



1-1-1967

Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword

Howard C. Westwood

Alexander E. Bennett

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Howard C. Westwood & Alexander E. Bennett, *Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword*, 42 Notre Dame L. Rev. 309 (1967).

Available at: <http://scholarship.law.nd.edu/ndlr/vol42/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

notre dame lawyer

A FOOTNOTE TO THE LEGISLATIVE HISTORY OF THE CIVIL AERONAUTICS ACT OF 1938 AND AFTERWORD

Howard C. Westwood and Alexander E. Bennett***

PART I — FOOTNOTE

The legislative process is the most distinctive feature of democracy. In our particular democracy that process is typically a complicated interplay among agencies of the Executive — with the President himself never far in the background and often in the forefront — the private interests to be affected, members of pertinent congressional committees, and occasionally, other Congressmen having a special concern. Now and then a large segment of the Congress is drawn into the interplay, and sometimes the whole body becomes involved, if only as a high court to which unaccommodated factions appeal for settlement.

In the interpretation of a particular statute, the record of the legislative process is regarded as material and often crucial. But the record that the courts will recognize does not always give the full story. Matters of great significance involving the Executive may not be found in that record, and a great deal involving members of Congress may also be beyond its reach. Frequently large portions of the process are not recorded at all, except in vagrant and misty memory.

In the story of the adoption of the Civil Aeronautics Act of 1938, there is an episode — now all but forgotten — that was the most important item in its legislative process. Although it is not recorded in a form likely to receive a judge's consideration, it is worth a footnote to the act's legislative history.

That episode is the action of an interdepartmental committee named by

* Member, District of Columbia Bar, New York Bar; Partner, *Covington & Burling*, Washington, D.C. During 1936-1944 Covington & Burling served as counsel to the Air Transport Association, and Mr. Westwood was in charge of the work.

** Member, District of Columbia Bar; Associate, *Arnold & Porter*, Washington, D.C.

the Secretary of Commerce in September 1937 at the request of President Roosevelt. The committee became known as the Interdepartmental Committee on Civil Aviation.¹ It was *ad hoc*, with no mission except to agree on a bill for the comprehensive regulation of civil aviation. It accomplished that task. Although the statute finally adopted was very different from the committee's proposal, the committee played a key role in the process leading to the Civil Aeronautics Act. By resolving differences within the executive branch, it ended an impasse that had prevented legislation in 1937 and cleared the way for urgently needed legislation in 1938.

The committee's bill appeared as a confidential committee print for the Committee on Interstate and Foreign Commerce of the House of Representatives, dated January 4, 1938. It was not given a number, and very shortly it was lost from sight. It has rarely been examined during all the years of controversy over the meaning of various provisions of the Civil Aeronautics Act and its successor, the Federal Aviation Act of 1958.² The text of the committee's bill is appended to this article.

I. The Background

When the Civil Aeronautics Act became law in 1938, commercial aviation was barely emerging from infancy. The first regularly scheduled flight of air mail, from New York to Philadelphia and on to Washington, had been operated by the Army just twenty years before, on May 15, 1918.³ The Army continued the operation until August 1918, when the Post Office Department took over.⁴ That Department's service grew to a transcontinental route from New York to San Francisco.⁵

1 Originally it called itself the Committee on Aviation Legislation. See note 106 *infra*; letter from Dr. Fred A. Fagg to Howard C. Westwood, February 21, 1951, p. 2. In congressional hearings, however, its spokesman introduced himself as the representative of the Interdepartmental Committee on Civil Aviation. See *Hearings on S. 3760 Before the Senate Committee on Commerce*, 75th Cong., 3d Sess. 1 (1938); *Hearings on S. 3659 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 75th Cong., 3d Sess. 14 (1938); *Hearings on H.R. 9738 Before the House Committee on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 36 (1938). The Dr. Fagg referred to above is identified in note 101 *infra*. Several letters from him to Howard C. Westwood are cited hereinafter as "letters from Dr. Fred A. Fagg." These letters have been deposited in the library of the Air Transport Association of America, Washington, D. C.

2 The only references to the committee's draft of legislation since 1938 appear to be RHYNE, CIVIL AERONAUTICS ACT ANNOTATED 53-55, 203-04 (1939); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1075 (1962); Westwood, *Choice of Air Carrier for New Air Transport Routes*, 16 GEO. WASH. L. REV. 159, 166-67 (1948). Copies of the confidential committee print are in the libraries of the Air Transport Association of America, Washington, D.C., and the Civil Aeronautics Board, Washington, D.C.

3 N.Y. Times, May 16, 1918, p. 1, col. 1.

4 *Id.*, Aug. 13, 1918, p. 7, col. 4.

5 See 74 CONG. REC. 2471-76 (1931), which sets forth a Post Office Department memorandum outlining its operations in carrying the mail. For a time the Post Office Department used air service to connect with train service in order to speed delivery of transcontinental mail. Thus, a mail plane would leave New York in the morning for Cleveland to catch the west-bound train that had left New York the night before. By the end of 1920 the Post Office Department had completed the last leg of a transcontinental route, with spurs from Chicago to Minneapolis and from Chicago to St. Louis. These two spurs and the New York-Washington service were discontinued in 1921, because Congress had provided funds only for a transcontinental route. *Id.* at 2472; 1927 POSTMASTER GEN. ANN. REP. 23.

The Department's objective was to prove the feasibility of air service and encourage private operation.⁶ Flying in bad weather as well as good and with primitive equipment, the Post Office pilots were able to develop and maintain service on a regular basis.⁷ Finally, Congress was persuaded to adopt the Kelly Act of 1925, providing in five sentences for air mail contracts with private operators.⁸ The first private operation was inaugurated on February 15, 1926.⁹ By August 31, 1927, all operations were in private hands, and nationwide expansion of the air mail system had begun.¹⁰

The law required that mail routes be awarded by competitive bidding.¹¹ This was not calculated to foster a coherent air transportation system; at least that was the view of Postmaster General Walter F. Brown, who took office on March 4, 1929. In 1930 he caused¹² the introduction of a bill that would have empowered the Postmaster General to award domestic air mail contracts by negotiation rather than by competitive bidding and to extend or consolidate existing routes.¹³ The statute that evolved, however, did not contain the provision that routes might be awarded by negotiation, although it did grant the Postmaster General several important powers, including the power to extend and consolidate existing routes.¹⁴

Brown determined that there should be a new, more rational network of air routes and that this could be achieved by establishing some new routes and consolidating or extending others. Setting forth his tentative proposals on a map, he called representatives of the air mail contractors together for what were later called "spoils conferences" and encouraged agreement as to which of them should operate the various additional routes and extensions that he proposed.¹⁵ The carriers could not reach agreement as to any important routes, and they so informed Brown.¹⁶ They did agree, however, to be bound by Brown's determinations, and because of this cooperation, there was not un-

6 See *Pacific Air Transport v. United States*, 98 Ct. Cl. 649, 677-78 (1942); 1926 *Postmaster Gen. Ann. Rep.* 26; *Hearings on H.R. 9500 Before the House Committee on the Post Office and Post Roads*, 71st Cong., 2d Sess. 3 (1930); 74 *Cong. Rec.* 2473 (1931).

7 For a description of some of the adventures of these Post Office Department flyers and statistics on their operations, see *AIR MAIL PIONEERS, SAGA OF THE U.S. AIR MAIL SERVICE 1918-1927* (1962). There were forty-three deaths in the line of duty. *Id.* at 99-100; 74 *Cong. Rec.* 2474 (1931). The worst year for accidents was fiscal 1921. In that year there were 1,764 forced landings and fifty-six crashes. *AIR MAIL PIONEERS, op. cit. supra* at 98.

8 *Air Mail Act of 1925 (Kelly Act)*, ch. 128, 43 Stat. 805.

9 LIPSNER, *THE AIRMAIL, JENNIES TO JETS* 218 (1951).

10 *Pacific Air Transport v. United States*, 98 Ct. Cl. 649, 677 (1942). The first five private contracts under the Kelly Act were signed by the Postmaster General on November 7, 1925. S. Doc. No. 70, 72d Cong., 1st Sess. 28-29, 48-50, 67-69, 89-91, 115-16 (1932). Thirty-four separate domestic air mail routes were awarded between 1925 and 1930. *Id.* at 2-3.

11 Although the Kelly Act did not in terms require competitive bidding, there was a general statute in force requiring advertisement and bidding for mail contracts. Act of June 8, 1872, ch. 335, §§ 243-44, 249, 17 Stat. 283, 313, *Rev. Stat.* §§ 3941, 3944, 3949 (1875). A 1930 amendment to the Kelly Act added a specific requirement of competitive bidding for air mail contracts. Act of April 29, 1930 (*McNary-Watres Act*) ch. 223, § 1, 46 Stat. 259.

12 *Pacific Air Transport v. United States*, 98 Ct. Cl. 649, 685 (1942).

13 H.R. 9500, 71st Cong., 2d Sess. §§ 4, 6 (1930).

14 Act of April 29, 1930 (*McNary-Watres Act*), ch. 223, § 3, 46 Stat. 260.

15 *Pacific Air Transport v. United States*, 98 Ct. Cl. 649, 695-702 (1942). Any such agreements, which were supposed to be based upon a carrier's pioneering work and equitable interest in a given area, were intended to be recommendations to Brown for his consideration in altering the air mail route map. *Id.* at 701-02.

16 *Id.* at 710-14.

restricted competitive bidding in the subsequent awarding of routes.¹⁷

A few years later, in 1933, a Senate committee that scented scandal in Brown's program undertook an investigation.¹⁸ The well-publicized hearings and attendant accusations led Postmaster General Farley to cancel the domestic air mail contracts abruptly in early 1934.¹⁹ The Army was ordered to operate the service — with disastrous consequences. Poorly trained and ill-equipped Army aviators logged twelve deaths carrying the mail in the three months that followed.²⁰ The resultant public outcry put the air mail back in the hands of private contractors, and this was followed very shortly by the Air Mail Act of 1934.²¹

¹⁷ *Id.* at 712-14, 716-27.

¹⁸ The committee, under the chairmanship of Senator Black, was the Special Committee on Investigation of Air Mail and Ocean Mail Contracts, created pursuant to S. Res. No. 349, 72d Cong., 2d Sess., 76 CONG. REC. 5008 (1933). Its hearings began on September 26, 1933, and continued until May 25, 1934. See generally *Hearings Before a Special Senate Committee on Investigation of Air Mail and Ocean Mail Contracts*, 73d Cong., 2d Sess., pts. 1-9 (1934). The committee never made a report on the air mail contracts.

¹⁹ The Postmaster General issued the cancellation order on February 9, 1934, to be effective ten days later. See *Pacific Air Transport v. United States*, 98 Ct. Cl. 649, 743-45 (1942). The action was approved by President Roosevelt. FARLEY, JIM FARLEY'S STORY, THE ROOSEVELT YEARS 46 (1948). Postmaster General Farley, writing later, said his cancellation "had general approval because a Senate investigating committee had found that the contracts were let without competitive bidding, as provided by law, and at figures wholly unjustified by the services rendered." *Ibid.* But the abrupt cancellation, with all that followed, seems in retrospect to have been of dubious wisdom. Indeed, if the Senate Committee had made a report on the matter, it is doubtful that it would have approved such hasty action. There were five members of the committee; only four months later all but Chairman Black — that is, Senators McCarran of Nevada, King of Utah, Austin of Vermont, and White of Maine — were to favor a legislative proposal that did not square with the vindictiveness that appeared to prompt the Executive action and the ensuing policy. They favored a bill offered by Senator McCarran that would have given "grandfather" rights to the air mail contractors. See 78 CONG. REC. 7614-28 (1934). See also notes 57-61 *infra* and accompanying text. Of the thirty-four domestic air mail contracts that had been awarded at the time of Farley's cancellation order, all but four had been awarded prior to 1929, when Postmaster General Brown took office, see S. Doc. No. 70, *supra* note 10, at 2-3, and on the basis of competitive bidding. See generally S. Doc. No. 70, *supra*. In addition to the four new routes that were awarded during Brown's tenure, two of which were important transcontinental routes, various extensions and consolidations of existing routes were made. See *Pacific Air Transport v. United States*, *supra* at table I facing p. 728; S. Doc. No. 70, *supra* at 2-3. Farley annulled all outstanding domestic air mail contracts, see *Pacific Air Transport v. United States*, *supra* at 744, apparently on the theory that all air mail contractors were aligned in a combination to frustrate competitive bidding and that each had profited by it. See 78 CONG. REC. 2471-72 (1934) (letter from Postmaster General Farley to Senator Black).

Some of the contractors brought suit in the Court of Claims. The court held that they were entitled to recover for services actually performed prior to the cancellation but that the Postmaster General had acted within his power in annulling the contracts and that the United States was not liable for breach of contract. Four judges participated in the decision and all concurred in the result. Two wrote separate opinions expressing the view that the contractors and Postmaster General Brown were not guilty of scandalous conspiracy and that the Postmaster General's fault was excessive zeal and not clandestine corruption. *Pacific Air Transport v. United States*, *supra* at 793-94, 794-97.

²⁰ LIPSNER, *op. cit. supra* note 9, at 248-51, 293; 78 CONG. REC. 8532, 8533 (1934) (remarks of Representative Fish). The Army service cost the Government \$2.21 per airplane mile; the cost for the preceding private operations had been \$0.54 per airplane mile. LIPSNER, *op. cit. supra* note 9, at 252-53. Postmaster General Farley later said that he had wanted private operation to continue under new contractual arrangements but that the Army said that it was prepared to do the job and the President wanted to give it the opportunity "to distinguish itself." FARLEY, *op. cit. supra* note 19, at 46. Later, after numerous Army accidents, the President wrote the Secretary of War saying that the Army's assignment had been made "on the definite assurance given me that the Army Air Corps could carry the mail." 78 CONG. REC. 4170 (1934).

²¹ Ch. 466, 48 Stat. 933 (1934).

II. The Air Mail Act of 1934—Temporary Legislation for the Carriage of Mail

At the time of the enactment of the Air Mail Act of 1934, there was no airline regulation (except some essentially inconsequential and ambiguous state regulation) aside from safety regulation under the Air Commerce Act of 1926.²²

In those days no airline operating substantial routes could survive without air mail pay. Indeed, the cost of passenger operations was such that, originally, air mail contractors had been unwilling, or at least reluctant, to enter the passenger field.²³ In the 1930 domestic legislation the Post Office Department, which theretofore apparently had no authority to require air mail contractors to carry passengers, was given the power to require the use of passenger aircraft for mail transportation.²⁴ But for many decades "subsidy" had been an ugly word in the political lexicon, and although many recognized that air mail pay had to be relied on to subsidize passenger operations,²⁵ the air mail contract legislation from the time of the original Kelly Act of 1925 was drawn as though nothing but "compensation" for air mail service was contemplated. The Air Mail Act of 1934 continued this treatment. Moreover, with the still fresh cries of scandal that had led to the contract cancellations by Postmaster Farley, the provisions of this act were preoccupied with the protection of the government against private greed. In addition, the act had to be adopted in haste; the Army's disaster required the quickest possible resumption of private service.²⁶ The result was an awkward hodgepodge, scarcely designed for a rationally integrated transport system or for sound long-range development of the industry.

22 Ch. 344, 44 Stat. 568.

23 See *Pacific Air Transport v. United States*, 98 Ct. Cl. 649, 682-83 (1942). See also *Air-Mail Compensation*, 206 I.C.C. 675, 729 (1935); *Hearings on H.R. 9500*, *supra* note 6, at 2-29 (testimony of Postmaster General Brown).

24 McNary-Watres Act, ch. 223, § 2, 46 Stat. 259 (1930). See *Pacific Air Transport v. United States*, *supra* note 23, at 683; *Air-Mail Compensation*, *supra* note 23, at 713, 717, 729.

25 See, e.g., 72 CONG. REC. 7374 (1930) (remarks of Representative Kelly).

26 When the Army's failure became apparent, the Postmaster General, acting under general authority to contract for the carriage of mail, Act of June 8, 1872, ch. 335, § 243, 17 Stat. 313, as amended, advertised for bids for temporary private service. The first advertisement was on March 30, 1934. It and subsequent advertisements barred any company whose contract had been annulled earlier that year from bidding for this temporary service. See *Pacific Air Transport v. United States*, 98 Ct. Cl. 649, 752 (1942). Private service was resumed on May 8, 1934, and by May 31, 1934, all service again was privately operated. In the meantime, on March 7, 1934, President Roosevelt had written the chairmen of the committees on Post Offices and Post Roads of the two Houses (Senator McKellar and Representative Mead) asking for new domestic air mail legislation. See 78 CONG. REC. 4041 (1934). On March 9, 1934, Senators McKellar and Black introduced S. 3012, 73d Cong., 2d Sess. On March 10, 1934, Representative Mead introduced a similar bill, H.R. 8578, 73d Cong., 2d Sess. Senate hearings were held from March 12 to March 20, 1934, resulting in a revised bill, S. 3170, 73d Cong., 2d Sess., which was reported on March 29. S. REP. NO. 574, 73d Cong., 2d Sess. (1934). With amendments it was adopted on April 28. 78 CONG. REC. 7629 (1934). The House Committee had held hearings on five days between March 12 and March 20, 1934. A revised bill, H.R. 9241, 73d Cong., 2d Sess., was introduced and was reported on April 23. H.R. REP. NO. 1302, 73d Cong., 2d Sess. (1934). When S. 3170 was received by the House, the House Committee reported it with the language of its own bill as a recommended substitute on May 1. H.R. REP. NO. 1428, 73d Cong., 2d Sess. (1934). After amendment the House adopted the bill on May 10. 78 CONG. REC. 8556 (1934). In conference, agreement was reached within a few days. S. DOC. NO. 182, 73d Cong., 2d Sess. (May 23, 1934); H.R. REP. NO. 1754, 73d Cong., 2d Sess. (May 23, 1934). After final congressional action, the President approved the statute on June 12. 78 CONG. REC. 11161 (1934). Thereafter, all the domestic air mail was contracted for anew.

The spirit of the new law was disclosed in its "blacklist," forbidding any air mail contractor from having any officer, director, or employee in a general managerial position who had been involved in any "unlawful combination to prevent the making of any bids for carrying the mails."²⁷ This meant an outlawing of some, if not most, of the best managerial brains of the struggling infant industry, for it was they who had cooperated with Postmaster General Brown in trying to work out a coherent system. The same section forbade compensation to any officer or employee of more than \$17,500 per year.²⁸

In brief, the act provided that the Postmaster General could let contracts for domestic air mail transportation on competitive bidding for periods of up to one year, with provision for indefinite extension on satisfactory performance.²⁹ All contracts were subject to a maximum allowable rate of compensation.³⁰ Measures were imposed to prevent a single contractor from operating more than a prescribed number of routes, with no one able to operate more than one "primary" route.³¹ Interlocking interests both with holding and investment companies and with persons or entities engaged in any phase of the aviation industry were prohibited.³² The Interstate Commerce Commission (until then never involved in aviation) was empowered to fix a fair rate of compensation for each route, within the prescribed maximum rate, and was instructed to review rates of compensation at least once a year to guard against unreasonable profits.³³ In fixing rates the ICC was to consider a carrier's revenues and profits from all sources and to adjust rates so as to achieve, by July 1, 1938, a total cost to the Government for all the routes that would be "within the limits of the anticipated postal revenue therefrom."³⁴

This improvised act was not, however, intended to be the final charter for the domestic airlines. It contained a provision for the appointment by the President of a five-member Federal Aviation Commission to submit a report to Congress by February 1, 1935, on a "broad policy covering all phases of aviation and the relation of the United States thereto."³⁵ While the act was under consideration, President Roosevelt himself had proposed this commission study.³⁶

A most important phase of aviation to be embraced in the commission study was airline operation outside the continental United States. Although the Kelly Act of 1925 had authorized the Postmaster General to enter into contracts for the carriage of air mail "between such points as he may designate,"³⁷ it was not regarded as authorizing him to contract for mail carriage to foreign countries.³⁸ Consequently, in 1928 another act was adopted, authorizing the Post-

27 Air Mail Act of 1934, ch. 466, § 7(d), 48 Stat. 936.

28 *Ibid.* See also Independent Offices Appropriation Act of 1934, ch. 101, § 6, 48 Stat. 305 (1933).

