.⁵⁰

50. Resolution of the Senate Committee on Interstate and Foreign Commerce, with report, SEN. DOC. No. 173, 79th Cong., 2nd Sess. (1946).

5. *Agreements Granting Special and Technical Facilities*

This type of agreement is less important from the standpoint of subject matter and also less frequently entered into than the preceding type discussed. It largely concerns some local facilities accorded to one of the contracting parties or both.

An example of this type of agreement is that of January 14, 1950 with South Korea, involving the Kimpo Airport near Seoul.⁵¹

6. *Miscellaneous Bilateral Agreements*

In this category are a number of varied bilateral agreements. (Some of them liquidate situations created by the necessities of war.) They deal with such problems as the appointment of a civil aviation mission, transfer of an airport, search and rescue operations, and the like.

7. *Multilateral Agreements*

The famous Two-Freedoms⁵² and Five-Freedoms⁵³ agreements, signed at Chicago in 1944 and known as the Transit and Transport Agreements, were entered into by the United States by means of executive agreements. The Transit Agreement granted to each contracting state, with respect to scheduled international air services, the privilege of flying across the territory of the parties without landing and the privilege of landing for non-traffic purposes. The Transport Agreement added the privileges of putting down or taking on passengers, mail and cargo either originating in or bound for the territory of any contracting state.

In 1946 the United States denounced the Five-Freedoms Agreement.⁵⁴ In the notice of withdrawal, it was stated that only fifteen countries had accepted the agreement, and of this number only two, besides the United States, had developed international air services to any extent, and thus the agreement could not be relied upon as an effective medium for the establishment of international air routes for operation by United States carriers.

51. Additional examples which might be given include: The Agreement of 1947 with Australia, dealing with facilities at Eagle Farm and Amberly in Australia, U.S. TREATIES & OTHER INT. ACTS SER., No. 1732 (Dep't State 1947); 61 STAT. 3843 (1947); and that of 1938 with Canada concerning radio communication in Alaska and British Columbia, U.S. EXEC. AGREEMENT SER., No. 142 (Dep't State 1938); 53 STAT. 2092 (1938).

52. U.S. EXEC. AGREEMENT SER., No. 487 (Dep't State 1945); 59 STAT. 1693 (1945); 1945 U.S. Av. Rep. 278.

53. U.S. EXEC. AGREEMENT SER., No. 488 (Dep't State 1945); 59 STAT. 1701 (1945); 1945 U.S. Av. Rep. 284.

54. 1946 U.S. Av. Rep. 378.

Another multilateral arrangement consummated by executive agreement was that in which nine North Atlantic nations in 1946 agreed to maintain weather stations at the site of the stations established by the United States military agencies during World War II.⁵⁵

The creation of a Permanent American Aeronautical Commission at the session of the Inter-American Technical Aviation Conference at Lima in 1937 took neither the form of a treaty nor that of an official executive agreement, but was merely a resolution constituting a recommendation of action to the participating governments. The national commissions provided for in Article 7 of the resolution were established in thirteen countries, including the United States, but the Permanent Commission never met.

C. THE AGREEMENT WITH CANADA OF JUNE 4, 1949

1. *The Contents of the Agreement*

On June 4, 1949, the United States entered into an executive agreement with Canada, relating to air transportation.⁵⁶

Article 3 of the agreement provided that:

Any air service described in the Annex . . . may be placed in operation as soon as the contracting party . . . has designated an airline or airlines to operate such services, and has so notified the other contracting party. . . . The contracting party . . . shall . . . be bound to give, with a minimum of procedural delay, the appropriate . . . permission to the airline . . . concerned. . . .

Article 4 (a) provided that the charges for the use of public airports should not be higher than would be paid by the nationals of the charging party.

Paragraphs (b) and (c), Article 4 provided for customs exemption and facilities with respect to fuel, lubrication oils and spare parts of aircraft of the other party.

The reciprocal recognition of certificates was agreed upon in Article 5. Article 13 submitted to arbitration disputes which might arise between the contracting parties.

The annexed schedules granted sixteen air routes to the United States and ten to Canada.

On June 5, 1949, the Department of State issued a press release announcing the conclusion of the agreement. Commenting

55. 1946 U.S. Av. Rep. 468.