29 Air Mail Act of 1934, ch. 466, § 3(a),(c), 48 Stat. 933.

30 Air Mail Act of 1934, ch. 466, § 3(a), 48 Stat. 933.

31 Air Mail Act of 1934, ch. 466, §§ 3(d), 15, 48 Stat. 934, 938.

32 Air Mail Act of 1934, ch. 466, §§ 7(a),(b),(c), 48 Stat. 936.

33 Air Mail Act of 1934, ch. 466, §§ 6(a),(b),(c), 48 Stat. 935.

34 Air Mail Act of 1934, ch. 466, § 6(e), 48 Stat. 936.

35 Air Mail Act of 1934, ch. 466, § 20, 48 Stat. 938.

36 See 78 CONG. REC. 7609 (1934) (remarks of Senator McKellar).

37 Kelly Act, ch. 128, § 4, 43 Stat. 805 (1925).

38 See H.R. REP. No. 481, 70th Cong., 1st Sess. 1 (1928); 69 CONG. REC. 3929 (1928) (remarks of Senator Moses).

master General to contract for air mail service to foreign countries and to United States possessions.³⁹ It provided for the award of routes on competitive bidding for periods of up to ten years.⁴⁰ Though many had assumed that the contracts awarded under that law might be as vulnerable to cancellation as those awarded for the domestic service, and though the senatorial investigation leading to the domestic contract cancellations had been directed to the foreign air mail contracts also,⁴¹ there were no cancellations of the foreign contracts. The overseas carriers, mainly Pan American Airways, continued undisturbed⁴² and were not affected by the Air Mail Act of 1934. The new commission, however, would examine overseas as well as domestic operations.

III. The Report of the Federal Aviation Commission — 1935

Pursuant to the Air Mail Act of 1934, the Federal Aviation Commission was promptly appointed. Consisting of unusually qualified men,⁴³ it plunged into its inquiry. On January 31, 1935, its very thorough report was transmitted by the President to Congress.⁴⁴ It was remarkable that it had done its job in just over seven months after enactment of the statute authorizing its creation.

A. *The Proposal For Comprehensive Economic Regulation of the Airline Industry*

The Commission's recommendations were sweeping. As far as the airline industry was concerned, the Commission urged an entirely new approach by government. Instead of legislation confined to providing for air mail contracts, it recommended that the Post Office Department's relation to the carriers be purely that of a customer, with certificates of public convenience and necessity for air routes being awarded by, and provisions for subsidy being administered by, a new Air Commerce Commission independent of the Executive.⁴⁵ The

39 Act of March 8, 1928, ch. 149, 45 Stat. 248. Because the 1928 act spoke only of mail carriage to foreign countries and insular possessions, some question was raised whether, under this act, the Postmaster General could contract for the carriage of mail *originating at* places outside the continental United States. 1928 POSTMASTER GEN. ANN. REP. 46; S. REP. NO. 1569, 70th Cong., 2d Sess. 2-3 (1929); H.R. REP. NO. 2330, 70th Cong., 2d Sess. 3 (1929); 70 CONG. REC. 2866 (1929) (remarks of Representative Kelly). An amending act was therefore passed, which among other things, more broadly described the termini between which the Postmaster General could contract for the carriage of foreign mail. Act of March 2, 1929, ch. 478, 45 Stat. 1449.

40 Both the 1928 Act, Act of March 8, 1928, ch. 149, § 1, 45 Stat. 248, and its 1929 amendment, Act of March 2, 1929, ch. 478, § 1, 45 Stat. 1449, provided for contracts for not more than ten years.

41 S. Res. No. 349, 72d Cong., 2d Sess., 76 CONG. REC. 5008 (1933).

42 Beginning in the fall of 1934, the Post Office Department conducted its own investigation of ocean and foreign air mail contracts and later issued extensive reports on individual contracts. As far as Pan American's contracts were concerned, the Postmaster General insisted that he had the right to cancel them because of alleged "favoritism" shown to Pan American, but he concluded that to do so would not be in the public interest. Letter from the Postmaster General to the Chairman of the Special Senate Committee to Investigate Air Mail and Ocean Mail Contracts Transmitting Individual Reports and Accompanying Exhibits on Foreign Ocean and Air Mail Contracts, pt. 3, pp. 716-18 (Senate Comm. Print 1935).

43 The chairman was Clark Howell, editor of the *Atlanta Constitution*. The vice-chairman was Dr. Edward P. Warner, who later became one of the original members of the Civil Aeronautics Authority created by the Civil Aeronautics Act of 1938.

44 S. Doc. No. 15, 74th Cong., 1st Sess. (1935).

45 *Id.* at 49-53, 243-47.

new agency would have jurisdiction extending both to domestic carriers and United States carriers in foreign commerce, and it would have extensive powers of economic regulation of the carriers' services.⁴⁶ It would assume broad responsibilities for the development of civil aeronautics and would supersede the Department of Commerce, which administered the Air Commerce Act of 1926, as the agency in charge of air safety.⁴⁷ The Department of Commerce would be vested with the responsibility of promoting miscellaneous private flying and would retain functions dealing with construction and administration of the airways system, but construction of new airways would be subject to the new agency's approval.⁴⁸

In addition to recommending this new approach, the report recognized that a financial crisis among the domestic airlines required immediate attention. Under the recent 1934 act, some companies had bid for and secured air mail routes at uneconomically low rates and were threatened with imminent ruin. This situation required a legislative remedy; several other changes in the 1934 act also were deemed urgent.⁴⁹

B. *The President's Message*

Although the Federal Aviation Commission had been the President's idea, his message transmitting the report to Congress gave it no support. After referring to the development of transportation since the creation of the Interstate Commerce Commission in 1887 and to various reports on the problems of transportation that recently had been made, the President urged that Congress consider the need "for the development of interrelated planning of our national transportation."⁵⁰ He said he would later ask for "general legislation centralizing the supervision of air and water and highway transportation with adjustments of our present methods of organization in order to meet new and additional responsibilities."⁵¹

The President then referred to the Federal Aviation Commission's finding that some immediate action was required because of the critical condition of some of the domestic carriers. The Commission had proposed that the ICC be empowered to raise as well as lower the rates of compensation paid carriers under air mail contracts.⁵² The President stated that he concurred in this suggestion as a temporary measure "subject to provisions against unreasonable profits by any private carrier."⁵³ He added this significant statement:

⁴⁶ *Id.* at 245-46.

⁴⁷ *Id.* at 77-78.

⁴⁸ *Id.* at 59-60, 84, 101, 104-05.

⁴⁹ *Id.* at 95-97.

⁵⁰ *Id.* at iii.

⁵¹ *Ibid.*

⁵² *Id.* at 95-96. On March 11, 1935, which was slightly more than a month after the Federal Aviation Commission's report was issued, the ICC released its first air mail decision. Apparently the ICC decided that in fixing fair and reasonable rates under the Air Mail Act of 1934, it was bound only by the maximum set forth in the act and not by the contract rate established after competitive bidding. Air-Mail Compensation, 206 I.C.C. 675, 693 (1935). However, to the extent that the fair and reasonable rate fixed by the ICC exceeded the contract rate, there seemed to be some question whether the Postmaster General was bound to pay the excess over the contract rate. See *id.* 690-91; Air-Mail Compensation, 216 I.C.C. 166, 167 (1936).

⁵³ S. Doc. No. 15, *supra* note 44, at iv.

On account of the fact that an essential objective during this temporary period is to provide for the continuation of efficiently operated companies and to guard against their destruction, it is only fair to suggest that during this period any profits at all by such companies should be a secondary consideration. Government aid in this case is legitimate in order to save companies from disastrous loss but not in order to provide profits.⁵⁴

With this word from a powerful Executive, it is not surprising that the legislation that followed was not inspired by a determination to put the airline industry on a solid footing. The suspicion and antagonism that attended the 1934 contract cancellations were still strong.

Those who had been encouraged by the Federal Aviation Commission's recommendation of an Air Commerce Commission and a wholly new approach were doomed to disappointment. The President's message effectively squelched the recommendation:

The Commission further recommends the creation of a temporary Air Commerce Commission. In this recommendation I am unable to concur. I believe that we should avoid the multiplication of separate regulatory agencies in the field of transportation. Therefore in the interim before a permanent consolidated agency is created or designated over transportation as a whole, a division of the Interstate Commerce Commission can well serve the needs of air transportation. In the granting of powers and duties by the Congress orderly government calls for the administration of executive functions by those administrative departments or agencies which have functioned satisfactorily in the past and, on the other hand, calls for the vesting of judicial functions in agencies already accustomed to such powers. It is this principle that should be followed in all the various aspects of transportation legislation.⁵⁵

The President referred to the Commission's recommendation as calling for the creation of a "temporary" new commission. At that time there was much agitation for coordinated regulation of all transportation — presumably by the ICC. The Commission's report recognized this agitation but urged that proper development of the airline industry, and of aviation in general, required the creation of a new commission. It dealt with the possible future need for coordinated regulation of civil aviation and other means of transportation in this way:

Once the commission regulation of aviation is well established upon a secure footing; once the general type of problem that arises has been discovered and means for its solution in particular cases devised; then co-ordination with other instrumentalities of transport may indeed appear as the paramount need. . . .

We are accordingly recommending that if an air commerce commission be created the President should have the power at any time to transfer its functions by executive order to such other body of a similar nature as he may direct. We assume that the natural merger would be with an all-inclusive transportation commission.⁵⁶

Later the President's message and Commission's report were to be

54 *Ibid.*

55 *Ibid.*

56 *Id.* at 244-45.

wishfully read as conflicting only on the question whether the ICC or a new agency should regulate the airline industry. Realistically viewed, however, there was a sharp difference, at least in emphasis, between the President and the Commission on a more fundamental question. The Commission had envisaged legislative needs in three stages. First, there was an emergency requirement for some changes in the Air Mail Act of 1934. Second, there was a need for prompt, comprehensive legislation for economic regulation of the airline industry and for the treatment of civil aviation on an entirely new basis. And third, at some time in the dim future, the regulation of the airlines might be brought into "co-ordination" with the regulation of other transportation under some "all-inclusive transportation commission." But the President apparently saw only two stages. First, emergency amendments to the 1934 Act were to be designed merely to prevent bankruptcy, not to provide profits. Second, "a permanent consolidated agency" would be created for "transportation as a whole." The President said that "in the interim" between these stages "a division of the Interstate Commerce Commission can well serve the needs of air transportation." He did not say that anything more than minor amendment to the Air Mail Act was necessary in order that the ICC serve those needs. Indeed, to the Commission's earnest plea for prompt enactment of comprehensive aviation legislation, the President seemed to pay no heed.

C. *Rejection of the Commission's Recommendation*

The Commission's recommendation for airline regulation under a new commission was rejected. This was in spite of the fact that, even while the original Air Mail Act of 1934 had been under consideration the year before, a serious proposal for comprehensive economic regulation under a new independent commission had been made by Senator McCarran of Nevada, a member of the Senate Investigating Committee whose inquiry had led to the domestic air mail contract cancellations. On March 26, 1934, he had introduced such a proposal as S. 3187, and when the Air Mail Act itself was under debate, he had moved to substitute the terms of his bill.⁵⁷ Although his motion was defeated, it had substantial support: the vote was forty-six to twenty-six.⁵⁸ Of the five members of the Senate Investigating Committee, only Senator Black opposed the motion.⁵⁹ Thus, Senator McCarran had been able to say that the Committee's investigation had produced

57 This pioneer proposal provided for a new five-man commission with fixed terms to regulate interstate scheduled air commerce. It was limited to economic regulation; safety regulation would have continued under the Air Commerce Act, administered by the Department of Commerce. Provision was made for (1) route certificates of convenience and necessity; (2) commission power over rates; (3) adherence to tariffs; (4) commission approval of abandonments, acquisitions of control, consolidations, interlocking officers and directors, and securities issues; (5) prescription of accounts and rates of depreciation; (6) valuation of carrier properties; and (7) determination of labor disputes. The provisions applicable to rates for transporting the mail were included with those applicable to rates for transporting passengers and property, with no rate-making standard except "fair and reasonable." The full text of the proposal appears at 78 CONG. REC. 7614-21 (1934). Seemingly, the proposal would not have allowed for subsidy. Indeed, Senator McCarran said, "[T]here is not a chance for subsidy in the proposed substitute." *Id.* at 7625.

58 *Id.* at 7628. Representative Wood had introduced a bill in the House almost identical to McCarran's bill in the Senate. H.R. 8953, 73d Cong., 2d Sess. (1934). That bill was never acted upon.

59 78 CONG. REC. 7628 (1934).

his proposal,⁶⁰ and that four of the five Committee members advocated it.⁶¹

The fate of the Federal Aviation Commission's recommendation can be told in a few words. On the date of the Commission's report, January 22, 1935, and even before it was made public, Senator McCarran introduced S. 1332, which was in line with the Commission's recommendation for a separate regulatory agency for the airline industry. On January 31, 1935, the date of the report's transmission to Congress, Representative Lea of California introduced H.R. 5174, a bill drawn by persons working with the Commission⁶² and closely reflecting its recommendations. But no further action occurred in the House. Likewise in the Senate, the Commission's proposal died quickly. Senator McCarran, after the President's statement that a division of the ICC rather than a new commission could serve the needs of air transportation, did not pursue his S. 1332. Instead, he introduced S. 3027, providing for ICC regulation of both domestic and international air transportation. There were brief hearings on this bill before a subcommittee of the Committee on Interstate Commerce.⁶³ A revised bill—S. 3420, which also provided for ICC regulation—was favorably reported on August 15.⁶⁴ It was called up in the Senate the next day but was passed over without objection.⁶⁵ No further action was taken on it, and the only result of the Federal Aviation Commission's report was legislation amending the Air Mail Act of 1934 in limited respects.⁶⁶

IV. Renewed Efforts at Legislation—the Proposals of 1937

A. Creation of the Air Transport Association

There was no significant legislative activity dealing with comprehensive economic regulation of the airline industry in 1936.⁶⁷ There was, however, one development that was to become important in the struggle for legislation—the creation of an airline trade association.

The airline industry, still in a state of shock from the contract cancellations, had done little to secure implementation of the Federal Aviation Commis-

60 *Id.* at 7622.

61 *Id.* at 7621.

62 Letter from Dr. Fred A. Fagg, May 20, 1963, p. 1. See notes 101-02 *infra* and accompanying text.

63 *Hearings on S. 3027 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. (1935). The hearings actually dealt with a proposed substitute for McCarran's original S. 3027, which was introduced by Senator Reynolds on Senator McCarran's behalf. See *id.* at 15.

64 S. REP. NO. 1329, 74th Cong., 1st Sess. (1935).

65 79 CONG. REC. 13406 (1935).

66 Act of August 14, 1935, ch. 530, 49 Stat. 614, amending Air Mail Act of 1934, ch. 466, 48 Stat. 933, as amended by H.R.J. Res. No. 366, June 26, 1934, ch. 762, 48 Stat. 1243. One section of the amending statute indicated a glimmer of realization that the industry was beginning to present a problem of business regulation rather than merely a problem of keeping air mail contract compensation at a minimum. A provision was added that, while very complicated in wording, was designed to give the ICC some power to order an air mail contractor to cease unfair competitive practices or certain uneconomic services that would adversely affect another contractor. Act of August 14, 1935, ch. 530, § 12, 49 Stat. 618.

67 Enacted that year, however, was the Act of April 10, 1936, 49 Stat. 1189, adding Title II of the Railway Labor Act, 45 U.S.C. §§ 181-88 (1964). This enactment, extending certain provisions of the Railway Labor Act to "every common carrier by air engaged in interstate or foreign commerce," was the first significant statutory treatment of the airlines as common carriers rather than mail contractors.

sion's recommendation for a new type of regulation. It had no industry organization except as a branch of the Aeronautical Chamber of Commerce, which was largely preoccupied with aircraft manufacture. Eventually the members of the industry bestirred themselves and in late 1935 decided to form their own trade association. In January 1936 the Air Transport Association came into being.

As president of the Association, the industry secured the services of a remarkable man, Colonel Edgar S. Gorrell.⁶⁸ One of the earliest army aviators — indeed, one of Pershing's daredevil flyers in the 1916 Mexican expedition — Gorrell had been a principal architect of America's combat aviation on the Western Front in World War I. Still in his twenties at the war's end, he left the Army for private business, but aviation had infected him incurably. As a member of a War Department aviation-review board that was headed by World War I Secretary of War Newton D. Baker and had been created during the Army's tragic effort to fly the mail after the contract cancellations,⁶⁹ he saw, as had very few, the need for a vigorous private airline industry as a vital component of the national defense.

Gorrell, who had independent means from postwar business success, had no interest except to attain health for a very sick industry. He had a rare opportunity for industrial leadership, and he made the most of it. Within a few months after assuming office, he had determined that the industry required, above all else, a legislative charter for its permanent economic regulation similar to the ICC regulation of rail and motor carriers, free of the vagaries of politics to which the air mail contract system was so subject. He set to work to secure that charter.

By late January 1937, he had achieved general industry agreement on a legislative proposal. At once he took it to Representative Lea, who had become Chairman of the House Committee on Interstate and Foreign Commerce. There was complete mutual confidence between the two. At the end of World War I, when a Congressional committee had been delving critically into the conduct of America's wartime aviation, Representative Lea, as a minority member, had worked closely with Gorrell to keep the record straight amid a welter of politically biased charges.⁷⁰

B. *Proposed Economic Regulation by the Interstate Commerce Commission*

Representative Lea fully agreed with Gorrell that carrier regulation, rather than mere mail contract regulation, was needed by the airlines. He was also

68 A biography of Colonel Gorrell appears in West Point Assembly, October 1945, pp. 12-15.

69 The Board, known as the War Department Special Committee on the Army Air Corps, had been created by directive of the Secretary of War on April 17, 1934, and it published its final report on July 18, 1934. For a summary of its recommendations, see *Hearings on H.R. 9738 Before the House Committee on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 398 (1938) [hereinafter cited as 1938 House Hearings].

70 See *Hearings on H.R. 5234 and H.R. 4652 Before the House Committee on Interstate and Foreign Commerce*, 75th Cong., 1st Sess. 265, 305 (1937) [hereinafter cited as 1937 House Hearings]. That earlier committee's report was H.R. REP. NO. 637, 66th Cong., 2d Sess. (1920). The minority report, signed by Representative Lea, is reprinted at 1937 House Hearings 411-43.

aware of the 1935 message on the Federal Aviation Commission's report in which the President had said that he was "unable to concur" in the Commission's recommendation for the creation of a new agency for aviation.⁷¹ The Congressman concluded that if there were to be any legislation for comprehensive regulation of the airline industry, it would have to be regulation by the ICC rather than by a new agency. This might be done by an addition to the Interstate Commerce Act of a new title similar to the act's Title II, which in 1935 had been adopted for motor carriers. Gorrell's industry had reached the same conclusion, and the bill Gorrell presented to the Congressman had been drawn to provide for carrier regulation by the ICC.

Representative Lea at once asked Interstate Commerce Commissioner Joseph B. Eastman, then the chairman of the ICC's committee on legislation, to go over Gorrell's draft of a bill and prepare a satisfactory measure. Eastman met with Gorrell and assigned members of the ICC's Bureau of Air Mail to work out a draft with Gorrell and his assistants.⁷² They quickly drafted a proposed Title III of the Interstate Commerce Act, generally adapting to United States air carriers in interstate and foreign commerce the pattern of economic regulation in effect for motor carriers, with some special provisions. Safety regulation by the Department of Commerce under the Air Commerce Act was left undisturbed. On March 2, 1937, Representative Lea introduced the bill, H.R. 5234.

In the meantime, Senator McCarran had been busy. He too had concluded that, if there were to be carrier regulation of the airlines, the President preferred that it be done by the ICC rather than a new agency. Indeed, as noted above, Senator McCarran had introduced a bill in 1935 for such ICC regulation, and he had seen it favorably reported. On the opening of the 1937 congressional session, he introduced S. 2. In its original form, S. 2 was a proposed Title III of the Interstate Commerce Act in two chapters. Chapter 1 dealt with economic regulation, but of domestic carriers only. Chapter 2 would have placed safety regulation of the airlines under ICC jurisdiction, leaving safety regulation of general aviation to the Department of Commerce under the Air Commerce Act. Working with Representative Lea and Commissioner Eastman and his staff, Gorrell had thought it wise not to become involved with Senator McCarran, who sometimes was rather touchy about sharing the spotlight. But when Representative Lea introduced H.R. 5234, the Senator, on the next day, introduced a proposed substitute for his S. 2 in the same terms as the Lea bill. At the same time he introduced a revised version of his safety proposal as S. 1760. McCarran also introduced amendments to his original bill with the purpose

71 S. Doc. No. 15, *supra* note 44, at iv.

72 The story of the drafting collaboration, at Representative Lea's request, between the airline industry and the ICC staff was told sketchily in Senate hearings in 1937 by Mr. Norman Haley, Director of the ICC's Bureau of Air Mail and one of the staff members assigned by Commissioner Eastman to the project. *Hearings on S. 2 and S. 1760 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 75th Cong., 1st Sess. 221-22 (1937) [hereinafter cited as *1937 Senate Hearings*]; see also *id.* at 429-30. In later debate on the Senate floor, Senator McKellar added some colorful embellishment to the story. 81 Cong. Rec. 8970-78 (1937).

of bringing United States airlines in foreign commerce under economic regulation.⁷³

C. *The Executive Departments Oppose Legislation*

By this time Gorrell had mustered broad support for legislation. Representative Lea's House Committee held hearings on the Lea Bill between March 30 and April 8, 1937.⁷⁴ Senator McCarran's proposals were heard between March 8 and April 12, 1937, by a subcommittee, under the chairmanship of Senator Truman, of the Senate Committee on Interstate Commerce.⁷⁵ The Lea Bill was revised, reintroduced as H.R. 7273, and favorably reported on May 28.⁷⁶ Senator McCarran's S. 2 substitute, which was similar to Lea's House Bill, was favorably reported on June 7.⁷⁷ Senator McCarran's safety bill, S. 1760, was favorably reported on the same day.⁷⁸

In both the Senate and House hearings, however, strong opposition had been voiced by the Post Office Department and the Department of Commerce. The former fought with special vigor. It argued that the Air Mail Act of 1934 was generally satisfactory, needing only limited amendment.⁷⁹ It emphasized three arguments against the proposed bills: (1) that ICC regulation would permit undesirable restraints on competition and would unduly limit entry into the airline business; (2) that Post Office Department control over the air mail service would be impaired and costs to the Government would be increased; and (3) that no adequate provision was made for the foreign relations aspects of air transportation, which required control by the Executive.⁸⁰ Somewhat less extensive, but generally similar, objections were voiced by the Department of Commerce.⁸¹

Gorrell was strongly behind the Lea Bill.⁸² He did not endorse the McCarran Bill, S. 1760, transferring safety regulation of the airlines from the Department of Commerce to the ICC, and he felt that the Senator's bill for

73 While McCarran placed Lea's House bill before the Senate as a substitute to S. 2, others placed McCarran's bills before the House. Representative Ellenbogen's H.R. 4600, 75th Cong., 1st Sess. (1937), was virtually identical to McCarran's S. 2 as introduced. Representative Crosser's H.R. 4652, 75th Cong., 1st Sess. (1937), was virtually identical to McCarran's separate safety bill, S. 1760. See 1937 Senate Hearings 45 (testimony of Senator McCarran).

74 See 1937 House Hearings.

75 See 1937 Senate Hearings.

76 H.R. REP. No. 911, 75th Cong., 1st Sess. (1937).

77 S. REP. No. 686, 75th Cong., 1st Sess. (1937).

78 S. REP. No. 687, 75th Cong., 1st Sess. (1937).

79 The Post Office Department had drafted a bill, which was introduced as H.R. 4732, 75th Cong., 1st Sess. (1937), and was heard before another committee, providing for the amendments to the Air Mail Act of 1934 that the Department deemed appropriate. See *Hearing on H.R. 4732 Before a Subcommittee of the House Committee on the Post Office and Post Roads*, 75th Cong., 1st Sess. 3-6 (1937). See also H.R. REP. No. 759, 75th Cong., 1st Sess. (1937). The Post Office Department also caused to be introduced a bill affecting the carriage of mail to insular possessions and foreign countries. See H.R. REP. No. 1272, 75th Cong., 1st Sess. 1 (1937). See also *Hearings on H.R. 7370 Before a Subcommittee of the House Committee on the Post Office and Post Roads*, 75th Cong., 1st Sess. (1937).

80 See 1937 House Hearings 119-59, 231-48; 1937 Senate Hearings 106-205, 258-80, 288-331.

81 See 1937 House Hearings 249-62; 1937 Senate Hearings 76-101.

82 Possibly because many of the airlines preferred regulation by a separate agency rather than the ICC, cf. 1937 House Hearings 299. Gorrell did not directly express the strong endorsement of the pending legislation that his actions in seeking its passage revealed. Although he made it quite clear that he was very much in favor of the Lea-McCarran bills, 1937 Senate Hearings 454, Gorrell said that, so far as the industry was concerned, whether there should be legislation of the kind contemplated was up to Congress, but that if legislation

economic regulation, S.2, required perfection.⁸³ There was, however, no serious possibility that S. 1760 would become law, for it had little support in the House.⁸⁴ And passage of the S. 2 substitute in the Senate, since it was like the Lea Bill, would pose no difficulties in a possible conference committee. Hence, Gorrell decided to press for adoption in the respective houses of the Lea Bill and McCarran's S. 2 during the 1937 session.

Time was running out for the domestic airlines. A series of airline accidents during the winter of 1936-1937 had aggravated the industry's already precarious financial condition.⁸⁵ Time was running short for the overseas airlines too. The foreign air mail contracts, most of which originally had been awarded for ten years,⁸⁶ would begin to expire in late 1938, and existing legislation did not provide for their extension. Thus the overseas carriers were threatened with the possibility that their routes would be subject to new rounds of competitive bidding.⁸⁷

In those days congressional sessions did not last as long as they often have since. Congress was to adjourn on August 21.⁸⁸ Legislation in 1937 would

were to be passed, the Lea Bill (and the Senate substitute) was "workable." See 1937 *House Hearings* 63, 91; 1937 *Senate Hearings* 431, 452-53. The next year Gorrell testified that the airline industry had "strongly supported" the 1937 Lea-McCarran bills when they had been under consideration. *Hearings on S. 3659 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 75th Cong., 3d Sess. 33 (1938).

⁸³ See 1937 *Senate Hearings* 450-54.

⁸⁴ Representative Crosser's H.R. 4652, which was virtually identical to McCarran's S. 1760, see note 73 *supra*, was heard in the House along with Lea's H.R. 5234, but was not reported.

⁸⁵ Between December 15, 1936, and March 25, 1937, there were seven major crashes in scheduled airline service, with fifty lives lost. S. REP. NO. 687, *supra* note 78, at 2. In 1937 the domestic airline industry's financial situation was steadily worsening. Despite substantial increases throughout the 1930's in total revenues, from passengers as well as mail, the domestic industry suffered operating losses in each year following the passage of the Air Mail Act of 1934. It was not until 1939, the first year of operations after the passage of the Civil Aeronautics Act of 1938, that the domestic airline industry as a whole showed a profit. See 1 CAA ANN. REP. 51 (1940). The industry throughout the period prior to the 1938 Act was seriously concerned that revenues would be reduced in 1938, through the operation of § 6(e) of the Air Mail Act of 1934, which directed the ICG in fixing domestic air mail rates "to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom." In 1936 the ICG reported that unless there was a "phenomenal increase" in revenues from air mail postage by 1938, the postal revenue limitation "would not enable the carriers to operate the present class of mail service, if it would permit them to operate at all." 50 ICG ANN. REP. 31 (1936). On October 23, 1936, the ICG instituted an investigation to deal with the postal revenue limitation. Its decision was not rendered until June 2, 1938, just before the Civil Aeronautics Act of 1938 became law. The ICG decided, contrary to its 1936 prediction, that for the fiscal year beginning July 1, 1938, "the anticipated postal revenue from air mail . . . will be in excess of the aggregate cost of transportation of air mail . . ." Postal Revenue Limitation on Air Mail Routes, 227 I.C.C. 498, 508 (1938). The outcome of the case, however, was in doubt to the end. The Post Office Department's cost ascertainment system, which was the standard tool for determining mail costs and revenues, showed a substantial anticipated deficiency in revenues. *Id.* at 506. But the ICG finally took a more generous (and confusing) view of anticipated revenues. See *id.* 507-08.

⁸⁶ See S. Doc. No. 70, 72d Cong., 1st Sess. 4-18 (1932). See also H.R. REP. NO. 2309, 75th Cong., 3d Sess. (1938).

⁸⁷ If there were to be competitive bidding for international routes, all domestic carriers were potential bidders. Therefore, the international carriers had good reason not only to see to it that international operations were brought within an orderly scheme of economic regulation, but also to oppose any scheme of economic regulation for domestic carriers that excluded overseas carriers, which is what McCarran's S. 2 as introduced had proposed. Domestic carriers, if secure on their own routes, could have been formidable bidders for the routes of the overseas carriers. Cf. unprinted hearings before the Interdepartmental Committee on Civil Aviation, note 106 *infra*, pp. 524, 557-58.

⁸⁸ 81 CONG. REC. 9609 (1937).

have been miraculous. Nonetheless, on August 13 Senator McCarran moved to bring up his S. 2.⁸⁹ Debate went on for several days. Unluckily, Senator McCarran was taken ill during this time.⁹⁰ Although Senator Truman sought to carry on in his stead, Senator McKellar, the Chairman of the Committee on Post Offices and Post Roads, let it be known that he was ready to filibuster.⁹¹ Generally echoing the Post Office Department arguments at the hearings and implying nefarious collaboration between the ICC staff and the airline industry, his opposition killed hopes of action. Faced with this impasse in the Senate and with Representative Mead, Chairman of the House Committee on Post Offices and Post Roads, indicating objection in the House,⁹² Representative Lea did not call up his bill.

V. The Interdepartmental Committee

From the beginning to the end of the 1937 congressional session, the White House had been silent on aviation legislation. But those favoring legislation asserted that the President wanted, or at least did not object to, full-scale economic regulation of the airline industry by the ICC. If this assertion had been based solely on the statements in the President's message on the Federal Aviation Commission's report of January 1935, it would have been questionable. That message had said only that the ICC could meet the needs of the airlines "before a permanent consolidated agency is created or designated over transportation as a whole."⁹³ It did not say that full-scale economic regulation of the airlines was desirable at that time. Indeed, the message pointedly ignored the plea of the Federal Aviation Commission that comprehensive regulation was immediately needed. Nor had the message said that the "permanent consolidated agency" that the President contemplated was to be the ICC.

On June 7, 1935, however, the President delivered another message that did say that the ICC should be the over-all transportation agency to regulate all carriers, air, rail, motor, and water.⁹⁴ However, this message no more than the earlier one said that the time had come for full-scale regulation of the airlines. On the contrary, in 1935 the President seemed content with limited amendments to the Air Mail Act of 1934.⁹⁵ Since the June 1935 message, he had been silent.

89 *Id.* at 8839.

90 See *id.* at 9195.

91 *Id.* at 9210, 9226.

92 See *id.* at 8984-85.

93 S. Doc. No. 15, 74th Cong., 1st Sess. iv (1935). See text accompanying notes 55 and 71 *supra*.

94 79 CONG. REC. 8851 (1935).

95 The June 7, 1935, message said that the ICC might "ultimately" become a consolidated transportation agency, but that time was too short in 1935 for the discussions necessary for changes such as the President had in mind. *Ibid.* Elsewhere in the message the President said that he had previously expressed his views on the desirable relationship between the Government and the airlines, and that legislation had been introduced for the purpose of carrying out his recommendations. *Ibid.* He said that he was in "general accord with the substance of this legislation" *Ibid.* Had the President stopped there, the reasonable interpretation would have been that he backed pending legislation to amend the Air Mail Act of 1934, which was the only kind of legislation he had specifically recommended in his earlier message. However, the sentence continued, ". . . although I still maintain, as I indicated in my message on that

A. *The Brownlow Report*

Even if the President had been receptive in 1935 to ICC regulation of the airlines, 1937 was two years later. And 1937 was the year of the Brownlow Report.⁹⁶ In substance, that report called for a drastic overhaul of the independent administrative agencies in a way that would have brought them within the framework of the executive departments, leaving them independent only with respect to certain quasi-judicial functions.⁹⁷ Indeed, the report suggested that the completely independent commission impaired the Executive's constitutional powers. In transmitting the report to Congress with a plea for legislation to implement its recommendations, the President made it evident that he shared this view.⁹⁸

The ICC, the most venerable, most powerful, and then at least, most independent of the agencies, was a far cry from what the Brownlow Report envisaged. Moreover, early in his tenure President Roosevelt had been taught a hard lesson by the universally admired Commissioner Eastman. At a time when there were few men in Washington who would say "no" to an enormously popular President, Eastman flatly refused to accede to the President's pointed suggestion that leaders of the independent agencies report directly to him. Eastman firmly insisted that the ICC "is by law a creature of Congress, and it is our duty to report direct to it."⁹⁹ It was no secret in 1937 that the President felt that the regulatory agencies, and the ICC in particular, were independent to an improper, if not unconstitutional, degree.¹⁰⁰

The Brownlow Report had been issued very shortly before Gorrell and Representative Lea began their consultations in January 1937. It is most unlikely that a legislative veteran as sophisticated as Representative Lea, chairman of one of the most important committees in the House, really thought that the President was ready to have the economic regulation of the airlines fitted into the very mould that he was condemning as an unwarranted trespass on the powers of the Executive. Especially is this unlikely since the airline regulation that the Congressman and Gorrell were considering embraced United States carriers in foreign commerce, thereby raising delicate questions of Executive prerogative. Nor is it likely that a man as careful and thorough as Gorrell felt sure that all was clear sailing at the White House. The greater probability is that both the Congressman and Gorrell, acutely aware of the pressing need

subject, that a separate commission need not be established to effectuate the purposes of such legislation." *Ibid.* In this phrase proponents of aviation legislation could read a Presidential endorsement of the 1935 Lea-McCarran proposals for comprehensive regulation of the airline industry, except that it should be regulated by the ICC rather than by a new agency. Three days later, on June 10, 1935, Senator McCarran introduced S. 3027, providing for ICC regulation. See notes 63-65 *supra* and accompanying text.

96 THE PRESIDENT'S COMM., REPORT ON ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937).

97 *Id.* at 39-42.

98 The Brownlow Report condemned the unaccountability of the independent agencies to the Executive in a manner not calculated to foster a calm reaction outside the Executive. It said that rather than calling them independent, "it would be more accurate to call them the 'irresponsible' regulatory commissions." *Id.* at 40. The President plainly agreed. See *id.* at iv-v.

99 FUESS, JOSEPH B. EASTMAN, SERVANT OF THE PEOPLE 245-46 (1952).

100 See note 98 *supra*. In 1938 the President made his feelings quite explicit. In a message of April 11, 1938, he said that certain essentially executive powers vested in the ICC are, "in all probability, unconstitutional." 83 CONG. REC. 5185 (1938).

for action, deliberately sought to avoid clearance with the White House at that time, lest their plans be frustrated by the controversy over the Brownlow Report. Very likely they decided to attempt to create the impression of Presidential favor for ICC regulation as provided in the Lea-McCarran bills by reference to the President's 1935 messages, hoping that, if strong support could be mustered, the White House might finally conclude that it would not be politic to repudiate that interpretation of the 1935 expressions.

They could not, however, overcome the opposition of the Post Office Department and the Department of Commerce. Although there is no evidence that that opposition was at White House prompting, the White House knew of it and knew, too, that it was quite sufficient, with the efforts of the powerful Senator McKellar, to block the drive for legislation. With the close of the 1937 session, legislation seemed stalled indefinitely.

This situation posed one of the great crises in the history of the airline industry. The domestic airlines could not have endured much longer under the strictures of the Air Mail Act. Initiative that led to an end of the impasse came from a most unexpected quarter.

B. Creation of the Interdepartmental Committee

The Department of Commerce has rarely risen to heights of statesmanship. But Secretary of Commerce Roper and two of his able lieutenants at this time were keenly aware of the danger the industry faced. Those lieutenants were the Assistant Secretary of Commerce, Colonel J. Monroe Johnson — later a distinguished member of the ICC — and the man he had brought into the Department to head the Bureau of Air Commerce, Dr. Fred A. Fagg of Northwestern University.

Dr. Fagg had been legal counsel to the Federal Aviation Commission.¹⁰¹ He, with John Henry Wigmore, had drafted the bill to carry out the 1935

101 Dr. Fagg was a towering figure in aviation's early history. Pioneer combat pilot in World War I, pioneer aviation academician in the 1920's and the early 1930's, he had accepted a position on the faculty of Northwestern University Law School tendered in 1929 by the then retiring Dean, John H. Wigmore. The retiring Dean did not quit working. At Northwestern, he and Dr. Fagg established the Air Law Institute and its *Journal of Air Law*, giving to aviation an academic stature far ahead of its technological and commercial sinews. When Dr. Fagg was asked to become counsel to the Federal Aviation Commission in 1934, he arranged that Dean Wigmore also work with the Commission. See S. Doc. No. 15, 74th Cong., 1st Sess. 253 (1935). Dr. Fagg later recalled that President Roosevelt was pleased that Dean Wigmore participated. Letter from Dr. Fred A. Fagg, May 13, 1963, p. 2. Dr. Fagg's numerous aviation chores included a time as legal advisor to the Senate Committee on Commerce, under the chairmanship of Senator Copeland. Pursuant to S. Res. No. 146, 74th Cong., 1st Sess., 79 CONG. REC. 8823-24 (1935), which had been prompted by an airline crash, on May 6, 1935, that killed Senator Cutting of New Mexico, the Copeland Committee investigated, and made several reports on, that specific crash and safety in the air generally. In 1936 Assistant Secretary of Commerce Johnson asked Dr. Fagg to undertake a complete revision of the Department's civil air regulations under the Air Commerce Act of 1926; again Dr. Fagg arranged that Dean Wigmore be included. Letter from Dr. Fred A. Fagg, May 13, 1963, p. 3. In 1937 Dr. Fagg was appointed Director of the Bureau of Air Commerce. When it became clear that the Civil Aeronautics Act of 1938 was well along toward adoption, Dr. Fagg returned to Northwestern as Dean of the School of Commerce, then became Vice President of the University and Academic Dean of Faculties. From 1947, when he left Northwestern, until 1957, when he retired, Dr. Fagg was President of the University of Southern California. It is an extraordinary coincidence that just as the driving and objective Colonel Gorrell became the airline industry's leader in its relationships to the Government, the Government's key figure in civil aviation became the similarly driving and objective Dr. Fagg.

recommendation of the Commission — the bill that Congressman Lea had introduced as H.R. 5174 on January 31, 1935.¹⁰²

With the collapse of the Gorrell-Lea-McCarran legislative push in 1937, Dr. Fagg was convinced that the time had come to revive the 1935 conception, with modifications to allow for the impact of the Brownlow Report. He persuaded his chief, Assistant Secretary Johnson, that a fresh approach was needed and that it should begin with the achievement of a consensus among six executive departments variously concerned with aviation, leaving the ICC on the sidelines. Johnson, in turn, persuaded Secretary Roper to present the idea to the President, and the President concurred. One less independent than Dr. Fagg would have hesitated a long time to broach the idea, for it meant that the White House, implicitly, would have to repudiate much that appeared in the 1935 Presidential message on the Federal Aviation Commission's report. And the President was not pleased; in concurring somewhat grumpily, he directed Secretary Roper to lock the representatives of the six executive departments into a room and not to release them until they had agreed on a satisfactory bill.¹⁰³

As a result, on September 15, 1937, less than a month after the close of the congressional session, Secretary Roper issued a press release announcing that the President had requested him to appoint a committee "to formulate a definite policy for both foreign and domestic aviation."¹⁰⁴ A few days later he announced the make-up of the committee. Designating his Assistant Secretary Johnson the chairman, he included Judge Moore, Counselor of the State Department; Second Assistant Postmaster General Branch; Assistant Secretary of War Louis Johnson; Assistant Secretary of Navy Edison; and Assistant Secretary of the Treasury Gibbons.¹⁰⁵ Dr. Fagg was appointed Secretary to the Committee. This was the group that became known as the Interdepartmental Committee on Civil Aviation.

C. *The Interdepartmental Bill — The Executive Departments Agree*

The Interdepartmental Committee proceeded in confidential sessions. Over a period of several weeks in the fall of 1937, it heard testimony from representatives of nearly every segment of civil aviation.¹⁰⁶ It then turned to the problem of reconciling interdepartmental differences. By the end of the year, agreement

102 See letter from Dr. Fred A. Fagg, May 20, 1963, p. 1.

103 Letter from Dr. Fred A. Fagg, May 16, 1963, p. 3, recalling Assistant Secretary Johnson's report on the session at the White House, when he and Secretary Roper presented the idea to the President. See also letter from Dr. Fred A. Fagg, Feb. 21, 1951, p. 2.

104 A copy of this press release is in the library of the Air Transport Association of America, Washington, D. C.

105 The members of the Committee and their alternates are listed at *1938 House Hearings* 48. One of the members, Assistant Postmaster General Branch, was to become a member of the original Civil Aeronautics Authority created by the Civil Aeronautics Act of 1938. Dr. Fagg acted as alternate for Assistant Secretary of Commerce Johnson as well as Secretary of the Committee.

106 A transcript of the hearings was made, but never printed. A photostatic copy of the transcript of the hearings (the hearings identify the committee as the Committee on Aviation Legislation, see note 1 *supra*) is in the library of the Civil Aeronautics Board, Washington, D. C. The hearings were held on eight days in October 1937. The committee heard from, among others, the Maritime Commission; the Interstate Commerce Commission; the airline industry; two former members of the Federal Aviation Commission; and Representative Mead, Chairman of the House Commission on the Post Office and Post Roads. A complete list of the witnesses before the Interdepartmental Committee is set forth at *1938 House Hearings* 133.

was reached in the form of a bill, in the drafting of which Dr. Fagg had a leading role.¹⁰⁷ It was submitted to Representative Lea, who then had it printed. This was the confidential committee print of January 4, 1938. The committee made no report, and the bill appeared in no other document.

On January 9, 1938, after a conference with the President, Representative Lea issued a lengthy statement to the press, stating that he had "under consideration a new plan for the regulation of civil aviation" evolved by the Interdepartmental Committee on Civil Aviation.¹⁰⁸ It stated that he was "inviting constructive criticism of the plan, particularly from representatives of the aviation industry."