56. U.S. TREATIES & OTHER INT. ACTS SER., No. 1934 (Dep't State 1949).

on the new exchange of routes, it emphasized the fact that "under these arrangements carriers of both countries may both operate between the largest city in the United States and the two largest cities in Canada [New York-Montreal, New York-Toronto]."

2. *The Complaint of Colonial Airlines*

The complaint of Colonial Airlines challenging the validity of the agreement recited that plaintiff held a "grandfather certificate" for the route between New York and Montreal, and that under the agreement the defendants had declared that they were bound to grant to Trans-Canada Airlines, as the carrier designated by Canada, a permit to operate on the same route. Accordingly, the hearing required by the Civil Aeronautics Authority would be only a pro-forma hearing. The complaint further alleged that the delegation of power in Section 402 (b) of the Civil Aeronautics Act (providing for the issuance of permits to foreign air carriers), as modified by Section 801 (requiring approval by the President) was an unconstitutional delegation of the Congressional authority over foreign commerce to the Executive Branch, since there were no limitations or standards established. It was also contended that the defendants had no authority whatever to cause negotiation of such an agreement as an executive agreement; that they did unconstitutionally conspire to and did prevent the air agreement's being sent to the United States Senate for ratification as a treaty; that the defendants caused the air agreement to be entered into without advising the Senate; and that the agreement had not been confirmed by the Senate as a treaty; and finally, that said agreement violated Article VI of the United States Constitution, in that it purported to alter the laws of the United States by conflicting with Section 402 (b) of the Civil Aeronautics Act, the anti-trust laws, the tariff laws, and the Chicago Convention.

Additionally, the plaintiff's complaint stated that the air agreement had all the elements of a treaty and met all the definitions thereof, since it was permanent in nature and could be terminated only upon a year's notice. Moreover, it was contended that certification of Trans-Canada Airlines, in view of its enormous monopoly position, violated the Sherman and Clayton Acts. The enormous strategic importance of permitting any foreign air carrier to regularly and frequently operate into the City of New

York over many hundreds of miles of United States territory was said to require the consent of the Senate.

In its "Additional Points and Authorities in Support of Motions for Preliminary Injunction," the plaintiff, in arguing that the agreement should be considered a treaty, contended that there was no sound basis for a distinction between a multilateral treaty and a bilateral arrangement, and that the State Department itself could not establish any distinction between a treaty and an executive agreement at the hearings before the Senate's Committee on Interstate and Foreign Commerce.⁵⁷ It was pointed out that the representatives of the Department of State offered to the Senate Committee mere expediency—"convenience"—when queried as to why the agreement had not been submitted to the Senate. The plaintiff said that it undoubtedly would be more "convenient" for the State Department if the control of the Senate over treaties were abolished entirely, and that many American treaties have been concluded only between two parties; yet, if the above distinction were to be fallaciously invoked, a treaty of peace or an alliance might be concluded by an executive agreement, provided there were only two parties.

The court held that the challenged sections [402 (b) and 801] of the Act were not repugnant to the Constitution, since before making any recommendations to the President, the Civil Aeronautics Board was obliged to make findings as required by the Act. The court also held that Congress had provided certain standards for the Board in connection with the issuance of a permit to a foreign carrier, and that Congress thus had the right to make the delegation of authority. None of the other allegations of Colonial were passed upon by the court because the consent of the United States to be sued had not been given. The complaint was dismissed, but the court did grant an injunction pending the determination of the case upon appeal to the Supreme Court.

The dissenting opinion of Judge Goldsborough maintained that according to a prior decision of the Supreme Court,⁵⁸ Sections 402 (b) and 801 of the Civil Aeronautics Act delegate plenary Congressional power to the Executive without any standards, limitations, or statutory controls whatever, and are therefore un-

57. *Hearings before Committee on Interstate and Foreign Commerce on Sen. Res. 50*, 81st Cong., 1st Sess. (1949).

58. *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

constitutional. He said that the maintenance of the proper constitutional balance between the Executive, the Legislative and the Judicial Branches of the Government is the enduring and unending obligation of the Judiciary.