Lea's statement sought to minimize differences between the "new plan" and the Lea-McCarran bills of the previous session. "[T]here is little difference," it said. But then it added, "under the plan, a three-member Board would be established which would exercise all of the functions involved in regulating and promoting civil aviation," including not only all economic regulation of the airlines but also "all of the powers of the Department of Commerce over civil aviation." The Brownlow cat peeked out from under the bag in this sentence: "The regulatory agency created under the Committee's plan follows the recent recommendation of the President to the Congress with respect to the organization of regulatory agencies."¹⁰⁹ The basis of the "new plan" was stated as follows:

Representative Lea stated that the principal argument advanced in favor of this proposal is that under the Constitution all of the executive power and responsibility for conducting our foreign relations and matters relating to national defense, are vested in the executive branch of the Government; and to make this Board independent of the President in the discharge of such functions would be in violation of the Constitution. The proponents of the plan concede that the Congress may constitutionally create a board and make it independent of the executive branch of the Government when its functions are limited solely to those of a quasi-legislative or quasi-judicial character not involving foreign affairs or national defense; but state that many of the functions involved in the regulation of civil aviation, such as the building of airways and air navigation facilities and the granting of authority to operate airlines in foreign air commerce, are executive in character or have a direct and important bearing on foreign relations and national defense.¹¹⁰

This proposal, obviously, was most remote from the 1937 Lea-McCarran bills that had been limited strictly to economic regulation of the airlines under ICG administration. Here was proposed a complete overhaul of regulation, promotion, and government administration for the whole gamut of civil aviation. One might have assumed that so drastic a proposal would presage a serious setback for hopes of prompt legislation. The Brownlow Report and its advocacy by President Roosevelt had aroused bitter opposition on Capitol Hill and among

107 For the drafting of the Interdepartmental Bill there was a subcommittee consisting of three of the alternate members, one of whom was Dr. Fagg. See *id.* at 48.

108 Lea, Press Release, Jan. 9, 1938. A copy of this press release is in the library of the Air Transport Association of America, Washington, D. C.

109 *Id.* at 1-2.

110 *Id.* at 2-3.

many private interests, who feared the erosion of ancient limitations on Executive power. Moreover, the proposed creation of still another new agency of government, when the ICC was so readily at hand for economic regulation of the carriers and when the Department of Commerce was long established as the regulator of safety and the promoter of civil aviation, suggested needless proliferation of bureaucracy. The mere fact of so complete a *volte face* after the diligent legislative efforts of the previous year seemed to threaten long delay, if only because of the time it would take for all concerned to adjust to a new program.

The ways of our democratic process, however, are varied. Rarely does it operate by the book, which would have suggested giving wide currency to the Interdepartmental Committee's bill and then the holding of hearings on it before the legislative committees, followed by a synthesis of views and redrafting. Since there was much in the bill that would have fostered controversy, such a course not only would have excited violent dispute but would have resulted in the hardening of opposing lines, a sure means for delaying legislation. Consequently, Representative Lea followed a quite different path.

D. *The Lea Bill and Enactment*

The Interdepartmental Committee had named as its spokesman and representative Mr. Clinton Hester, a Treasury Department attorney with much experience in dealing with Congress.¹¹¹ Representative Lea and Mr. Hester agreed that the first step in working out a new bill should be the adaptation of the Lea Bill that had been favorably reported in 1937¹¹² to make it generally consistent in fundamental pattern with the Interdepartmental Committee's ideas. To this end Representative Lea arranged meetings between Hester's legal assistants, Gorrell's assistants, and a member of the Legislative Drafting Service assigned to the House Committee.¹¹³ They were to go as far as possible in agreeing on an adaptation of the Lea Bill. Any points on which they failed to agree would be submitted to Representative Lea for resolution. Thus, there would evolve a new bill to be introduced by Representative Lea, with the Interdepartmental Committee's bill remaining a confidential committee print, never to see the light of day.

The representatives of Lea, Hester, and Gorrell worked swiftly, and they

111 Mr. Hester, who had been the alternate for Assistant Secretary of the Treasury Gibbons on the Interdepartmental Committee and a member of the drafting subcommittee, 1938 *House Hearings* 48, was to become the first Administrator in the Civil Aeronautics Authority created by the Civil Aeronautics Act of 1938. One of Hester's assistants was Stuart G. Tipton, who some years later became General Counsel of the Air Transport Association and is now its President.

112 The 1937 bill was H.R. 7273. See note 76 *supra* and accompanying text.

113 This was Charles S. Murphy, now Chairman of the Civil Aeronautics Board. He was then Assistant Legislative Counsel of the Senate, working in this instance for the House Committee. See 1938 *House Hearings* 36; *Hearings on S. 3760 Before the Senate Committee on Commerce*, 75th Cong., 3d Sess. 2 (1938); *Hearings on S. 3659 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 75th Cong., 2d Sess. 14 (1938). Mr. Murphy had been present at most of the hearings before the Interdepartmental Committee, see unprinted hearings described in note 106 *supra*, and had assisted the draftsmen of the Interdepartmental Committee's bill. Later in the 1938 session, Mr. Murphy rendered assistance to Senator Truman in working out the bill in the Senate and thereafter assisted the Conference Committee.

came very close to agreement. Representative Lea decided remaining points of difference, and on March 4, 1938, he introduced H.R. 9738.¹¹⁴

What followed is recorded in the conventional legislative history — the bills, hearings, reports, and debates — with few episodes not apparent on the record. In a very short time, on June 23, 1938, the Civil Aeronautics Act of 1938 became law.

PART II — AFTERWORD

Mulling over most of the details of the Interdepartmental Committee's bill after thirty years might, at first blush, seem to profit only the antiquarian. But in at least one respect the bill is of lively interest; that is in its treatment of the role of the President in the regulation of civil aviation.¹¹⁵ The Interdepartmental Committee's proposals led to the creation of a unique administrative complex to allow for the place of the Executive. Years later the complex was finally undone. The history of its creation and undoing may be instructive to those in this latter day who are called upon to formulate a redefinition of the President's role in relation to transportation. Presidents still struggle — as they have for nearly a half century — to find the proper place for transportation in the organization of a government of separated powers. This past year, at the initiative of the President,¹¹⁶ Congress considered and finally enacted a law creating a new Department of Transportation.¹¹⁷ The problems of defining the role of the Executive in the regulation of transportation, which are most acute in the case of civil aviation, once again are pressing. The history of the groping for a solution in 1938, and of what followed, merits close attention today.

I. The Relationship Between the President and the New Agency in the Interdepartmental Bill

A. The Brownlow Report

The Brownlow Report was transmitted to Congress by President Roosevelt on January 12, 1937, with a strong endorsement and an urgent call for legislative action. Throughout 1937 and 1938 dispute raged in Congress, reaching a

114 See 1938 *House Hearings* 36, for Hester's account of the collaboration that produced H.R. 9738. Hester sketched out nineteen "major differences in policy" between H.R. 7273, the House bill reported in 1937, and H.R. 9738. *Id.* at 37-46. Most of these differences are traceable to the Interdepartmental Committee Bill.

115 The Interdepartmental Bill also bears examination in connection with specific provisions of the final enactment. For example, § 301 of the Interdepartmental Bill was the source of one of the most controversial provisions of the Civil Aeronautics Act — the provision that the agency should consider "competition to the extent necessary to assure the sound development of an air-transportation system" as in the public convenience and necessity. Civil Aeronautics Act of 1938, ch. 601, § 2(d), 52 Stat. 980 (now Federal Aviation Act of 1958, § 102(d), 72 Stat. 740, 49 U.S.C. § 1302(d) (1964)). See Westwood, *Choice of the Air Carrier for New Transport Routes*, 16 *Geo. Wash. L. Rev.* 159, 166-67 (1948); see also Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 *Harv. L. Rev.* 1055, 1075 (1962).

116 The President's proposal was set forth in a message to Congress of March 2, 1966. H.R. Doc. No. 399, 89th Cong., 2d Sess. (1966). On the same day the Administration Bill was introduced in the Senate as S. 3010, 89th Cong., 2d Sess. (1966), and in the House as H.R. 13200, 89th Cong., 2d Sess. (1966).

117 Pub. L. No. 89-670, 89th Cong., 2d Sess. (Oct. 15, 1966).

crescendo during the spring of 1938 when civil aviation legislation was in the final stage.

The Brownlow Report seemed to assume the inevitability, if not the desirability, of the commission form of governing various areas of the economy, and it accepted the need for "independent" commission decision of "judicial" issues.¹¹⁸ The report aimed at preventing the sprawling of commissions that were without effective budgetary or similar controls but had a vast amount of "non-judicial" powers considered by some as threatening to the President's executive capacity.¹¹⁹ Hence, "as a possible solution," it proposed that each commission be in an executive department but divided into two sections, the administrative and the judicial.¹²⁰ The former would be fully "in" the department;¹²¹ the latter would be "in" the department "only for purposes of 'administrative housekeeping,' such as the budget, general personnel administration, and material," but otherwise would be wholly independent of the department head and the President.¹²² The Report explained the matter thus:

The division of work between the two sections would be relatively simple. The first procedural steps in the regulatory process as now carried on by the independent commissions would go to the administrative section. It would formulate rules, initiate action, investigate complaints, hold preliminary hearings, and by a process of sifting and selection prepare the formal record of cases which is now prepared in practice by the staffs of the commissions. It would, of course, do all the purely administrative or sub-legislative work now done by the commissions — in short all the work which is not essentially judicial in nature. The judicial section would sit as an impartial, independent body to make decisions affecting the public interest and private rights upon the basis of the records and findings presented to it by the administrative section. In certain types of cases where the volume of business is large and quick and routine action is necessary, the administrative section itself should in the first instance decide the cases and issue orders, and the judicial section should sit as an appellate body to which such decisions could be appealed on questions of law.¹²³

This proposal was well calculated to stimulate discussion in academic circles. But in the practical political world it was pure dynamite, for it came at a time when the place of the Executive was undergoing rapid expansion and the Legislature was increasingly apprehensive about its supremacy. Application of the general proposal to specific situations raised hosts of collateral problems — and some not so collateral. The treatment of the rule-making function as one for the administrative section, sharply differentiated from the "judicial" function of the judicial section, was fraught with particular difficulty. And the problem of licensing seemed left in limbo. In Congress the Brownlow Report's proposal excited both suspicion of the Executive and strong antagonism.

118 THE PRESIDENT'S COMM., *op. cit.* *supra* note 96, at 39-42.

119 *Ibid.*

120 *Id.* at 41.

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

B. *Revival of the Conception of a Single Agency For All Aviation*

In winning favor for a new approach to aviation legislation in late 1937, Dr. Fagg's basic conception was that all the problems of civil aviation should be dealt with by one agency and that a new agency would be requisite. That, in substance, had been the view of the Federal Aviation Commission in 1935.¹²⁴

This conception offered distinct possibilities for sloganeering that would enhance the chance of success in securing the critically needed legislation. If executive opposition could be avoided, even though there were no overt executive support (and the President never was formally to express his support),¹²⁵ a most appealing case could be verbalized. It would emphasize the dynamics of a vital new industry, its peculiar problems, the requirement that it be developed aggressively, the great value of promoting nonairline civil aviation, the national defense need to fill the skies with airplanes, and so on. An argument stressing the diffusion among existing government agencies of various powers over civil aviation and the virtue of bringing all into a coherent unity under a new body would sound good in Congress.

There had been disenchantment in some congressional quarters with the Department of Commerce's supervision of air safety. The disenchantment stemmed from the death of the highly respected Senator Bronson M. Cutting of New Mexico in a 1935 airline crash. Soon after Senator Cutting's death, the Senate directed its Committee on Commerce to investigate that crash and other accidents in air transportation and to appraise the efficiency and adequacy of the Department of Commerce's air safety activities.¹²⁶ The Committee on Commerce and its chairman, Senator Copeland of New York, took their duties seriously. The committee held extensive hearings and issued several reports. The first report,¹²⁷ issued in 1936, dealt principally with the crash that had caused Senator Cutting's death, laying the blame for the crash squarely on the Depart-

124 See Part I, text accompanying notes 45-48 *supra*. Although the Federal Aviation Commission recommended a new agency with broad civil aviation powers, it would have left various other functions to other government agencies, principally the Department of Commerce. Some of these functions, construction of new airways and government loans to airlines, would have been subject to approval by the new agency. See S. Doc. No. 15, 74th Cong., 1st Sess. 59-60, 72, 106, 217-18, 233-34 (1935); notes 133-34 *infra*. See also H.R. 5174, 74th Cong., 1st Sess. (1935), which was drafted by persons associated with the Commission (see letter from Dr. Fred A. Fagg, May 20, 1963) and which reflected its recommendations.

125 Indeed, the President's 1935 message transmitting the report of the Federal Aviation Commission to Congress had stated that he was "unable to concur" in the Commission's recommendation for the creation of a new aviation agency. S. Doc. No. 15, *supra* note 124, at iv. See generally Part I, text accompanying notes 49-55. In 1938, however, Representative Lea testified that in January of that year, after the Interdepartmental Bill had been produced, the President told him that he favored a new agency for aviation. 1938 *House Hearings* 71-72. Senator McCarran, too, testified that he had been called to the White House in January 1938, and that the President said he had concluded that there should be a new agency for all aviation. *Hearings on S. 3659 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 75th Cong., 3d Sess. 6-7 (1938); 83 *Cong. Rec.* 6628 (1938) (remarks of Senator McCarran). But there never was a Presidential message endorsing aviation legislation in 1938. (In 1938 there was congressional testimony that the March 10, 1938, edition of the *Washington News* had carried an account of a news conference in which the President indicated his support for pending aviation legislation. 1938 *House Hearings* 75. However, the edition maintained on microfilm by the *News* and the Library of Congress does not contain the account referred to.)

126 S. Res. No. 146, 74th Cong., 1st Sess., 79 *CONG. REC.* 8823-24 (1935); see note 101 *supra*.

127 S. REP. No. 2455, 74th Cong., 2d Sess. (1936).

ment of Commerce.¹²⁸ It recommended a number of departmental changes to remedy an allegedly poor administration of air safety.¹²⁹ In 1937 the committee issued another report commenting at length on the ills within the Department of Commerce affecting aviation.¹³⁰ A bill offering a new program for air safety by placing responsibility in a separate agency that could coordinate all governmental aviation programs would have particular appeal to the sentiments fostered by the Commerce committee's reports.

When the Fagg conception emerged from the Interdepartmental Committee as a proposed bill, Colonel Gorrell quickly perceived how appealing arguments favoring a new aviation agency would be, and he cultivated them to the maximum in his legislative campaign. Except for its sloganeering value, there was very little reason for the airline industry to adopt this conception. Gorrell and his industry were genuinely interested only in securing an economic charter for the airlines that could be administered as surely through ICC regulation as through that of a new agency. They were content to leave safety regulation and operation of the airways in the Department of Commerce,¹³¹ which had done much to improve safety administration since the Committee on Commerce had issued its 1936 report. Moreover, nothing specific in the Interdepartmental Committee's proposal was any more "promotional" of civil aviation generally than what was otherwise inherent in existing legislation and in the still pending 1937 proposals for ICC regulation. It was difficult to demonstrate persuasively that the proposal would unify all governmental treatment of civil aviation, since the Interdepartmental Bill specifically contemplated that various and important functions affecting civil aviation would be performed by the President, the State Department, the Post Office Department, the Department of Commerce, and the Maritime Commission.¹³² Also, the Weather Bureau and the Department of Justice would still perform functions affecting civil aviation, and through the President, other departments and agencies, particularly the military, might have a voice. Nevertheless, Gorrell adopted the conception of a new aviation agency and promptly mapped out a nationwide campaign to marshal support of the most diverse interests. There is no question that the sloganeering to which Dr. Fagg's conception was so readily adaptable smoothed the way to swift legislative action in 1938.

By that very conception, however, the basic problem dealt with in the Brownlow Report was most sharply posed. Involved in the gamut of civil aviation matters were many items not of a "judicial" nature. A program promoting

128 *Id.* at 19.

129 *Id.* at 24-32.

130 S. REP. NO. 185, 75th Cong., 1st Sess. (1937).

131 Gorrell was concerned about safety but not with its administration by the Department of Commerce. His concern was with the inadequacy of past appropriations for the construction of airway aids. See *Hearings on S. 2 and S. 1760 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 75th Cong., 1st Sess. 450-53 (1937); *Hearings on H.R. 5234 and H.R. 4652 Before the House Committee on Interstate and Foreign Commerce*, 75th Cong., 1st Sess. 286-95 (1937). In its 1937 safety report, the Senate Committee on Commerce regarded the urgent need for a large appropriation for airway aids as the most pressing problem for Congress to deal with. S. REP. NO. 185, *supra* note 130, at 47, 19-21.

132 Interdepartmental Bill §§ 401-03, 502. The Interdepartmental Bill, which was a confidential committee print dated January 4, 1938, is printed in full as an appendix to this article.

miscellaneous private flying would surely be an executive matter.¹³³ The enormous job of building and operating the airways with their beams, markers, control towers, and communications systems, was purely executive.¹³⁴ Moreover, national defense and foreign relations, traditional areas of executive responsibility, both were apart from and cut across "judicial" functions. Finally, almost every conceivable variety of rule-making was involved in the governing of the several sectors of civil aviation, and the Brownlow Report indiscriminately treated rule-making as "nonjudicial."¹³⁵

On the other hand, there had to be provision for an agency that would be independent of the Executive, at least in some vital respects. The experience with the domestic air mail contract cancellations had been searing both within the industry and in Congress. "Political" control of the airlines, if there were to be any legislation at all, was not acceptable.

C. *The Interdepartmental Bill*

The bill finally approved by the Interdepartmental Committee reflected a groping for a way between the two extremes of unadulterated Brownlow and the completely independent commission. Provision was made for a three-member agency.¹³⁶ It was named "Board" instead of "Commission."¹³⁷ Sounding more like Brownlow, it minimized the possibility that the agency would have the towering prestige of the ICC, and it appeared to render it more susceptible to modification in subsequent executive reorganization orders.

Furthermore, the President would annually designate the member who would be Chairman and "the executive officer of the Board."¹³⁸ In this power of Presidential designation — not existing for the ICC — and in this ambiguous but conceivably potent phrase, the door to executive influence was opened a crack.¹³⁹

133 The Federal Aviation Commission had seemingly recognized this problem in its 1935 recommendation of a new agency for aviation. Although the Commission recommended transferring the Department of Commerce's safety functions to the new agency despite arguments that they were "essentially executive," S. Doc. No. 15, *supra* note 124, at 77, it recommended that promotion of miscellaneous private flying be left to the Department of Commerce. *Id.* at 101.

134 The Federal Aviation Commission also recognized that the administration of the federal airways system was "an executive function and should be the responsibility of an executive department." *Id.* at 59. In the Commission's view, administration of the airways by the new agency would have been "alien to any proper recognition of the true functions of the various divisions of government." *Ibid.* The Commission would, however, have made plans for the construction of new airways by the Department of Commerce subject to the new agency's approval. *Id.* at 59-60.

135 THE PRESIDENT'S COMM., *op. cit.* *supra* note 96, at 41.

136 Interdepartmental Bill § 201.

137 *Ibid.*

138 *Ibid.*

139 The spokesman for the Interdepartmental Committee later indicated that the term "executive officer" in the context of the Interdepartmental Bill was intended to make the Chairman particularly responsive to the President's will. See notes 181-85 *infra* and accompanying text. Perhaps the term need not have been ascribed such potent meaning. In 1950, acting under the provisions of the Reorganization Act of 1949, 63 Stat. 203, 5 U.S.C. § 133z (1964), President Truman transmitted to Congress reorganization plans proposing to transfer to their respective chairmen "the executive and administrative functions" of the Interstate Commerce Commission (Plan 7, H.R. Doc. No. 511, 81st Cong., 2d Sess. (1950)), the Federal Trade Commission (Plan 8, H.R. Doc. No. 512, 81st Cong., 2d Sess. (1950)), the Federal Power Commission (Plan 9, H.R. Doc. No. 513, 81st Cong., 2d Sess. (1950)), the Securities and Exchange Commission (Plan 10, H.R. Doc. No. 514, 81st Cong., 2d Sess.

The substantive provisions of the bill began with a transfer to the Board of all the "powers and duties" of the Secretary of Commerce under the Air Commerce Act.¹⁴⁰ These were a vast conglomeration of functions, executive, legislative, and judicial. The new Board would construct and maintain the federal airways, issue a variety of licenses for airmen and aircraft, and promulgate and enforce rules for air safety. Then came a series of substantive and procedural provisions for the Board's full-scale regulation of the airlines, including licensing, adjudication, rule-making, and enforcement — the usual powers of an agency responsible for comprehensive economic regulation of an industry — and certain other powers respecting foreign-flag airlines.

But what of the Brownlow Report? On three points provisions were made for Board subordination to the President. One concerned foreign and territorial routes. The licensing of a United States line in foreign and territorial commerce was made "subject to the approval of the President."¹⁴¹ Licensing of foreign-flag

(1950)), the Federal Communications Commission (Plan 11, H.R. Doc. No. 515, 81st Cong., 2d Sess. (1950)), the National Labor Relations Board (Plan 12, H.R. Doc. No. 516, 81st Cong., 2d Sess. (1950)), and the Civil Aeronautics Board (Plan 13, H.R. Doc. No. 517, 81st Cong., 2d Sess. (1950)). It seems not to have been the purpose of these plans to impose Presidential control over these agencies. See 96 CONG. REC. 3241 (1950) (Presidential message transmitting Reorganization Plans 1-13 of 1950). These same plans transferred to the President the power to designate the chairmen of these agencies, except where the President already had that power. The 1949 act provided that reorganizations proposed thereunder could not become effective if disapproved by either House of Congress. Reorganization Act of 1949, § 6, 63 Stat. 205, 5 U.S.C. § 133z-4 (1964). Plans 7, 11, and 12 were disapproved by Senate resolutions, 96 CONG. REC. 7173, 7177, 6886 (1950), and therefore did not become effective. Plans 8, 9, 10, and 13, however, did become, and still are, effective. See 64 Stat. 1264-67, 5 U.S.C. following § 133z-15 (1964). A similar reorganization plan, making the chairman of the Maritime Commission its "chief executive officer," had become effective in 1949. 63 Stat. 1069, 5 U.S.C. following § 133z-15 (1964). Plan 7, affecting the ICC, was disapproved in 1950. In his March 2, 1966, transportation message, however, President Johnson stated his intention to submit a new reorganization plan along the same lines. H.R. Doc. No. 399, *supra* note 116, at 7.

The 1950 proposals to transfer administrative functions to the chairmen of the respective agencies were made pursuant to specific recommendations of the first Hoover Commission. See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, THE INDEPENDENT REGULATORY COMMISSIONS 5-6 (1949). The various plans received a mixed and somewhat inconsistent reception in Congress. In the case of the FCC, the transfer of administrative functions was thought to make the chairman a "dictator." 96 CONG. REC. 7177 (1950) (remarks of Senator Johnson); *but cf.* S. REP. No. 1564, 81st Cong., 2d Sess. 6 (1950). In the case of the ICC, the plan, which included a proposal giving the President the power to designate the chairman, was said to pose a "grave danger" to the independence of the agency. S. REP. No. 1567, 81st Cong., 2d Sess. 10 (1950). See also S. REP. No. 1516, 81st Cong., 2d Sess. (1950). On the other hand, with respect to the other agencies affected by similar plans, the transfer of administrative functions to their chairmen was regarded as merely sound management practice. See S. REP. No. 1685, 81st Cong., 2d Sess. 5 (1950); S. REP. No. 1563, 81st Cong., 2d Sess. 6 (1950); S. REP. No. 1563, 81st Cong., 2d Sess. 6 (1950); S. REP. No. 840, 81st Cong., 1st Sess. 3 (1949). Plans, 8, 9, and 10, which were permitted to become effective, transferred to the President the power to designate the chairmen, respectively, of the FTC, the FPC, and the SEC. Congress was undisturbed by this transfer because opponents of the plans were "unable to cite any evidence whatsoever of Presidential domination" of the five regulatory commission chairmen that the President already had the power to designate. S. REP. No. 1685, *supra*, at 5; S. REP. No. 1563, *supra*, at 6; S. REP. No. 1562, *supra*, at 5-6.

Ten years later it was said to be "obvious" that the purpose of making the chairmen the "executive" officers of the agencies was to provide the President with a direct contact with the agencies. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 13 (1960). Apparently, however, such action has had little practical effect. *Ibid.*; Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931, 951 (1960).

¹⁴⁰ Interdepartmental Bill § 302.

¹⁴¹ Interdepartmental Bill §§ 1(f), 303(a); see also § 303(g). See note 159 *infra*.

lines operating to the United States, not provided for in previous bills, was now provided and made "subject to the approval of the President."¹⁴² Related to these provisions was an involved section respecting agreements with foreign governments for the development of air commerce. The State Department was to negotiate such agreements "at the instance of the Board" and "as determined by the Board" and "subject to the approval of the President."¹⁴³

A second aspect of Board subordination to the President, the President's power to remove agency members, was less obvious on the face of the bill. The significance of the bill's provisions affecting this power can be understood only by reference to the dispute about the President's control over executive officers. One of the notable chapters of that dispute had been added by the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*,¹⁴⁴ which held that the provision in the Federal Trade Commission Act that its members may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office," coupled with a provision specifying a definite term of office, manifested an intention to limit the President's power of removal to the causes specified.¹⁴⁵ It further held that in so limiting the President's power, Congress did not impinge upon his constitutional prerogatives.¹⁴⁶ This holding was in spite of the Court's statement just ten years before in *Myers v. United States*¹⁴⁷ that the President had inherent constitutional powers to remove all executive officials, including members of "executive tribunals" having "duties of a quasi-judicial character."¹⁴⁸

The Interdepartmental Bill provided for six-year terms for members of the new agency, who were to be appointed by the President with Senate approval.¹⁴⁹ But it was silent on grounds for their removal, which apparently meant that the President could remove members without cause. The accepted doctrine was that the Presidential power of removal was inherent in the Presidential power of appointment unless Congress manifested a contrary intention¹⁵⁰ — an intention that in *Humphrey's* was found in the statutory fixing of the term of office and the laying down of specific causes for which appointees may be removed. Due to the Interdepartmental Bill's failure to specify causes for removal, presumably such a finding would not be warranted.¹⁵¹

142 See Interdepartmental Bill §§ 304(a),(b),(c),(e),(f).

143 Interdepartmental Bill § 401.

144 295 U.S. 602 (1935).

145 *Id.* at 621-26.

146 *Id.* at 626-32.

147 272 U.S. 52 (1925).

148 *Id.* at 135. *Myers* dealt specifically with the constitutionality of the congressional limitation on the President's power to remove postmasters, whose entire functions are indisputably executive in nature. In *Humphrey's* the Court said that affirmation of the President's inherent constitutional power of removal in *Myers* "is confined to purely executive officers," *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935), and that expressions in that opinion that went beyond the issue before the Court "are disapproved" insofar as inconsistent with the opinion in *Humphrey's*. *Id.* at 626.

149 Interdepartmental Bill §§ 201, 203.

150 See *Shurtleff v. United States*, 189 U.S. 311, 318 (1903); *Parsons v. United States*, 167 U.S. 324, 331 (1897); *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). But there was some question as to how explicit the congressional intention need be. See note 151 *infra*.

151 Some time later a unanimous Court decided in *Weiner v. United States*, 357 U.S. 349 (1958), that a person appointed by the President to the War Claims Commission, which Congress made an independent adjudicatory body, could not be removed by the President even

A third aspect of Presidential control over the agency was less ambiguous in its import. That was a section in the bill entitled, with the draftsman's tongue in cheek, "Administrative Review." It provided that the exercise of all the Board's powers or duties that were "not subject to review by courts of law shall be subject to the general direction of the President" and that the Secretary of Commerce should have general direction over the preparation of estimates of appropriations and the accounting for public funds.¹⁵²

The bill shed no helpful light on which of the Board's powers or duties were "subject to review by courts of law" and thus not subject to executive direction. One section did provide that any person "aggrieved" by an order of the Board, except "a final order approved by the President" respecting

though the statute did not specify causes for removal, because "no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." *Id.* at 356. The Court said that the "nature of the function" vested in an agency is the "most reliable factor" for inferring what were Congress' intentions as to the President's power to remove members. *Id.* at 353. This analysis had its genesis in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), in which the Court said that if the intention of Congress "were not clear upon the face of the statute, . . . it would be made clear by a consideration of the character of the commission and the legislative history . . ." of the act. *Id.* at 624. However, since the "character" of the new aviation agency of mixed functions was so vastly different from the Federal Trade Commission, whose duties were "predominantly quasi-judicial and quasi-legislative," *ibid.*, the Interdepartmental Bill's silence on grounds for removal might reasonably have been thought to avoid the *Humphrey's* result if no countervailing legislative history developed.

¹⁵² Interdepartmental Bill § 502. The Executive would have a voice in certain areas as a result of two other provisions. Section 402 of the Interdepartmental Bill gave the Postmaster General wide powers respecting mail transportation, including the power to specify "the schedules of any air line" and the terminals and stops on routes for carrying mail. As stated, these were drastic powers, but possibly the Interdepartmental Committee did not intend them to be as extensive as they seemed. The other provision was § 403, which had lesser implications for Executive control. It extended "under the authority of the Maritime Commission" the construction subsidy provisions of the Merchant Marine Act of 1936 to aircraft engaged in foreign commerce. And in the case of lighter-than-air aircraft, the extension was for both construction subsidy and operating subsidy. Here again, the Executive might have been drawn into the matter, since the Navy Department had the power of approval over plans and specifications of vessels eligible for construction aids. Merchant Marine Act of 1936, ch. 858, §§ 501(b), 502(a), 49 Stat. 1995, 1996.

Although an effort was made during 1938 to bring the Maritime Commission into the aviation picture, it never attained serious proportions. Section 211(g) of the Merchant Marine Act of 1935, ch. 858, 49 Stat. 1990, had directed the Maritime Commission to study and report on whether laws relating to shipping should be extended to aircraft engaged in foreign commerce. Its report was issued on November 13, 1937. U.S. MARITIME COMM'N, AIRCRAFT AND THE MERCHANT MARINE (1937). The report recommended that certain subsidy provisions of the maritime laws be extended to cover such aircraft. Pursuant to the recommendations of the Maritime Commission, through its Chairman, Joseph P. Kennedy, bills were introduced in both Houses of Congress in late 1937 providing for extension of the provisions of the Merchant Marine Act, "insofar as they are practically or appropriately applicable," to the "construction and operation of aircraft" used "in foreign and territorial commerce. S. 3078, 75th Cong., 2d Sess. § 3 (1937); H.R. 8532, 75th Cong., 2d Sess. § 4 (1937). The House bill was favorably reported, H.R. REP. NO. 1950, 75th Cong., 3d Sess. (1938), but it died after reopened hearings were held, disclosing the opposition of the airline industry to it. See *Hearings on Section 4 of H.R. 9710 Before the House Committee on Merchant Marine and Fisheries*, 75th Cong., 3d Sess. 19-37 (1938). At such reopened hearings the spokesman for the Interdepartmental Committee appeared. He did not endorse the amendment to the Merchant Marine Act, at least in the form under consideration. He would have limited the role of the Maritime Commission to providing the funds, with the actual giving of financial aid subject to the proposed civil aviation agency's approval. See *id.* at 3-19; see also *Hearings (on S. 3078) Before the Senate Committee on Commerce*, 75th Cong., 3d Sess., pt. 13, at 1252-54 (1938). In the end, the Civil Aeronautics Act of 1938 did provide that any loan or financial aid to an air carrier by an agency of the United States should be subject to approval by the Civil Aeronautics Authority. Civil Aeronautics Act of 1938, ch. 601, § 410, 52 Stat. 1003 (now Federal Aviation Act of 1958, § 410, 72 Stat. 769, as amended, 49 U.S.C. § 1380 (1964)).

licensing of foreign-flag carriers and United States-flag carriers in foreign commerce, "may obtain a review of such order" in a Court of Appeals.¹⁵³ The bill left open the question of what, if any, Board action not amounting to an aggrieving order might be "subject to review" in one way or another in a court of law and therefore not "subject to the general direction of the President." Much of what an agency does, short of an aggrieving order, is of great significance in administrative regulation. Thus, the mere adoption of a "rule" may not be an aggrieving order, but it could be finally determinative of aggrieving orders in the indefinite future.

Thus was the bill transmitted to Representative Lea by the Interdepartmental Committee. The Brownlow Report had made its impress, but in an elliptical way. And while Representative Lea's press release,¹⁵⁴ which was probably carefully drawn at or near the White House, referred to the Brownlow Report, it did not reveal much of what was actually proposed.

II. The Legislative Treatment of the President's Relationship to the New Agency

A. *The Legislative Treatment in the House*

1. The House Bill as Introduced.

The redrafting that occurred in the conferences between representatives of the Interdepartmental Committee and Gorrell and the resolution of differences by Representative Lea led to a bill, H.R. 9738, quite different from the Interdepartmental Committee's bill. Even so, the relationship to the Executive provided for in the Interdepartmental Committee's bill largely survived.

H.R. 9738 provided for an "Authority"¹⁵⁵ rather than a "Board." The Authority was to be composed of five members instead of three.¹⁵⁶ Like the Interdepartmental Bill, Lea's bill provided that each member would be appointed for a six-year term,¹⁵⁷ but it was silent on grounds for removal. The Lea Bill also was consistent with the Interdepartmental Committee's bill in its provisions that the Chairman should be designated annually by the President and should be "the executive officer" of the Authority.¹⁵⁸

The substantive provisions of H.R. 9738 included a complete rewriting and revision of the Air Commerce Act provisions dealing with safety, operation of the airways, and other matters, and the addition of new provisions — all to be administered by the Authority. There were even more elaborate provisions for economic regulation of the airlines than had been included either in the 1937 Lea-McCarran bills or in the Interdepartmental Bill. The result of all this, of course, was a conglomeration of executive, legislative, and judicial functions for the new agency even more extensive than those in the Interdepartmental Committee's proposal.

153 Interdepartmental Bill § 504.

154 See Part I, text accompanying notes 108-10 *supra*.

155 H.R. 9738, 75th Cong., 3d Sess. § 201(a) (1938). H.R. 9738 is reprinted at 1938 *House Hearings* 1-35.

156 H.R. 9738, *supra* note 155, § 201(a).

157 *Ibid*.

158 *Ibid*.

Like the Interdepartmental Committee's bill, H.R. 9738 provided that licensing of United States carriers in foreign and territorial commerce and licensing of foreign-flag carriers should be "subject to the approval of the President."¹⁵⁹ The provision respecting negotiation of agreements with foreign governments appearing in the Interdepartmental Committee's bill was revised somewhat in wording, but remained as complicated. It provided that whenever the Secretary of State and the Authority, restricting their decision to "the aspects of the public interest involved in the discharge of their respective functions," determined that the public interest required it, the Secretary of State was to initiate and conduct such negotiations and conclude such agreements "as may be satisfactory to the Authority and to the President."¹⁶⁰

Also retained from the Interdepartmental Committee's bill was the provision that exercise of the powers and duties of the Authority "which are not subject to review by courts of law shall be subject to the general direction of the President."¹⁶¹ But the provision that appropriation estimates and accounting for funds should be under the general direction of the Secretary of Commerce was dropped.

As to which of the Authority's powers or duties were "subject to review by courts of law" and thus not subject to Executive direction, H.R. 9738 was no more enlightening than had been the Interdepartmental Committee's bill. Some change was made in the provision for judicial review. H.R. 9738 provided

159 H.R. 9738, *supra* note 155, §§ 801(b)-(e). H.R. 9738 separately defined "foreign air transportation" and "overseas air transportation." The latter included common carriage by aircraft between the mainland and the territories and possessions of the United States or between its territories and possessions. *Id.* § 1(31). "Foreign air transportation" included such carriage between "any place in the United States," which included the territories and possessions, *id.* § 1(37), "and any place outside thereof." *Id.* § 1(21). Licensing orders involving United States carriers in both "foreign" and "overseas" air transportation were made subject to Presidential approval, as were licensing orders involving air transportation within a territory or possession. *Id.* §§ 801(b),(c). (Air transportation within a territory or possession was elsewhere included in the definition of "interstate air transportation." *Id.* § 1(24).)

The scope of Presidential power over United States carrier licenses in the Interdepartmental Bill was similar. Licensing orders involving United States airlines in "foreign air commerce" were made subject to Presidential approval. § 303(a). The definition of "foreign air commerce" in the Interdepartmental Bill included air commerce carried on between the "continental United States . . . and any place outside thereof" and air commerce between a territory or possession on the one hand and another territory or possession or a foreign country on the other. § 1(f). Thus, in terms of places "between" which transportation might be performed, the Interdepartmental Bill's "foreign air commerce" included the same transportation as H.R. 9738's "foreign" and "overseas" air transportation. The Interdepartmental Bill, § 1(f), also included as "foreign air commerce" commerce within a territory or possession of the United States.

In geographic terms, therefore, the scope of the transportation requiring Presidential approval for United States carrier licenses was the same in the two bills. On the other hand, the Interdepartmental Bill, §§ 303(a),(g), required Presidential approval only for the issuance or transfer of such licenses, while H.R. 9738, § 801(b), required it for issuance, denial, transfer, amendment, cancellation, or suspension of such licenses. H.R. 9738, § 801(c), also required Presidential approval of the terms, conditions, and limitations in such licenses. The Interdepartmental Bill did not.

The statute finally enacted, the Civil Aeronautics Act of 1938, adopted definitions of "foreign" and "overseas" air transportation and a scope of Presidential review of United States carrier licenses that, in geographic terms, were essentially those in H.R. 9738. See Civil Aeronautics Act of 1938, ch. 601, §§ 1(21), 801, 52 Stat. 979, 1014 (now Federal Aviation Act of 1958, §§ 101(21), 801, 72 Stat. 738, 782, 49 U.S.C. §§ 1301(21), 1461 (1964)).

160 H.R. 9738, *supra* note 155, § 802.

161 H.R. 9738, *supra* note 155, § 801(a).

that any order of the Authority could be reviewed by a court of appeals upon petition by any person "disclosing a substantial interest in such order" except for "an order not properly subject to review by courts of law."¹⁶² This provision did not in terms except review of a Presidentially approved licensing order, as had the bill of the Interdepartmental Committee;¹⁶³ thus the question whether such a licensing order was reviewable in court was left open.¹⁶⁴ Also the Interdepartmental Committee's bill had provided for court review of orders that aggrieved anyone, whereas H.R. 9738 provided for review by an interested person of any order except one "not properly subject to review by courts of law." This difference, though subtle, reflected the difficulty draftsmen were having with the concept of what was to be reviewable in court and what was to be subject to the "general direction" of the President.

2. The House Hearings — Hostile Probing by the Minority.

Within a few days after Congressman Lea introduced H.R. 9738, hearings began before his House Committee. The first witness was the spokesman for the Interdepartmental Committee, Mr. Hester. He explained that all the executive departments represented on the Interdepartmental Committee favored H.R. 9738.¹⁶⁵ He was called upon to testify repeatedly during the hearings, with Dr. Fagg participating on several occasions.

During much of Mr. Hester's testimony there was hostile probing by minority members of the Committee, notably the ranking minority member, Representative Mapes of Michigan. This probing proceeded from the premise that the President's 1935 message on the report of the Federal Aviation Commission had indicated his approval of airline regulation by the ICC, and that in 1937 the House Committee, in unanimously reporting the Lea Bill for the ICC regulation, had relied on that approval.¹⁶⁶ The minority wanted to know what evidence there was that the President had changed his mind and why the 1937 bill should not be adhered to.¹⁶⁷

Throughout all of the questioning of Hester there was much sparring, some very loose discussion of the constitutional prerogatives of the Executive, and reference to the difficulty of clearly defining the Executive's role. The provision that licensing of United States carriers in foreign and territorial commerce and of foreign-flag carriers should be subject to the President's approval was specific and seemed to concern no one, even though the bills favorably reported in 1937 in both House and Senate, which had provided for regulation of United States carriers in foreign and territorial commerce¹⁶⁸ (but not

162 H.R. 9738, *supra* note 155, § 1005(a).

163 Note 153 *supra*.

164 Cf. note 272 *infra*.

165 1938 House Hearings 36.

166 See H.R. REP. NO. 911, 75th Cong., 1st Sess. (1937). The premise, however, was questionable. See Part I, text accompanying notes 93-95 *supra*.

167 Ultimately, when H.R. 9738 was favorably reported by the House Committee, the entire minority membership signed a report adhering to the bill reported in 1937. H.R. REP. NO. 2254, 75th Cong., 3d Sess., pt. 2 (1938).

168 See H.R. 7273, 75th Cong., 1st Sess. § 302(b) (Union Calendar No. 317, May 28, 1937); S. 2, 75th Cong., 1st Sess. § 302(b) (Calendar No. 702, June 7, 1937).

for regulation of foreign-flag airlines¹⁶⁹), had provided with respect to licenses in such commerce only that the agency should "consult with the Secretary of State in respect of the international policy involved."¹⁷⁰ The great controversy arose over the vague provision in H.R. 9738 that there should be executive direction respecting matters "not subject to review by courts of law." Nothing like this had appeared in the 1937 bill.