The suit by Colonial aroused anti-American feelings in Canada.⁵⁹ The Canadian Transport Board ordered Colonial to appear to show cause why it should continue operating as a monopoly between the largest cities of the United States and Canada. At the hearings, the representative of the Air Industries and Transportation Association stated that the successful prosecution of Colonial's effort "would make illegal all air traffic between Canada and the United States, and between the United States and other countries, until new arrangements could be made." As the result of a conference between the representatives of the American and Canadian governments, Colonial's right to perform the service between New York and Montreal was not cancelled.

It is to be stressed that the United States entered into many executive agreements of this kind, and it was very unfortunate that the one which was attacked settled the air transportation relations between the United States and Canada—a country with which the United States has always, since the very birth of the international air services, had most friendly intercourse. International arrangements rarely grant unilateral privileges, but under this agreement, the American air carriers were granted more routes than those of Canada. There is no reason whatever for contending that Canadian air carriers should not be permitted to fly over the largest American city, while Colonial flies over the largest one in Canada. Besides, it seems that the Government is better equipped than Colonial to decide whether this question has an "enormous strategic importance."

3. *Merits of the Complaint*

This study is devoted primarily to Colonial's contention that the air arrangement with Canada could not be entered into by executive agreement. However, in order to dispose of the airlines complaint in its entirety, it is necessary to consider the merits of its remaining arguments. If the allegation that some provisions of the agreement were repugnant to American statutes

59. See Griffin, *Colonial Suit Called Peril to Air Pacts—Canadians Warn It May Halt Traffic*, Chicago Daily Tribune, Dec. 13, 1949.

or treaties was justified, the argument that the arrangement should have been entered into by treaty procedure might have been strong.

(a) *The custom question.* After a careful reading of the provisions of the agreement, it must be inferred that there is absolutely nothing contrary to the customs laws of the United States, since the facilities involved concern only fuel, oils and spare parts which are used by aircraft in connection with the performance of their service, materials not regularly imported into the United States. Obviously, these provisions are in furtherance of the Chicago Convention, which purported to enhance international air intercourse and improve facilities connected therewith as much as possible.

(b) *The monopoly problem.* The contention that the agreement violated the Sherman Anti-Trust Act is an argument which might have been advanced against the continuation of the New York-Montreal service by Colonial alone. The general policy of the United States, particularly that of the air transportation authorities, is clearly opposed to such a lack of competition. The contention that Trans-Canada had a monopolistic position and that the granting of a permit to it would constitute a violation of the anti-trust laws is insupportable. The United States cannot in any way control the system adopted by other states. Whether they choose the policy of a selected instrument in their foreign air transportation, whether they have only one national air navigation company, or whether they promote the system of competition between several companies is purely a matter of their internal policy, having no connection with American legislation. The question must be disregarded.

(c) *The "conspiracy" of the members of the Civil Aeronautics Board.* This allegation is quite unusual. Publicity of negotiations between two countries was never required anywhere by any law or custom. However, in conformance with the modern trend in international affairs, there should be no secret treaties. The Covenant of the League of Nations obligated its members to register all treaties, and the United Nations Charter maintained this requirement, although the sanction for non-performance was mitigated. Internal legislation of some states, enacted after World War I, prohibited the entering into secret treaties (*e.g.*, that of Spain). But all these stipulations provided only for the

publication of arrangements which were concluded, and never required public negotiations. Of course, when a constitution requires the consent of the legislature to the ratification of all or of some treaties, no secrecy of arrangements entered into is possible. However, when they can be entered into by executive agreements, publicity may be, and sometimes is, withheld (particularly with respect to arrangements dealing with military matters). Probably it would be difficult to find a single country which made public all of its international commitments.

Publicity of the negotiations often could occasion undesirable interference of journalists or other commentators and impair the success of the talks. Besides, before the end of the negotiations, it is sometimes doubtful whether an agreement of the parties will be reached. In the case of failure, it is often far better not to disclose the fact that an attempt at an understanding had been made. Publicity of the collapse of the talks might not have an advantageous influence upon the friendly relations of the countries.