In his questioning of Hester, Representative Mapes suggested that H.R. 9738 was "in harmony with the recommendation of the Brownlow Committee's report . . ."¹⁷¹ This Hester denied, since the proposal did not put the Authority in an executive department with an administrative section and a judicial section.¹⁷² Then Representative Mapes asked whether the Interdepartmental Committee had attempted "to carry out the ideas of the Brownlow Committee in setting up this new Authority?"¹⁷³ Hester replied that "the interdepartmental draft" brought to Congressman Lea

did have a provision in it that to a certain extent related to the Brownlow Committee Report; but Mr. Lea was unwilling to accept the provision and so we took it out of the Department of Commerce and it is a completely independent establishment, both with respect to its executive authority and its administrative work.¹⁷⁴

That reply was not an effective parry of Representative Mapes' thrust. The Congressman drew attention specifically to the provision that the President should have general direction of the Authority respecting powers and duties "which are not subject to review by courts of law." He suggested that he was not clear as to its meaning.¹⁷⁵ Hester candidly admitted "considerable difficulty"

169 Since 1926 foreign-flag air carriers had operated to and from the United States under authorizations issued by the Secretary of Commerce pursuant to § 6(c) of the Air Commerce Act of 1926, ch. 344, 44 Stat. 572. Under this section such authorization was permissible if similar privileges were granted to United States air carriers by the country of the foreign carrier's nationality. The Air Commerce Act would have been unaffected by the economic regulatory bills reported in 1937. Senator McCarran's 1937 airline safety bill, S. 1760, which would have amended certain other provisions of the Air Commerce Act, also had left this section untouched.

170 H.R. 7273, *supra* note 168, § 305(c); S. 2, *supra* note 168, § 305(c). Both of the 1937 bills had provided that on applications of United States air carriers to engage in foreign commerce "due notice shall be given" to the Secretaries of State, Commerce, and the Treasury and the Postmaster General. Assistant Secretaries of these four departments had comprised an informal committee that was known as the Interdepartmental Committee on International Civil Aviation, which had been functioning for several years to deal with certain of aviation's international problems. See *Hearings on H.R. 5234 and H.R. 4652 Before the House Committee on Interstate and Foreign Commerce*, 75th Cong., 1st Sess. 123 (1937). This committee was explicitly named in § 305(c) of H.R. 7273 as introduced, but reference to it did not appear in the reported bill. A spiritual successor to the Interdepartmental Committee on International Civil Aviation is the present Interagency Group on International Aviation, which is an informal body consisting of representatives of the Department of Defense, the Department of Commerce, the Department of State, the Federal Aviation Agency, and the Civil Aeronautics Board. As the name suggests, this group consults on international aviation problems. See Exec. Order No. 10883, 25 Fed. Reg. 7710 (1960).

171 *1938 House Hearings* 52.

172 *Id.* at 52-53.

173 *Id.* at 53.

174 *Ibid.* The only thing to which Hester could have referred was the elimination of the provision in § 502 of the Interdepartmental Bill that the Secretary of Commerce should have general direction over the preparation of appropriations estimates and accounting for public funds.

175 *1938 House Hearings* 53.

with the provision and that his group had been "unable to draw any definite line of demarcation, and we think it is a matter which should be left to the courts to decide."¹⁷⁶

Throughout the questioning of Hester, the difficulty of determining which of the Authority's functions would be subject to Executive direction recurred. At one point Hester suggested that the bill might be amended to provide that the President's power to direct might be confined to matters "not subject to review by the courts" and "which are purely executive in character."¹⁷⁷ But at once Representative Mapes wanted to know which of the Authority's functions would be "purely executive."¹⁷⁸ Hester named a few and then offered to "attempt to list those and put them in the record."¹⁷⁹ Representative Mapes rejoined that "it would be well to have something of the kind in the record" ¹⁸⁰ But no such listing ever appeared.

It is curious that at no time did the hostile probing of Hester advert to the provision that the Authority's Chairman should be designated annually by the President and should be "the executive officer of the Authority."¹⁸¹ Yet on several occasions Hester referred to this provision in such a way as to give it much more significance than appeared in the language of the bill. He expressly testified that "the Authority would exercise its executive functions through its chairman subject to the general direction of the President"¹⁸² and that "executive work would be funneled through the chairman who would be the executive officer of the agency."¹⁸³ Since Hester also testified that about ninety percent of the work of the proposed Authority would be "executive" in nature,¹⁸⁴ his statement could well have meant to lay a foundation for a regime whereby the annually designated Chairman would, in practical effect, be a single administrator — with only nominal participation by his colleagues — carrying out the President's "general direction" for ninety percent of the Authority's work. Presidential domination of the agency, via the Chairman, might have been thought no idle threat.¹⁸⁵

Nor was Hester questioned concerning the power of the President to remove members of the Authority, causes for which were not specified in H.R. 9738. Hester himself, however, raised the *Humphrey's* case. He said that it had placed regulatory bodies performing as legislative agents beyond the control of the President and that the provision for "general direction" would assure

176 *Ibid.*

177 *Id.* at 136.

178 *Ibid.*

179 *Id.* at 137.

180 *Ibid.*

181 See note 139 *supra* and accompanying text.

182 1938 House Hearings 38.

183 *Id.* at 145.

184 *Id.* at 49.

185 Since Hester never specified what was "executive," the import of the proposal was by no means clear. Construction and operation of the airways plainly would be "executive." In terms of the Authority's expenditures, that and closely related functions would constitute a very large portion of the Authority's work. In the Brownlow sense, much else could have been deemed "executive," including such activities as staff presentation of economic regulatory cases. Likewise, there was a tendency to refer to all safety functions as "executive," even though they included not only rulemaking and prosecution but also licensing and judging.

to the President his proper voice in the executive work of the agency.¹⁸⁶ Hester also testified that it would be "clearly unconstitutional" to place the various aviation functions contemplated for the new agency in the ICC because the Supreme Court had decided that the ICC was outside the executive branch of the Government.¹⁸⁷ The Supreme Court in *Humphrey's*, however, was dealing with an agency performing only quasi-judicial and quasi-legislative functions. It had specifically reserved for future decision constitutional questions in a "field of doubt," *i.e.*, involving agencies whose functions were neither solely executive nor wholly quasi-judicial and quasi-legislative.¹⁸⁸ Hester himself suggested¹⁸⁹ that the ICC, because of certain executive functions it performed, might already be in that constitutional "field of doubt." Clearly the proposed new agency for aviation, with its mixed executive and nonexecutive functions, would have raised constitutional questions unanswered by *Humphrey's* if placed beyond Presidential influence in all of its functions. But H.R. 9738 seemed not to propose that the new agency be cast into the constitutional "field of doubt." Its silence on grounds for removal presumably meant that, quite apart from constitutional considerations, the President would have unlimited power to remove members of the Authority.¹⁹⁰ If, however, this was proper deference to the President as head of the executive branch of the Government, it also threatened serious impairment of the independence of the Authority in the exercise of its nonexecutive functions. Indeed, the President's unlimited power of removal might have posed a graver threat to agency independence than the provision for "general direction" by the President on matters "not subject to review in courts of law," which had excited so much questioning of Hester.

Finally, Representative Wadsworth of New York voiced a thought that penetrated to the quick. Had the thought been seriously pursued, it could well have derailed legislation in 1938. He suggested to Hester that the problem of the Executive's role in the matter, which had been the foundation of Hester's argument that a new Authority rather than the ICC was necessary, could be taken care of by limiting the ICC to conventional regulatory functions, by providing that the licensing function for foreign and territorial commerce be subject to the President's approval, and by leaving all other functions respecting safety regulation and construction and maintenance of the federal airways—the functions that Hester seemed to insist were "executive"—in the Department of Commerce, thus eliminating "the necessity, or supposed necessity, of establishing a new commission."¹⁹¹ Hester almost got into deep water; he congratulated Representative Wadsworth for approaching the problem "from a very constructive angle" and for making "a fine suggestion."¹⁹² Apparently he interpreted the Congressman's thought as one that, if applied to all the independent commissions, might result in the transferring of all "executive" functions from them to executive departments. Dr. Fagg quickly saw the danger. Represen-

186 1938 House Hearings 39.

187 *Id.* at 49.

188 *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935).

189 1938 House Hearings 50-51.

190 See notes 144-51 *supra* and accompanying text.

191 1938 House Hearings 148.

192 *Ibid.*

tative Wadsworth was neatly leading right back to the Lea-McCarran proposal of 1937, which would have thrown everything out of gear. Dr. Fagg interrupted and listed a number of points of a safety or "executive" nature that in the interest of efficient government, he argued, should be handled by the same agency that was to deal with the economic regulatory problems of the airline industry.¹⁹³ After Dr. Fagg had finished, Representative Wadsworth figuratively threw up his hands, and Chairman Lea quickly adjourned the day's session.¹⁹⁴

From that point on, it was apparent that there would be legislation in 1938. Dr. Fagg had established the point that a vast range of powers had to be vested in a single agency; Hester had established the point that with so many of these powers "executive" in nature, the agency could not be set completely adrift like an independent commission. But within the House Committee the hostile probing of Hester had set minds working toward a more satisfactory solution than that proposed in the vague provision that the Executive would have "general direction" respecting all matters "not subject to review by courts of law."

3. The Solution in the House — Creation of an Administrator Within the Authority.

The problem that the draftsmen were having regarding the President's role in supervising the new agency's work was resolved by Representative Bulwinkle's proposal that there be a person within the agency to handle specified executive functions who would be directly subject to the will of the President.¹⁹⁵

In H.R. 9738, as it was reported by the House Committee, there was provision for an Administrator.¹⁹⁶ While the Administrator was "in" the Authority, he was to be appointed by the President with the advice and consent of the Senate.¹⁹⁷ No term of office was specified, nor was there specification of causes for the President's removing him. The functions given to the Administrator were executive in character: generally, he was empowered to "encourage and foster the development of civil aeronautics and air commerce"; he was given comprehensive powers to establish and maintain civil airways, to survey and make recommendations to Congress concerning airport construction and operation, and to undertake and supervise experimental work and testing concerning aircraft and aircraft appliances;¹⁹⁸ and finally, he was to exercise "such other powers and duties as may be assigned to him by the Authority."¹⁹⁹ This final function was a most important element in Representative Bulwinkle's proposal, for it made possible the Authority's employment of an executive official

193 *Id.* at 149-50.

194 *Id.* at 151.

195 See 83 CONG. REC. 8868 (remarks of Representative Lea).

196 H.R. 9738, 75th Cong., 3d Sess. § 201(b) (Union Calendar No. 831, April 28, 1938). See H.R. REP. NO. 2254, 75th Cong., 3d Sess. 5-6 (1938). In the usual course of House procedure, the committee amendments to H.R. 9738 would have been presented on the House floor, or the committee could have introduced and reported a new bill embodying the amendments. However, by resolution the House agreed to treat H.R. 9738 as amended by the committee as an original bill, thereby eliminating the need to have agreement of the House on the specific amendments made by Lea's committee. 83 CONG. REC. 6401, 6406 (1938).

197 H.R. 9738, *supra* note 196, § 201(b).

198 H.R. 9738, *supra* note 196, §§ 301-04.

199 H.R. 9738, *supra* note 196, § 305.

and his staff in numerous ways without impairment of the Authority's own independence.

Under this setup, the members of the Authority were reduced from five to three. Appointed by the President with the advice and consent of the Senate, they would serve for six-year terms and be removable by the President for "inefficiency, neglect of duty or malfeasance in office."²⁰⁰ Although the provision that the Chairman was to be designated annually by the President was retained,²⁰¹ the provision that the Chairman would be the "executive officer" of the Authority was deleted.

Another officer was provided for "in" the Authority, a Director of the Safety Division, whose functions, to be exercised "independently of the Authority,"²⁰² were limited to investigating and studying accidents and making recommendations to the Authority for the prevention of future accidents.²⁰³ He, too, was to be appointed by the President with Senate approval.²⁰⁴ No term of office for this Director was fixed, nor was there any expressed limitation on the President's power to remove him. (As originally introduced, the House bill had provided for a five-man Air Safety Board under Civil Service and subject to the supervision of the five-man Authority, with functions, principally accident investigation, similar to those to be performed by the Director.²⁰⁵) The separate Safety Division with a Director to exercise functions "independently" of the Authority was established "to insure the impartial investigation of accidents."²⁰⁶ This device was in part a result of the Copeland Committee's studies and the Department of Commerce's attempt to exculpate itself for the Cutting accident by placing the blame on others.²⁰⁷ No limitation on the President's power to remove the Director of the Safety Division was expressed, apparently because it was believed that his functions, since they related to safety, were "executive" in character.²⁰⁸

4. Summary of the Final House Bill.

Thus was the basic organization of the Authority in the bill reported by Lea's Committee; thus was it adopted by the House. The powers of safety regulation of civil aviation and of economic regulation of the airlines and certain other powers were vested in the three-man Authority. "In" the Authority, but independent of it and completely subject to the Executive, were an Administrator to exercise certain specified "executive" functions and such other functions as the

200 H.R. 9738, *supra* note 196, § 201(a).

201 *Ibid.*

202 H.R. 9738, *supra* note 196, § 701(c).

203 H.R. 9738, *supra* note 196, § 701(b).

204 See H.R. 9738, *supra* note 196, § 701(a).

205 H.R. 9738, *supra* note 155, §§ 701-02. The Interdepartmental Bill had said nothing about a separate organization for accident investigation.

206 H.R. REP. NO. 2254, 75th Cong., 3d Sess. 10 (1938).

207 See S. REP. NO. 2455, 74th Cong., 2d Sess. 14 (1936). See generally text accompanying notes 126-30 *supra*.

208 See 83 CONG. REC. 7093 (1938) (remarks of Representative Lea). See also note 185 *supra*. On the floor of the House, Representative Crosser moved to amend the provisions establishing the Safety Division and its Director by substituting a three-man Air Safety Board, members of which would be appointed by the President to serve fixed terms subject to removal by the President for specific causes. 83 CONG. REC. 7091 (1938). Representative Crosser's amendment was rejected. *Id.* at 7095.

Authority might assign him, and a superinvestigator of accidents. This made it possible to eliminate the controversial provision that the Authority was subject to the "general direction" of the President on matters not subject to court review. Retained was the provision for Presidential approval of licensing orders involving either a foreign-flag airline or a United States-flag airline in foreign and territorial commerce,²⁰⁹ to which there had been no objection. The provision that judicial review was available to "any person disclosing a substantial interest" in an order issued by the Authority was also retained.²¹⁰ However, the phrase excluding from judicial review orders "not properly subject to review" was changed to except only orders involving licensing of foreign-flag airlines subject to the approval of the President.²¹¹ Finally, the reported House bill kept the involved provision concerning negotiations for international aviation agreements.²¹²

B. *Progress of Aviation Bills in the Senate*

While H.R. 9738 was being drafted and later when its course through the House was being steered, there was vigorous activity in the Senate, principally on bills introduced by Senator McCarran. On January 7, 1938, only three days after the confidential printing of the Interdepartmental Committee's bill, Senator McCarran produced the first of a number of amendments in the nature of substitutes for his S. 2, which had remained from the first session of that Congress in 1937.²¹³ The first amended bill in 1938 took account of some provisions that had appeared in the Interdepartmental Bill. Most significantly, it provided for regulation by a new commission, whereas S. 2 originally provided for regulation by the ICC. Senator McCarran readily returned to the concept of a new agency; it had been in his original aviation bill introduced in 1934.²¹⁴ Throughout January and February of 1938, McCarran and his staff worked on a new bill, producing at least eight new printed versions of S. 2 and culminating in a final committee print dated March 3, 1938.²¹⁵ This draft, while in many respects similar in principle to H.R. 9738, was quite different from it in form and language and on a number of substantive matters. This bill was introduced with a new number²¹⁶ on March 11, 1938, and was referred to the Senate Committee on Interstate Commerce.²¹⁷

1. Efforts to Develop a Workable Senate Bill.

Not long after Senator McCarran introduced this bill, the Senate Committee on Commerce and its Chairman, Senate Copeland, entered the picture.

209 H.R. 9738, *supra* note 196, § 801.

210 H.R. 9738, *supra* note 196, § 1004(a).

211 *Ibid.* See text accompanying notes 162-64 *supra*.

212 H.R. 9738, *supra* note 196, § 802. See text accompanying note 160 *supra*.

213 Senator McCarran's draft bill of January 7, 1938, in the nature of a substitute for S. 2 was printed as a confidential committee print. Copies of this print are in the library of the Air Transport Association, Washington, D. C.

214 See S. 3187, 73d Cong., 2d Sess. (1934); Part I, note 57 *supra* and accompanying text.

215 S. 2, amendment in the nature of a substitute, 75th Cong., 1st Sess. (Comm. Print, March 3, 1938).

216 S. 3659, 75th Cong., 3d Sess. (1938). There was one difference between McCarran's S. 2 draft of March 3, 1938, and S. 3659 as introduced: S. 2 was a proposed amendment to the Interstate Commerce Act; S. 3659 was not.

217 83 CONG. REC. 3229 (1938).

This committee, which ordinarily would not have taken jurisdiction over legislation on such aviation matters, was familiar with aviation through its studies of air safety.²¹⁸ Twice the committee had issued reports on air safety, the second suggesting that broad legislative recommendations would be forthcoming.²¹⁹ On March 30, 1938, it issued its third report,²²⁰ which recommended that an independent agency to deal with all civil aviation be created by the "immediate enactment of a compromise measure embracing all the noncontroversial points" in Senator McCarran's bill and Representative Lea's H.R. 9738.²²¹

On the same day, Senator Copeland introduced a bill²²² that was evidently intended to be the compromise measure. It was difficult to see any compromise, however, because Copeland's bill was virtually identical to the original H.R. 9738. With respect to the organization of the agency, it provided for the creation of a five-member Authority, whose members would serve six-year terms but without limitation upon the President's power of removal.²²³ There would be annual Presidential designation of the Chairman, who would be the "executive officer" of the Authority.²²⁴ The provision for the President's approval of licensing in foreign and territorial commerce,²²⁵ the exclusion from judicial review of orders "not properly subject to review,"²²⁶ the five-man Air Safety Board under Civil Service,²²⁷ and the involved foreign agreements section²²⁸ were all as in the bill then pending before the House Committee. But on one important point Copeland's bill differed from the House bill: it contained nothing like the provision for "general direction" by the President on matters not subject to review in court that had appeared in the House bill. Copeland's bill would have created the Authority "in the Department of Commerce,"²²⁹ but apparently this phrase was merely to give the Committee on Commerce jurisdiction over the subject of the bill. On April 5, 1938, Senator Copeland held hearings on his bill.²³⁰ The only witness called was Mr. Hester, the spokesman for the Interdepartmental Committee.

On the same day that Senator Copeland introduced his "compromise" bill, Senator Truman introduced a measure in the form of an amendment in the

218 See text accompanying notes 126-30 *supra*.

219 S. REP. No. 185, 75th Cong., 1st Sess. (1937); S. REP. No. 2455, 74th Cong., 2d Sess. (1936). The resolution pursuant to which the Committee on Commerce's studies were made had also commissioned the committee to make legislative recommendations. S. Res. No. 146, 74th Cong., 1st Sess., 79 CONG. REC. 8823-24 (1935). The Committee's 1937 report had stated that it was formulating various bills. S. REP. No. 185, *supra*, at 46. The Committee had concluded that safety was closely related to other aspects of regulation and apparently felt itself not limited to making recommendations directly concerning safety and the Department of Commerce. See *id.* at 45-46. See generally S. REP. No. 185, *supra*.

220 S. REP. No. 185, 75th Cong., 3d Sess., pt. 2 (1938).

221 *Id.* at 1-2.

222 S. 3760, 75th Cong., 3d Sess. (1938).

223 S. 3760, *supra* note 222, § 201(a) (1938).

224 *Ibid.*

225 S. 3760, *supra* note 222, § 801.

226 S. 3760, *supra* note 222, § 1005(a).

227 S. 3760, *supra* note 222, § 701(a).

228 S. 3760, *supra* note 222, § 802.

229 S. 3760, *supra* note 222, § 201(a).

230 See *Hearings on S. 3760 Before the Senate Committee on Commerce*, 75th Cong., 3d Sess. (1938).

nature of a substitute for Senator McCarran's bill.²³¹ It was very nearly a carbon copy of Copeland's bill and was, therefore, very much like the original H.R. 9738. Senator Truman was Chairman of the subcommittee of the Senate Committee on Interstate Commerce that was to hold hearings on McCarran's bill. At those hearings, which began the day after Copeland's brief hearings, the spokesmen for the Interdepartmental Committee and for the airline industry both said that they preferred Truman's substitute and expressed the hope that Senator McCarran would accept it.²³²

The purpose of this maneuvering was to pass a Senate bill that would be sufficiently comparable to the House bill to ease compromise in a conference committee. Although Senator Copeland's committee had an apparently legitimate interest in aviation legislation, his entry at this point might have seemed an unwarranted intrusion on Senator Truman's subcommittee, to which Senator McCarran's bill had been referred. But Copeland's action was with Truman's understanding and blessing. Truman was generally committed to the terms of the Lea Bill. Since it was uncertain as to how far McCarran would go in compromising differences, there was the danger that critical time might be lost in disputes with McCarran within Truman's subcommittee. Therefore, Copeland made himself available and put his committee in a position, with the nominal hearings he had held on his bill, to report a bill quickly if the situation called for it.

Finally, on April 14, 1938, after all Senate hearings had concluded, Senator McCarran introduced a further bill,²³³ which was referred to Senator Copeland's Committee on Commerce.²³⁴ An identical bill was introduced by Senator McCarran five days later under a different number.²³⁵ This bill was referred to the Committee on Interstate Commerce and thereby to Truman's subcommittee.²³⁶ This was an important step in the development of a Senate bill that could be readily accommodated with the House bill in conference. The McCarran Bill that had been before the Truman subcommittee had been similar

231 S. 3659, amendment in the nature of a substitute, 75th Cong., 3d Sess. (March 30, 1938).

232 See *Hearings on S. 3659 Before a Subcommittee of the Senate Committee on Interstate Commerce*, 75th Cong., 3d Sess. 15, 26 (1938).

233 S. 3845, 75th Cong., 3d Sess. (1938).

234 83 CONG. REC. 5379 (1938). How this bill came to be referred to the Committee on Commerce when the Committee on Interstate Commerce apparently had jurisdiction over its subject is not clear. This bill did not provide for the creation of the agency "in the Department of Commerce," as had Senator Copeland's S. 3760. See note 229 *supra* and accompanying text. Senator McCarran evidently was able to choose between the two committees since it was far from clear that the apparent jurisdiction of the Committee on Interstate Commerce was exclusive. Senate committee jurisdiction over civil aviation remained undefined until the enactment of the Legislative Reorganization Act of 1946. The act amended Senate Standing Rule XXV to consolidate the Senate Committee on Interstate Commerce and the Senate Committee on Commerce into a single committee, the Senate Committee on Interstate and Foreign Commerce, and to give exclusive jurisdiction over civil aviation to the new committee. See Legislative Reorganization Act of 1946, ch. 753, § 102, 60 Stat. 817. Until then each of the two Senate committees apparently had, to some extent, nominal jurisdiction over civil aviation. See *Hearings Before a Joint Committee on the Organization of Congress*, 79th Cong., 1st Sess. 53-54 (1946); cf. S. REP. NO. 1400, 79th Cong. 2d Sess. 14 (1946). The name of the consolidated Senate committee was changed in 1961 to the Committee on Commerce. See S. Doc. No. 1, 88th Cong., 1st Sess. 29 (1963) (Senate Standing Rule XXV(f)).

235 S. 3864, 75th Cong., 3d Sess. (1938).

236 83 CONG. REC. 5504 (1938).

to Lea's bill in the House in broad principle only. Its accommodation with the Lea Bill in conference would have been a vast undertaking. The bill that Senator Copeland had introduced and the substitute for McCarran's bill that Senator Truman had laid before his subcommittee would have greatly reduced possible conflict between Senate and House versions. These measures, however, lacked McCarran's endorsement; and it seemed quite likely that, if they were pushed to the exclusion of McCarran's bill, McCarran would revolt, with the possible consequence an impasse in the Senate. McCarran's two latest bills, one referred to Copeland's committee and the other to Truman's subcommittee, had been drafted by McCarran "to follow the outline" of the Copeland Bill and the Truman substitute.²³⁷ McCarran had also adopted the "substance" of the Copeland Bill but only insofar, he later said, as it was possible "without undue sacrifice of the principles and provisions" of his earlier bill.²³⁸ Thus, McCarran himself was now committed to the form of the House bill and many of its provisions, but many differences remained.

Finally it proved expedient to have Senator Copeland's Commerce Committee report a bill, rather than have the Committee on Interstate Commerce do so.²³⁹ The Committee on Commerce reported the recent McCarran Bill that had been referred to it.²⁴⁰

While the Committee on Commerce had reported McCarran's bill, there was an understanding between Copeland and Truman that a series of amendments would be offered on the floor. They were designed, in the main, to bring the measure into closer conformity to what was being developed in the House, and as many of those amendments would be adopted as reasonably possible short of precipitating a damaging wrangle. Before the various amendments were discussed on the floor, Senator Truman said that he was prepared to offer a substitute measure if it were not possible to amend the McCarran Bill sufficiently so that agreement between the House and Senate would be possible.²⁴¹ Certain amendments presented by Senator Copeland as committee amendments and certain others introduced by Senator Truman were adopted without strain,²⁴² and Senator Truman never did offer his substitute. One amendment, however, nearly resulted in trouble. Introduced by Senator Truman, it concerned the power of the President to remove members of the Authority — a provision which, Truman said, was "the fundamental difference" between his substitute and McCarran's bill.²⁴³

237 See *id.* at 6636 (remarks of Senator McCarran).

238 *Ibid.*

239 Truman's subcommittee amended S. 3845, the McCarran bill that had been referred to the Committee on Interstate Commerce, and reported it to the full committee. The Chairman of the full committee, however, was busy with other matters at that time so the McCarran bill could not be quickly reported. See 83 CONG. REC. 6725 (1938) (remarks of Senator Truman). It was apparently at that point that it was decided that Senator Copeland's committee should report the bill.

240 S. REP. NO. 1661, 75th Cong., 3d Sess. (1938), reporting S. 3845. The circumstances that caused Copeland's committee to report the bill perhaps explain why the report was a sketchy two pages.

241 83 CONG. REC. 6725 (1938).

242 See *id.* at 6746-70.

243 *Id.* at 6728.

2. The Senate's Treatment of the Relationship of the President to the New Agency.

Truman's amendment was to strike the provision in McCarran's bill that members of the Authority could be removed by the President "for inefficiency, neglect of duty, or malfeasance in office."²⁴⁴ To this amendment McCarran violently objected. He said that if the amendment passed, he would have his name removed from the bill.²⁴⁵ Passionately he promised: "I shall stand on the floor of the Senate as long as I have the strength to stand to defeat the bill, because the amendment destroys everything worthwhile in the bill."²⁴⁶

Debate ranged over the kinds of functions to be performed by the new agency, the implications of the *Humphrey's* doctrine, and the constitutional prerogatives of the President, with McCarran frequently voicing his undiminished opposition to the amendment.²⁴⁷ Put to a vote, Truman's amendment was adopted and the controverted phrase was stricken.²⁴⁸ McCarran did not carry out his threat to withdraw sponsorship of the bill, and its progress continued.

There were many other, less fundamental, differences between McCarran's bill and the Copeland and Truman measures. But McCarran had written into his bill the provision that licensing orders in foreign and territorial commerce would be subject to Presidential approval,²⁴⁹ which Copeland and Truman had taken from the House bill. McCarran had also written into his bill the Copeland-Truman provision taken from the House bill that the Chairman would be the "executive officer" of the Authority,²⁵⁰ but McCarran's bill provided that the first chairman would be appointed chairman for three years rather than designated annually and that subsequent chairmen would be appointed for full six-year terms.²⁵¹ One of the committee amendments, however, deleted several words with the curious effect of eliminating any procedure for designating a chairman after the first chairman had served.²⁵² McCarran also wrote into his bill a provision on judicial review similar to that in the Copeland-Truman (and House) measures. It provided for review of the Authority's orders on petition by anyone "disclosing a substantial interest" in them.²⁵³ But McCarran's judicial review section, in place of the vague exclusion from review of orders "not properly subject to review," made unreviewable licensing orders "approved by the President" involving a United States carrier in foreign air transportation or a foreign-flag line.²⁵⁴ A committee amendment, however, altered this provision to make unreviewable only orders affecting foreign-flag lines "subject to the approval of the President."²⁵⁵ McCarran also had accepted the

244 S. 3845, *supra* note 233, § 201(b).

245 83 CONG. REC. 6856 (1938).

246 *Ibid.*

247 See *id.* at 6854-67.

248 The vote was 34-28 in favor of Truman's amendment. *Id.* at 6868.

249 S. 3845, *supra* note 233, § 801. For minor committee amendments to this provision, bringing it into closer conformity to the corresponding House provision, see 83 CONG. REC. 6761 (1938).

250 S. 3845, *supra* note 233, § 201(a).

251 *Ibid.*

252 See 83 CONG. REC. 6748 (1938).

253 S. 3845, *supra* note 233, § 1006(a).

254 *Ibid.*

255 83 CONG. REC. 6764 (1938).

involved provision dealing with foreign agreements,²⁵⁶ which Copeland and Truman had adopted from the House bill. This provision, however, was deleted on the Senate floor by an amendment proposed by Senator White, who apparently was not privy to the Copeland-Truman understanding. The amendment was offered with the assertion that giving the Authority veto power over international negotiations would impinge upon the President's constitutional prerogatives in foreign affairs.²⁵⁷

With respect to the Air Safety Board, McCarran went well beyond the Copeland-Truman provisions. Whereas their measures, like the bill originally introduced in the House, had provided for a five-man Air Safety Board under Civil Service to investigate accidents and study safety matters with the Authority's supervision, McCarran proposed an independent agency "within" the Authority, a five-member Air Safety Board with its members to be appointed by the President with Senate approval for six-year terms.²⁵⁸ Moreover, it specified causes for removal by the President of members of the Board, which, under *Humphrey's*, would presumably be the only causes for removal.²⁵⁹ The Air Safety Board's basic function remained accident investigation, but its independent powers to investigate were considerably broadened.²⁶⁰ No amendments to diminish the power or the "independence" of the Air Safety Board were offered, and McCarran's independent agency within the Authority survived.

3. Summary of the Final Senate Bill.

And so, a bill finally passed the Senate. The device of an Administrator, having developed in the House, was not adopted by the Senate.²⁶¹ The Authority would be a five-man body serving six-year terms, and its chairman would be designated by the President and was described as its "executive officer." The first chairman would serve a three-year term; how he would be designated thereafter was not clear. The provision in the original House bill that the President should exercise "general direction" on matters not subject to court review had appeared neither in the Copeland-Truman measures nor in the McCarran Bill, and it was omitted from the final Senate version as well. But neither did the final Senate bill specify the grounds for removing members of the Authority.

Like the legislation developing in the House, licensing orders affecting foreign-flag lines and United States carriers in foreign and territorial commerce were made subject to the President's approval. Also like the bill developing in the House, the Senate bill excepted from judicial review foreign-flag licensing orders subject to Presidential approval, but did not except licensing orders affecting United States carriers in territorial and foreign commerce, though

256 S. 3845, *supra* note 233, § 802.

257 See 83 CONG. REC. 6853-54 (1938).

258 S. 3845, *supra* note 233, § 701(a).

259 *Ibid.*

260 See S. 3845, *supra* note 233, § 702.

261 The Senate Committee on Commerce had considered the Administrator device. It appeared in a committee print bearing the date April 19, 1938. S. 3845, 75th Cong., 3d Sess. § 201(b) (Comm. Print, April 19, 1938). (April 19 was also the day that the bill as reported was printed, with proposed committee amendments later to be offered by Senator Copeland on the Senate floor appearing in italics. S. 3845, 75th Cong., 3d Sess. (Calendar No. 1690, April 19, 1938). The accompanying Senate report was not printed until April 28.)

they also were subject to the President's approval. But the final Senate version omitted the House-conceived foreign agreements provision. And where the House bill as finally developed provided for a single superinvestigator of accidents, the Senate version established within the Authority an independent five-man agency for accident investigation, the Air Safety Board. The Senate bill had come close enough to the House bill that agreement in conference posed no serious difficulties.

C. *The Aviation Bill as Enacted*

Due to the teamwork between Senators Copeland and Truman, passage of the Senate bill preceded action by the House. So it was that the Senate bill came before the House.²⁶² The House substituted the bill worked out by the House Committee, and under the Senate number the bill went to conference, where agreement was easily reached.

In the conference measure the Authority was made an independent five-man body. Members were to be appointed by the President for six-year terms, with specified causes for their removal.²⁶³ Although the Chairman of the Authority was to be designated annually by the President, he was not denominated the "executive officer." An Administrator, to be appointed by the President,²⁶⁴ with neither fixed term of office nor specified causes for removal, was assigned certain functions of an executive nature, with the Authority authorized to delegate additional functions to him at any time.²⁶⁵ However, whereas the House bill had provided no limitation as to functions subject to such delegation, the conference version provided that certain enumerated administrative functions or the powers of economic and safety regulation conferred on the Authority could not be delegated.²⁶⁶ The conference report explained that this would "not prevent the Authority from assigning to the Administrator the executive duties incidental to the exercise of the quasi-legislative and quasi-judicial powers" vested in the Authority.²⁶⁷

An Air Safety Board for accident investigation was adopted. It was made a three-man Board, to perform its duties "independently of the Authority."²⁶⁸ Its members were to be appointed by the President for six-year terms,²⁶⁹ but the Senate provision specifying causes for their removal was omitted.

Licensing orders in foreign and territorial commerce affecting both United States carriers and foreign-flag lines were subject to the President's approval.²⁷⁰ Excepted from orders subject to judicial review, which was made available generally to any person "disclosing a substantial interest" in "any order" of the Authority, were licensing orders affecting foreign-flag carriers subject to Presidential

262 83 CONG. REC. 7104 (1938).

263 H.R. REP. NO. 2635 (Conference Report), 75th Cong., 3d Sess. 10-11, § 201(a) (1938).

264 *Id.* at 11, § 201(b).

265 *Id.* at 15-17, §§ 301-08.

266 *Id.* at 17, § 308. Among the nondelegable administrative functions was the Authority's power to appoint personnel. The Administrator, however, had the specific authority to appoint and prescribe the duties of such personnel as he deemed necessary for the performance of his own functions. *Id.* at 11, § 202(a).

267 *Id.* at 67.

268 *Id.* at 46, § 702(b).

269 *Id.* at 44, § 701(a).

270 *Id.* at 46, § 801.

approval.²⁷¹ No exception from review was made for Presidentially approved licensing orders affecting United States carriers.²⁷² The foreign agreements section, deleted in the Senate bill, was restored in modified form. It provided that the Secretary of State should "advise" and "consult with" the Authority on negotiations for international aviation agreements.²⁷³

The conference agreement was accepted by both Houses²⁷⁴ and on June 23, 1938, the President signed the measure.²⁷⁵ Thus, with a unique organization and an elaborate resolution of the problem of the relationship between the Executive and the government of civil aviation, all civil aviation was brought under one, but tripartite, agency.

The long struggle for carrier legislation for the airlines, the need for which had been made manifest by the domestic air mail contract cancellations and the confusing aftermath, finally ended. For the airlines, it was late in the twelfth hour. Soon, however, that unique organization that had been pieced together upon the suggestion of Representative Bulwinkle was to become unglued.

III. Reorganization — the Unified Authority Fragmented

The fight over reorganization legislation that would have given the President the power to implement the recommendations of the Brownlow Report raged on during the 1938 legislative session. A law was very nearly enacted. Favorably reported by the Senate Select Committee on Government Organization,²⁷⁶ a reorganization bill narrowly passed the Senate on March 28, 1938, after long debate.²⁷⁷ In the House the Senate bill was referred to committee,²⁷⁸ and with amendments, it was favorably reported on the next day, March 30.²⁷⁹ Through the first week in April — while draftsmen were struggling with the President's role in the new aviation agency — the bill was heatedly debated on the floor of the House. Strong opposition, born in part of the hasty manner with which the Senate bill had been reported to the House, kept the bill from passing. On April 8, 1938, the House voted by a slender margin to recommit.²⁸⁰ Reorganization legislation was to wait another year.

271 *Id.* at 56-57, § 1006(a).

272 Some years later, the Supreme Court was called upon to decide whether judicial review could be had of licensing orders subject to Presidential approval involving United States carriers in foreign and overseas air transportation, which the act did not explicitly except from review. See Civil Aeronautics Act of 1938, ch. 601, §§ 801, 1006(a), 52 Stat. 1014, 1024 (now Federal Aviation Act of 1958, §§ 801, 1006(a), 72 Stat. 782, 795, 49 U.S.C. §§ 1461, 1486(a) (1964)); see also note 159 *supra*. Conceding that Congress' failure to except such orders from review was deliberate, the Court, in a five to four decision, held that they were unreviewable in any event. *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 110, 114 (1948). For recent developments concerning the reviewability of orders relating to foreign and overseas air transportation, see *American Airlines v. CAB*, 348 F.2d 349 (D.C. Cir. 1965); *Pan American-Grace Airways v. CAB*, 342 F.2d 905 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 934 (1965); *Alaska Airlines v. Pan American World Airways*, 321 F.2d 394 (D.C. Cir. 1963); *British Overseas Airways Corp. v. CAB*, 304 F.2d 952 (D.C. Cir. 1962).

273 H.R. REP. No. 2635, *supra* note 263, at 46, § 802.

274 83 CONG. REC. 8869, 8963 (1938).

275 *Id.* at 9616.

276 *Id.* at 1928.

277 The vote was 49-42. *Id.* at 4204.

278 *Id.* at 4337.

279 H.R. REP. No. 2033, 75th Cong., 3d Sess. (1938).

280 The vote was 204-196 in favor of recommitment. 83 CONG. REC. 5124 (1938).

A. *The Reorganization Act of 1939*

In 1939 a new Congress began. Proponents of reorganization legislation were to find this Congress more receptive; a reorganization bill was favorably reported in the House.²⁸¹ After comparatively mild debate, the bill passed the House by a substantial majority.²⁸² It then went to the Senate, where it also found smooth sailing. Following a favorable committee report,²⁸³ it easily passed the Senate.²⁸⁴ Minor differences were resolved in conference, and the Reorganization Act of 1939 became law.²⁸⁵

The act provided that the President should investigate government organization to determine what changes should be made in the interests of efficiency and economy.²⁸⁶ It authorized the President, upon having determined that these interests would be served by the transfer of functions from "any agency" to another or by consolidation of the functions of any agency or by abolition of any agency whose functions were wholly transferred, to transmit proposed reorganization plans to Congress.²⁸⁷ A plan would take effect within sixty days after transmittal unless in the meantime both Houses of Congress were to pass a resolution stating that Congress did not favor the reorganization proposed.²⁸⁸

"Agency" was defined in a way that included every unit of government that was not associated with the operations of Congress or the judiciary.²⁸⁹ Certain agencies, however, were exempted from the President's reorganization powers, and these included virtually all of the "independent" regulatory agencies.²⁹⁰ The Civil Aeronautics Authority was not among the exempted agencies. This omission was not a mere oversight; in both the Senate and the House, amendments had been offered that would have included it among the exempted agencies. Both were defeated. The proposed House amendment was debated briefly and defeated routinely.²⁹¹ In the Senate, the debate was more spirited and the vote close.

281 H.R. REP. NO. 120, 76th Cong., 1st Sess. (1939).

282 The vote was 246-153. 84 CONG. REC. 2504 (1939).

283 S. REP. NO. 169, 76th Cong., 1st Sess. (1939).

284 The vote was 63-23. 84 CONG. REC. 3105 (1939).

285 See *id.* at 4235 (1939).

286 Reorganization Act of 1939, ch. 36, § 1, 53 Stat. 561.

287 Reorganization Act of 1939, ch. 36, § 4, 53 Stat. 562.

288 Reorganization Act of 1939, ch. 36, § 5, 53 Stat. 562. That act was effective only for reorganizations proposed before January 21, 1941. Reorganization Act of 1939, ch. 36, § 12, 53 Stat. 564. In 1945 and again in 1949 similar reorganization acts were passed. The 1945 act, which was effective until 1948, permitted reorganization plans to become effective unless disapproved by both Houses of Congress. Reorganization Act of 1945, ch. 582, § 6(a), 59 Stat. 616. The 1949 act, however, provided that disapproval of either House would prevent a reorganization plan from becoming effective. Reorganization Act of 1949, § 6, 63 Stat. 205, as amended, 5 U.S.C. § 133z-4 (1964). See note 139 *supra*. The 1949 act has been extended from time to time, most recently in 1965, Act of June 18, 1965, 79 Stat. 135, 5 U.S.C.A. § 133z-3 (Supp. 1965), and is still effective. The first reorganization statute, Act of June 30, 1932, ch. 314, §§ 401-08, 47 Stat. 413, had provided in § 407 that executive reorganization orders under the act would not become effective if disapproved by either branch of Congress.

289 See Reorganization Act of 1939, ch. 36, § 2, 53 Stat. 561.

290 Reorganization Act of 1939, ch. 36, § 3, 53 Stat. 561. Among the exempted agencies were the Federal Communications Commission, the Federal Power Commission, the Federal Reserve Board, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the Securities and Exchange Commission, and the Maritime Commission.

291 See 84 CONG. REC. 2483-85 (1939). The vote was 123-47 against exempting the Civil Aeronautics Authority. *Id.* at 2485.

Senator McCarran, who proposed the amendment in the Senate, insisted that the eight-month-old Civil Aeronautics Authority was an independent agency and so should be exempted from the President's powers of reorganization.²⁹² In opposition to the amendment, however, some Senators commented on what they regarded as the Authority's extraordinarily large budget. At one point, the Authority was accused, incorrectly, of having more employees than all the airlines of the United States combined.²⁹³ The new agency did have a substantial budget. It had taken over the Department of Commerce's aviation employees and had almost immediately become as large as the ICC.²⁹⁴ Other Senators were not persuaded that the Authority was in fact "independent" or that it should be. Senator Byrnes estimated that three-quarters of the Authority's work was administrative rather than quasi-judicial.²⁹⁵ Senator Byrnes also cited alleged dissension between the Administrator and the Authority on budgetary matters.²⁹⁶ In what might be regarded as a warning, he called for defeat of McCarran's proposed amendment so that, if the internal dissension continued, the President might take steps further defining the roles of the Administrator and the Authority.²⁹⁷ In the end, McCarran's amendment was defeated, though barely.²⁹⁸ Thus it was that in 1939 the President was given the power to alter the organization of the recently created Authority.