Thus, the statement of Mr. P. Barringer of the Department of State, at the hearing before the Senate Committee on Interstate and Foreign Commerce, is quite proper.⁶⁰ Commenting on the Canadian Agreement, Mr. Barringer said:

It has been the general practice to conduct bilateral negotiations concerning the exchange of international air transport rights without publicity. It is believed that this practice is essential if the best possible result, in the interests of the United States of America, and of all its citizen air carriers, is to be obtained in the bargaining inherent in such negotiations. This is particularly true when the different air carriers of the United States have divergent views with respect to the terms upon which such negotiations should go forward. Amplification of the divergency of views of the United States carriers could easily be diverted to the advantage of the foreign governments concerned in such negotiations, and could thus be used to impair the pursuit of the international civil air policy of the United States.

The secrecy of the negotiations was usual, the Bermuda conference being the only exception.⁶¹

In the case of the Canadian Agreement, the Civil Aeronautics Board held meetings with representatives of the American air

60. *Hearings, supra* note 57 at 1483.

61. *Id.* at 1500.

carriers and asked them to express their views, before entering into the negotiations. Furthermore, Mr. Tipton, General Counsel of the Air Transport Association of America, was a regular member of the American delegation appointed for the talk with the Canadians.

It was stressed during the hearings⁶² that, as a whole, the agreement with Canada was advantageous to the United States, particularly because the enjoyment of the five freedoms at Gander, after Newfoundland became a part of Canada, was dependent upon the satisfactory conclusion of a new arrangement with Canada. Many interesting figures, presenting the economic background of the negotiations, were revealed at the hearings; the cancellation of Colonial's monopoly on the New York-Montreal route was declared by the Canadians a *conditio sine qua non* of the new agreement. However, the question whether the result of the bargaining with Canada was economically profitable for the United States is not a legal question and cannot be considered by the courts. The matter lies within the discretion of the Executive. Agreements of this kind are beneficial to both parties, and Colonial's right to perform its services derived from the understanding between the two countries. Therefore, in the motion to dismiss the complaint and to dissolve the preliminary injunction, of September 6, 1949, the defendants contended that Colonial was estopped on equitable grounds to seek protection of its rights based upon the alleged invalidity of the Civil Aeronautics Act and the Canadian Agreement because the very rights it sought to protect arose from such Act and Agreement.

(d) *Pre-determined outcome of the hearings before the Civil Aeronautics Board.* This question may present some difficulties. Section 402 of the Civil Aeronautics Act requires that the Board grant permits to foreign air carriers after having found that they are fit, willing and able to provide the necessary transportation and that such transportation will be in the public interest. On the other hand, Section 1102 imposes on the Board the duty of performing its powers consistent with the international agreements of the United States.

62. *Id.* at 1482, 1495.

The Canadian Agreement stipulated in Article 3:

The contracting party granting the right shall . . . 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.

Thus, the United States reserved the right to check the fitness, willingness and ability of the air carrier designated by Canada and to consider whether the issuance of a permit was in the public interest. In his letter to the Secretary of State of June 18, 1946,⁶³ the Attorney General stated that:

. . . the granting of permits to foreign air carriers is not affected by any of the civil aviation agreements which have been concluded, and . . . the Board in each case must still decide . . . within the broad policy declared in the agreement.

Again, during the hearings on June 8, 1949, the representatives of the Civil Aeronautics Board asserted that the Board would not grant a permit without being satisfied that the applicant was fit, willing and able to perform the service, and that in only one case has the Board had the slightest doubt about the qualifications of a foreign air carrier.

However, even if the agreement were simply to provide for the granting of a permit to a designated air carrier, it would nevertheless still not be repugnant to the Civil Aeronautics Act. Section 1102 may properly be construed as an exception to Section 402. In the light of the requirement that the Civil Aeronautics Board, in exercising and performing its powers and duties, act consistently with any agreement of the United States, it may be said that the usual procedure of hearings need not be followed when an international agreement dispenses with it.

If the United States enters into an agreement recognizing, on a reciprocal basis, the airworthiness certificates or the pilots' licenses issued by the other party, it is because it has confidence that the contracting party will issue the certificate only under proper circumstances. The United States is bound by the agreement and could not argue that its internal legislation requires

63. 40 OP. ATT'Y GEN. 451 (1946).

action of the Board to investigate whether there were grounds for issuing the certificates. The same principle applies with respect to permits. The United States selects its air carrier for foreign air transportation. If by the terms of an agreement the contracting parties are bound to accept reciprocally the choice of the other, there can be no reason why the United States should check the fitness of the carrier designated by the other state. In such case, the hearings would be only pro-forma hearings. This fact has been well understood by the Civil Aeronautics Board which asked Congress, in 1943, to amend the Civil Aeronautics Act expressly to dispense with the requirement of hearings and findings where an international agreement of this kind has been entered into.⁶⁴ Unfortunately, although some other amendments were adopted, the provisions relating to the permits remain the same, and the construction of the Civil Aeronautics Act, according to which Section 1102 established an exception to Section 402, has not been universally accepted. This fact enabled the Senate Committee on Commerce to offer the ill-founded resolution previously referred to, after the conclusion of the Bermuda Agreement.⁶⁵ Fortunately, it was not adopted by Congress.

4. *The Justiciability of the Question*

Even if the court had passed upon the merits of the *Colonial* case, it is not at all certain that it would not have considered the treaty or executive agreement question a political one, beyond the control of the judiciary.

In its original meaning, "political" signifies "pertaining to the policy or the administration of government";⁶⁶ but the term "political question," as developed by the courts, relates to any problem which must be conclusively settled by the executive or legislative departments of the government. Many provisions of the Constitution, which, since they are embodied in this supreme law of the land, necessarily have a legal character, have been construed by the Supreme Court as involving only political issues whenever the Court thought that interference by the judiciary with the conduct of the "political" departments was not advisable.

In a few cases, the Constitution may offer a basis for this dis-

64. See Rhyne, *Legal Rules for International Aviation*, 31 VA. L. REV. 267 (1945).

65. See *supra* note 50.

66. BLACK'S LAW DICTIONARY 1375 (3rd ed. 1923); BOUVIER'S LAW DICTIONARY 2626 (8th ed. 1914).

inction. Thus, since Article I, Section 5 recites that "each House shall be the judge of the elections, returns and qualifications of its own members . . .," the ruling of the Supreme Court in *Colegrove v. Green*,⁶⁷ in which the Court decided not to interfere with the electoral districting of the State of Illinois, could rest on an express provision of the Constitution. But in most cases the Court establishes its own classification of political and justiciable questions, without much help from the Constitution. This accounts for the fact that the Court's decisions are rarely unanimous in these matters, and it has, on occasion, been so divided that it could not deliver an opinion. Thus, in *Coleman v. Miller*,⁶⁸ the Court was equally divided and could not decide whether the problem of whether the lieutenant governor was a part of the "legislature" of Kansas presented a justiciable controversy or was political in its nature. In another part of the opinion, it was held that:

. . . the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.⁶⁹

Then the Court attempted to formulate some general standard for distinction:

In determining whether a question falls within [the political] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. There are many illustrations in the field of our conduct of foreign relations, where there are 'considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice.' *Ware v. Hulton*, 3 Dall. 199, 260. Questions involving similar considerations are found in the government of our internal affairs. Thus, under Art. IV, Section 4, of the Constitution, providing that the United States 'shall guarantee to every State in this Union a Republican form of Government,' we have held that it rests with the Congress to decide what government is the established one in a State, and whether it is republican in form. *Luther v. Borden*, 7 How. 1, 42.⁷⁰

67. 328 U. S. 549 (1946).

68. 307 U. S. 433 (1939).

69. *Id.* at 450.

70. *Id.* at 454.

It seems unnecessary to give further examples of cases where the Court declined to deliver an opinion on the ground that the question presented was a political one. It is to be emphasized, however, that in the field of foreign relations the Court is prone to recognize the large discretionary power of the Executive, and will not disturb his decisions relating to the existence or termination of a treaty, recognition of a state or government, or the title to a territory. The statements of the Executive in these matters are considered by the Court as conclusive.

In some of the aforementioned cases, the Supreme Court emphasized the importance and the necessity of executive agreements. It is quite probable that it would not be willing to interfere with the Executive action and hold that international arrangements of a certain type have to be entered into by treaties. The Constitution itself offers little help in deciding this question, and although it seems that for the sake of a perfect functioning of the "Government of Law" as many questions as possible should be treated as *legal* and justiciable ones, submitted to the control of the judiciary, it does not seem likely that the Court would recognize this problem as such. It is to be noted also that in some cases, even after having stated that the Constitution has been violated, the Court declined to grant any remedy upon the ground that its power did not reach to obligations which were of a moral rather than a justiciable character.⁷¹

5. *The Treaty or Agreement Problem*

As mentioned above, the question of whether arrangements of the type entered into on June 4, 1949 can be properly entered into by executive agreement must be determined in the light of considerations based: first, on the general American legal system relating to foreign affairs, and secondly, on the practice and precedents in the field of aviation.

Air navigation arrangements such as the one concluded with Canada have no permanent character and may be denounced by either party; they do not require appropriations; they tend to open the air space of various countries in the world to American air carriers and thus implement the general American policy; and they impose no burden or obligation upon the United States other than the reciprocal recognition of some air traffic rights,

71. *E.g.*, in the case of *Kentucky v. Dennison*, 65 How. 66, 109 (U.S. 1860), involving the extradition clause of the Constitution.

which, were the international community better organized, would belong to every nation.⁷² Above all, they do not change or purport to change any federal statutes. Therefore, on the basis of general principles relating to international commitments of the United States, it may be concluded that air navigation arrangements of this type can be properly entered into by executive agreement.

Moreover, according to American practice in the field of air commerce, treaty procedure is required only when the provisions relating to aviation are a part of an important multilateral or bilateral international arrangement which, according to the legal practice and custom, were always entered into by treaties (particularly, the peace treaties), and where because of their permanent or quasi-permanent character, the number of the signatory states, and the proclamation of principles of law they may be considered as acts of "international legislation." In all other cases, according to the American practice, the air arrangements are concluded by executive agreements, not only when they are bilateral, but also when they are multilateral if they relate to technical questions (*e.g.*, weather stations) or have a purely contractual character and grant reciprocal air navigation facilities to the contracting parties (transit and transport agreements).

Only because the United States concluded more than a hundred executive agreements was it possible to develop the international air transportation pattern of the American carriers to its present state. Because of the slow and heavy machinery of the Senate, that body would never have been able to consider and adequately pass upon all these arrangements concluded in a few years. The Senate is not properly equipped to deal with these problems. The circumstances in the field of air navigation change quickly; the development of aviation, quite rapid up to 1939, made tremendous progress during World War II. According to some experts, some twenty-five years of progress resulted from the five years of war. Usually, air agreements must be adjusted, amended or completely replaced by new arrangements every few years. How could the Senate meet this task? Certainly, before any decision could be reached—after all the investigations, hearings, reports, and dis-

72. See the story of the fight of the United States for complete freedom of the air at the Conference of Chicago in 1944 in WAGNER, *LES LIBERTÉS DE L'AIR* (1948).

cussions—many proposed arrangements would have become antiquated. It is because of the wise policy pursued by the American Government in the field of aviation, effectuated by the conclusion of many executive agreements, that the United States has gained its advantageous position in international air transportation today.

The action of the Executive is in complete accord with the Civil Aeronautics Act, which provides in Section 1102:⁷³

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

This provision may be interpreted as recognizing that international arrangements of the United States relating to aviation may be entered into either by treaties or executive agreements, and that they will have the same binding effect.

Section 802 of the Civil Aeronautics Act provides that:

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

This provision may be understood as expressly vesting in the Executive the power and duty to enter into air agreements; and nobody can contend that the Executive performs inadequately its tasks. The resolution of the Senate Committee on Commerce⁷⁴ in connection with the Bermuda Agreement has no merit, and the Department of State properly disregarded it.

Those who agree with the proposition that "there is no self-executive test differentiating 'compact' from 'treaty,' and . . . it was left for Congress to decide within which category any specific instance may fall"⁷⁵ (compact being the synonym of agreement) must agree that Congress made its decision in Section 802 of the Civil Aeronautics Act.

Senate Bill 12, introduced by Senator McCarran on June 9,

73. 52 STAT. 973, 1026 (1938), 49 U.S.C. 672 (1946).

74. See *supra* note 50.

75. Levitan, *Executive Agreements*, 35 ILL. L. REV. 365, 370 (1940), citing Frankfurter and Landis, *The Compact Clause of the Constitution*, 34 YALE L. J. 685, 695 n. 37 (1925).

1949 and approved by the Senate Committee on Interstate and Foreign Commerce,⁷⁶ reads as follows:

No agreement with any foreign government restricting the right of the United States or its nationals to engage in air-transport operations, or generally granting to any foreign government or its nationals or to any 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 phases thereof, shall be made or entered into by or on behalf of the Government of the United States except by treaty.

The first part of the above paragraph would not appear to affect any aviation agreement heretofore entered into by the United States, since none "restricted the rights of the United States." All of them granted some rights which would not exist were the agreements not concluded.

All the bilateral agreements were concluded according to the second requirement of Senate Bill 12. No "general grants" have been provided for. Rather specific grants have been made, conforming to an exchange of routes in every particular case, pursuant to the last clause of Section 802. Thus, the provision of Senate Bill 12 can concern only agreements similar to the Transport Agreement of Chicago, which is no longer binding upon the United States, was never copied, and has no chance of being revived in any manner in the future. Moreover, it is difficult to imagine how this type of agreement could be disadvantageous to the United States, which was the promoter of the Transport Agreement. It purported to establish a complete freedom of the air, and under the system of free competition no foreign air navigation company could match the American air carriers. Senate Bill 12 would be understandable in some foreign country fearing the competition of the United States transportation companies; it seems out of place when advanced by Americans.

Senate Bill 12 purports to take the control over the international air transportation relations of the United States from the State Department and put it in Congress, but, from its very wording, it is difficult to see what it seeks to change. All non-Ameri-

76. SEN. REP. No. 482, 81st Cong., 1st Sess. (1949).

can air carriers operate in the United States as foreign air carriers, under permits granted by the Civil Aeronautics Board and approved by the President, not under certificates of public convenience and necessity. Should Senate Bill 12 be construed as requiring non-predetermined hearings, it is unnecessary, as pointed out above. It would be more reasonable to comply with the Civil Aeronautics Board's suggestions and cancel the requirements of Section 402.

The last part of Senate Bill 12 purports to impose upon the Executive Branch the duty of consulting the Senate before joining any international aviation organization, a requirement contrary to the recent American practice. The United States joined nearly all the international organizations established after World War II by executive agreements. The Chicago Convention of 1944 was submitted to the Senate for its "advice and consent," not because it provided for the establishment and the membership of the signatory states in the International Civil Aviation Organization, but because it established permanent bases of international air law.

CONCLUSION

From a review of the international arrangements of the United States in the field of aviation, it may be inferred that the Canadian Agreement of June 4, 1949 presents nothing unique in the whole system. The agreements deal with all the numerous matters connected with air commerce. A practice developed which worked very well, and there is neither legal ground nor reason to require any change.

From the judgment of the District Court for the District of Columbia, Colonial appealed to the Supreme Court, but there was not much hope that the judgment would be reversed. On February 5, 1950, a release of the president of the airline was issued reciting that "with the increasing gravity of the international situation" Colonial "concluded that it would not be right, in the public interest, to challenge the Executive Power of the Government to make Executive Agreements with foreign powers," and that the attorneys had been instructed to dismiss the suit in the Supreme Court. As the Civil Aeronautics Board and the President have ample power to alleviate the "injustice" done to Colonial, it is hoped that additional air routes will be granted to the airline, announced the president of Colonial.

In concluding, it is interesting to note the statement of the President of the United States in his message to Congress of June 11, 1946:

Naturally, agreements of this nature to which the United States is a party are consistent with the requirements of the Civil Aeronautics Act, are valid under its terms and fully protect the public interest.

The following words of the Attorney General, written to the Secretary of State, on June 18, 1946, are also of interest:

The President consulted me in connection with the above statement, and it was made with my full approval. . . . It is recognized that there are many classes of agreements with foreign countries which are not required to be formulated as treaties.⁷⁷

77. 40 Ops. ATT'Y GEN. 451, 452 (1946).