B. *Reorganization Plans III and IV*

The President's Reorganization Plan III was transmitted to Congress on April 2, 1940. Section 7 of the plan transferred to the Administrator certain functions of the Authority, principally "the functions of aircraft registration and of safety regulation . . . [set forth in specific titles of the act], except the functions of prescribing safety standards, rules, and regulations and of suspending and revoking [safety] certificates after hearing."²⁹⁹ In his message accompanying Plan III, the President explained that this was to "clarify the relations" between the Administrator and the five-man Authority and make the Administrator the "chief administrative officer" of the Authority with respect to "all functions other than those relating to economic regulation" and certain other activities of a rule-making or adjudicative character.³⁰⁰

Plan III made good sense. The office of Administrator had not become

292 *Id.* at 3094.

293 *Id.* at 3098; see *id.* at 3103.

294 See *id.* at 3098.

295 See *id.* at 3100. Of course, the Bulwinkle-conceived assignment of "executive" functions to an Administrator subject to the President's direction should have provided the answer to Senator Byrnes' point. But the uniqueness of the agency and its organization, coupled with the fact that it was so new, led to a failure among most Congressmen to understand the division of functions among its parts. Even some who were well informed, in Congress and elsewhere, were not absolutely confident that the new organization would work smoothly. It is possible that some felt that Presidential power to perfect the organization might prove desirable. It is possible, too, that some thought the President might profitably employ reorganization power to transfer to the Administrator some of the powers that the Authority itself had no power to delegate. See text accompanying notes 266, 267, *supra*.

296 84 CONG. REC. 3099 (1939).

297 *Id.* at 3100.

298 The vote was 41-38 against McCarran's amendment. *Id.* at 3104.

299 Reorganization Plan III of 1940, § 7, 54 Stat. 1233.

300 86 CONG. REC. 3841-43 (1940).

what many had hoped it would when the Civil Aeronautics Act had passed. It was through the provision that the Administrator should exercise, in addition to specified duties, "such powers and duties . . . as may, from time to time, be assigned to him by the Authority,"³⁰¹ that many had thought the Administrator would be given an administrative role considerably beyond the specified functions conferred upon him by the act, despite the prohibition against delegating to him any of the powers of economic and safety regulation.³⁰² But the five-man Authority seemed desirous of clinging to what the act had given it, nearly ignoring the delegation provision that had been essential to the organizational conception Representative Bulwinkle had introduced into the law.

Had the matter rested with Plan III, there might have been universal applause, and the five-man agency, chastened, might have regarded more sympathetically the opportunity to evolve an even further role for the Administrator. But hard on the heels of Plan III — only nine days later — came Plan IV. This plan struck at fundamentals and at once aroused strong congressional resistance.

Plan IV transferred the functions of the Authority, the Administrator, and the Air Safety Board to the Department of Commerce.³⁰³ The Air Safety Board was abolished and its functions transferred to the five-member Authority.³⁰⁴ The five-man agency was thereafter to be known as the Civil Aeronautics Board,³⁰⁵ the name originally proposed by the Interdepartmental Committee. The Administrator was designated the Administrator of Civil Aeronautics;³⁰⁶ he and his staff later were called the Civil Aeronautics Administration.³⁰⁷ The Administrator was to be completely "within" the Department; the Board was to be within the Department only for budgeting, procurement, and related "routine" functions.³⁰⁸ This was a long step toward the Brownlow Report's organizational pattern.

The day that Plan IV was transmitted, April 11, 1940, Senator McCarran

301 Civil Aeronautics Act of 1938, ch. 601, § 308, 52 Stat. 986.

302 Colonel Gorrell anticipated wide application of the delegation power. Address by Colonel Edgar S. Gorrell, Eighth Annual Convention of the National Association of State Aviation Officials, Oct. 15, 1938, a copy of which is in the library of the Air Transport Association of America, Washington, D.C. So also did the first Administrator, Hester, *The Civil Aeronautics Act of 1938*, 9 J. AIR L. 451, 458 (1938). In fact, in the early days the Administrator did prescribe detailed safety conditions under the terms of broader rules that had been promulgated by the Authority under its nondelegable safety rule-making power. After the 1940 separation of the Board and the Administrator, there was apparently some doubt as to the legality of this practice. See H.R. REP. NO. 2315, 80th Cong., 2d Sess. 5 (1948). These doubts were a reason for a later amendment to the act in 1948 affirmatively authorizing the Board to delegate safety rule-making functions to the Administrator. Act of July 1, 1948, ch. 792, § 4, 62 Stat. 1217, adding § 601(c) of the Civil Aeronautics Act of 1938; see H.R. REP. NO. 2315, *supra*, at 4-5. Prior to 1940 there had been no doubt that the five-man agency could have delegated many subordinate functions to the Administrator to aid it in economic and safety regulation. See text accompanying note 267 *supra*.

303 Reorganization Plan IV of 1940, § 7(a), 54 Stat. 1235.

304 *Id.* § 7(b).

305 *Ibid.*

306 *Id.* § 7(c).

307 See 2 CAA ANN. REP. ii (1941).

308 Reorganization Plan IV, *supra* note 303, § 7(c).

introduced a resolution to disapprove it.³⁰⁹ Representative Lea introduced a similar measure in the House.³¹⁰

C. *The Congressional Fight Over Plan IV*

Few days passed that April when some Representative or Senator did not take the floor to disparage Plan IV. It was claimed that "political control" of the airlines was what Congress meant to stop when it enacted the Civil Aeronautics Act.³¹¹ Also it was said that the air safety record had been poor under the Department of Commerce's administration and had been greatly improved since the Authority had been created.³¹² The opponents of Plan IV relied principally on this latter point, which became the subject of much newspaper comment.

By the end of April, the outcry had developed sufficiently to prompt the President to issue a press release supplementing his message transmitting Plan IV.³¹³ His message had not gone into detail; it had described Plan IV as but "another step" toward simplification of the task of executive management.³¹⁴ Now he explained the matter further. He said that the inherent problems of having "three agencies" within the Authority had been "intensified by friction, particularly within the Air Safety Board."³¹⁵ The Bureau of the Budget had studied the problem, and from its study came Plans III and IV.³¹⁶ The effect of these plans, said the President, was to bring the Authority within the "federal family," with the five-man board remaining independent and with certain functions transferred to the Administrator "to eliminate a blind spot created by the failure of the Civil Aeronautics Act of 1938 to carry out the intention of Congress to distinguish clearly between the functions of the Administrator and the Authority."³¹⁷ Safety would not be endangered by abolition of the Air Safety Board; on the contrary, it would be enhanced since the Civil Aeronautics Board would both perform the function of accident investigation and have the power to implement its recommendations.³¹⁸

On May 8, the House passed the resolution disapproving Plan IV.³¹⁹ After hearings³²⁰ the Senate committee, chaired by Senator Byrnes, reported the resolution unfavorably.³²¹ On the Senate floor the fight against Plan IV was led not only by Senator McCarran but also by Senator Truman, who the year before had voted against the proposed amendment of the reorganization bill to exempt

309 S. Con. Res. 43, 76th Cong., 3d Sess. (1940). Senator McCarran had also introduced a resolution, S. Con. Res. 42, 76th Cong., 3d Sess. (1940), to disapprove Plan III. This latter resolution was never voted upon; there was little congressional opposition to Plan III.

310 H.R. Con. Res. 60, 76th Cong., 3d Sess. (1940).

311 E.g., 86 CONG. REC. 5162-63 (1940) (remarks of Senator Truman).

312 E.g., *id.* at 5166 (remarks of Senator Clark).

313 The President's press release appears at 86 CONG. REC. APP. 2688 (1940).

314 86 CONG. REC. 4323-24 (1940).

315 86 CONG. REC. APP. 2688 (1940).

316 *Ibid.*

317 *Ibid.*

318 *Ibid.*

319 86 CONG. REC. 5755-56 (1940). The vote for H. Con. Res. 60 disapproving Plan IV was 232-153. *Ibid.*

320 See *Hearings on S. Con. Res. 43 Before the Senate Select Committee on Government Reorganization*, 76th Cong., 3d Sess. (1940).

321 86 CONG. REC. 5950 (1940).

the Authority from the President's power of reorganization.³²² Although the opposition to Plan IV in the Senate was substantial, it was not great enough for passage of the resolution disapproving it.³²³ Thus, Plan IV became effective.

IV. Denouement

The problem of defining the President's role did not end with the 1940 Reorganization Plans. Later, in 1950, the grip of the Department of Commerce on civil aviation executive functions was strengthened by transferring to the Secretary of Commerce "all functions . . . of all agencies" of the Department (except of the Civil Aeronautics Board)³²⁴ and by the creation within the Department of an Under Secretary for Transportation³²⁵ to assist the Secretary in providing "central leadership in transportation matters."³²⁶ In the same year another reorganization order transferred to its Chairman the "executive and administrative functions" of the Board,³²⁷ thus making the Chairman the "executive officer" that had been contemplated by Representative Lea's original H.R. 9738, though of an agency with functions far less extensive than had been proposed in H.R. 9738.

Then came the Federal Aviation Act of 1958, again overhauling the government organization for civil aviation. In order to abolish "the present unnatural division of responsibility between the Civil Aeronautics Administration and the Civil Aeronautics Board for the promotion of civil aeronautics generally" and to repose "full authority in this field" in one place, all the functions of the Civil Aeronautics Administration and the Board's remaining safety-regulatory powers were transferred to a newly created Federal Aviation Agency, outside the Department of Commerce and headed by an Administrator directly responsible to the President.³²⁸ In the safety field the only powers left to the Board were to review denials, suspensions, and revocations of licenses by the Administrator and the function of investigating accidents.³²⁹ By the repeal of section 7 of the Reorganization Plan IV of 1940, the Board was taken out of the Department of Commerce;³³⁰ it was made completely independent, even for housekeeping purposes. Moreover, the virtually unused power of the Board to delegate functions to the Administrator was dropped.³³¹ The Board and the new Federal

322 See 84 CONG. REC. 3104 (1939).

323 The vote in the Senate, which was on H.R. Con. Res. 60, which had already passed the House, was 46-34 against disapproving Plan IV. 86 CONG. REC. 6069 (1940).

324 Reorganization Plan 5 of 1950, §§ 1(a), (b), 64 Stat. 1263.

325 Reorganization Plan 21 of 1950, § 301, 64 Stat. 1276.

326 96 CONG. REC. 3250, 3252 (1950) (Presidential message transmitting Reorganization Plan 21 of 1950).

327 Reorganization Plan 13 of 1950, 64 Stat. 1266. See note 139 *supra*.

328 S. REP. NO. 1811, 85th Cong., 2d Sess. 10 (1958). See H.R. REP. NO. 2360, 85th Cong., 2d Sess. 1-2, 12 (1958).

329 Federal Aviation Act of 1958, §§ 602(b), 609, 701, 72 Stat. 776, 779, 781, 49 U.S.C. §§ 1422(b), 1429, 1441 (1964).

330 Federal Aviation Act of 1958, § 1401(c), 72 Stat. 806, 5 U.S.C. § 133t note (1964). See H.R. REP. NO. 2360, *supra* note 328, at 12.

331 The Board was, however, empowered to request the Administrator to investigate and report on accidents, with the Board retaining the duty to determine probable cause of all accidents. Federal Aviation Act of 1958, § 701(f), 72 Stat. 781, 49 U.S.C. § 1441(f) (1964). This permitted the continuance of a practice that had existed since at least 1948 when Congress had amended the Civil Aeronautics Act to provide that the Board could delegate to the Administrator the accident investigatory functions transferred to it in 1940 upon the abolition

Aviation Agency became as separate from each other as the ICC and the Department of Commerce would have been under the 1937 legislative proposals. Thus, wholly abandoned was the concept reflected in the Interdepartmental Bill and critically important in the 1938 legislative process, that all the government of civil aviation should be unified in one agency.

In short, Dr. Fagg's theory was repudiated. But it was Dr. Fagg's theory and his skill in its advocacy that made legislation possible in 1938. Fortunately, the 1937 ICC proposal had not been pursued in that year of swirling controversy over the Brownlow Report and the reorganization bill. Surely, since the Post Office Department and its guardians on the Hill remained adamant and the President seemed never quite prepared formally to endorse airline legislation, the effort again would have foundered. With the financial condition of the domestic airlines critical, in some cases desperate, and with the air mail contracts of the overseas carriers running out, had legislation been delayed until 1939 or later it is doubtful that the airline industry would have developed as we know it today.

V. Conclusion

The process of bringing about the Civil Aeronautics Act reveals the importance of individuals in the workings of our democracy. Each major contributor brought a special characteristic to the task. Gorrell brought dynamism; Fagg, idealism; Hester, improvisation; Copeland, diplomacy; McCarran, dedication; Truman, accommodation; Bulwinkle, resourcefulness; and Lea, wisdom and patience. All bent their efforts in a race against time, and finally moved the machinery of legislation, that ponderous complex of Executive, Congress, and private interests.

The story of what they did and of the undoing of the governmental structure they contrived is relevant today. Once more a President has proposed and Congress has adopted a structural change in the government of civil aviation, this time in the Department of Transportation Act.³³² The history recited here raises doubts that any given structural change will satisfy.

The new act creates a Department of Transportation, which assumes a vast and varied array of functions respecting all transportation. As to civil aviation, three changes are made.

First, the whole Federal Aviation Agency, taken out of an executive department only eight years ago, goes back into a department.³³³ "Within" the new department an independent five-man National Transportation Safety Board is created, to which are transferred (along with certain functions respecting surface-transportation safety) the Civil Aeronautics Board's duties of investigating aircraft

of the Air Safety Board. Act of July 1, 1948, ch. 792, § 4, 62 Stat. 1217, adding § 601(c) of the Civil Aeronautics Act of 1938. The power to delegate such functions appeared to exist even before 1948 under the 1938 act's broad delegation power, but apparently the separation of Board and Administrator in 1940 had created a question as to the continuing vitality of this delegation power. See H.R. REP. NO. 2315, 80th Cong., 2d Sess. 5 (1948).

332 Pub. L. No. 89-670, 89th Cong., 2d Sess. (Oct. 15, 1966).

333 The corresponding unit in the Department is called the Federal Aviation Administration, with an Administrator appointed by the President. Pub. L. No. 89-670, 89th Cong., 2d Sess. § 3(e)(1) (Oct. 15, 1966).

accidents and its powers of appellate review of safety licensing.³³⁴ Thus, the separate and independent Civil Aeronautics Board is finally confined strictly to economic regulation of the airlines. In safety matters, both for airlines and for nonairline civil aviation, an undisguised Brownlow-type board "within" an executive department emerges.

Second, there is a wholly new governmental voice affecting airline subsidies. The Civil Aeronautics Board, hitherto completely independent in determining such subsidies, is now to "take into consideration any standards and criteria prescribed by the Secretary of Transportation."³³⁵ "In this way," said the Presidential Message proposing the Department of Transportation, "the subsidy program will be coordinated with overall national transportation policy."³³⁶

Third, there is a new approach to the ever-perplexing problem of the Executive's role in international aviation. The Presidential Message stated that the Secretary of Transportation "should provide leadership within the executive branch in formulating long-range policy for international aviation" and "should participate in Civil Aeronautics Board proceedings that involve international aviation policy," although the Secretary of State will remain responsible for "foreign policy aspects of international aviation."³³⁷

Civil Aeronautics Board international route decisions affecting both foreign-flag and United States carriers have been subject to the President's approval since 1938.³³⁸ Heretofore the Board has exercised considerable initiative, at least in cases involving United States carriers. Were the Executive, through the Secretary of Transportation, to participate extensively in the Board's own proceedings before the Board arrives at its recommendation to the President, it could be questioned whether the Board would retain any function of substantial significance.

In this latest adjustment of the role of the Executive in the governing of civil aviation there is again revealed persistent Executive discontent with the independent commission as an instrument of government. Although from time to time that discontent waxes and wanes, over the years it has frequently been

334 The five members of the National Transportation Safety Board are appointed by the President for five-year terms and are removable for specified causes. Pub. L. No. 89-670, 89th Cong., 2d Sess. §§ 5(h),(i) (Oct. 15, 1966). Although it is "within" the department in the exercise of its functions the Board "shall be independent of the Secretary and the other offices and officers of the Department." Pub. L. No. 89-670, 89th Cong., 2d Sess. §§ 5(a),(f) (Oct. 15, 1966).

335 Pub. L. No. 89-670, 89th Cong., 2d Sess. § 8(a) (Oct. 15, 1966).

336 H.R. Doc. No. 399, 89th Cong., 2d Sess. 6 (1966). The Civil Aeronautics Board, however, does not view the act as providing that the Secretary's standards and criteria shall be binding on it. It would be, the Board Chairman has said, "a matter of persuasion." *Hearings on S. 3010 Before the Senate Committee on Government Operations*, 89th Cong., 2d Sess. 240 (1966). See also H.R. REP. No. 1701, 89th Cong., 2d Sess. 9 (1966). ("It is mandatory that the Board consider, not that it follow, the Secretary's standards or criteria.")

337 H.R. Doc. No. 399, *supra* note 336, at 6. On Nov. 6, 1966, President Johnson announced that he would nominate Alan S. Boyd as Secretary of Transportation. Mr. Boyd served first as a member then as Chairman of the CAB. In 1965 he was appointed Under Secretary of Commerce for Transportation. N.Y. Times, Nov. 7, 1966, p. 1, col. 1, p. 36, col. 1.

338 Curiously, the Presidential message recommending the Department of Transportation said that, "subject to policy determinations by the President," the Board regulates "international aviation routes and fares . . ." H.R. Doc. No. 399, *supra* note 336, at 6. There is no provision in the Federal Aviation Act for a Presidential role in the regulation of fares.

manifested in the government of transportation and especially in the government of civil aviation.

Nevertheless, in the case of civil aviation, what has occurred since 1938 is repeated tinkering with governmental structure in respects that, on the face of things, often appear hardly worth the effort. With seemingly nothing ever finally settled, it may be wondered whether the real source of Executive discontent is something much more fundamental than is revealed either in the oft-mooted question of whether a given function is "executive" in the constitutional sense, or in the professed aims for mere improvement in administrative efficiency. Perhaps the real source of discontent is that the Civil Aeronautics Board, in its normal economic regulation, deals with large issues of policy in the resolution of which Presidents feel that they should have something more to say.

If this be so, Presidents have never admitted it. That they would not is understandable. The storm evoked by the Brownlow Report demonstrated that executive intervention in the quasi-legislative or quasi-judicial work of an administrative agency, at least in the case of economic regulation, would touch a very tender spot. Hence, thus far at least, no regular means has been provided for executive participation in the resolution of such issues, except in international air route matters. Until some regular means is provided, irregular means occasionally may be resorted to; and quite irrelevantly, there may be continued tinkering with government organizational matters of marginal significance, which simply keeps matters unsettled.

It is a great loss to the evolution of a "science" of government that the commission-administrator device conceived by Representative Bulwinkle in 1938 was never given a full trial. A cardinal factor in the device was the provision for delegation of functions to the administrator by the five-man agency (with, presumably, power in the agency to revoke the delegation). Although the Civil Aeronautics Authority was prohibited from delegating its economic and safety regulatory powers, the power of delegation was broad enough to permit considerable meshing of the functions of the Administrator with those of the Authority. In the regulatory work of the Authority it would have been possible to have made use of the Administrator in many ways, notably in preparing and presenting cases on behalf of the public, or on behalf of or in accordance with the policies of the Executive. In 1938 air transportation was but a "speck in the sky,"³³⁹ and the device could have been tried out when aviation's problems were still formative and wieldy and there was no vested interest in a particular pattern for its government. Much might have been learned; indeed, in commending Representative Bulwinkle's proposal to the House in 1938, Representative Lea suggested that the device might be fruitfully applied to other areas of commission regulation.³⁴⁰

It may not be too late to make some trial of the idea, although conditions

³³⁹ The phrase is that of Chairman Walter M. W. Splawn of the Interstate Commerce Commission, testifying in 1939 on omnibus transportation legislation. *Hearings on H.R. 2531 Before the House Committee on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. 28 (1939).

³⁴⁰ 83 CONG. REC. 8868 (1938) (remarks of Representative Lea).

have so changed that trial would have to be much more cautious. With the creation of a Department of Transportation, it appears that one of the potentially most useful aspects of the administrator device will be revived. The House Report on the new act states:

The independent regulatory agencies naturally will be aware of, and give consideration to, transportation policies and programs of the new Department. Indeed, the Secretary of Transportation from time to time will appear before the ICC and other regulatory agencies³⁴¹

Thus, it seems that the Secretary is to participate in selected cases, in addition to international air route cases, not only before the Civil Aeronautics Board, but also before other agencies that decide important transportation issues. Heretofore executive departments sometimes have participated in administrative proceedings affecting transportation, but their participation has generally been limited to the interests of the particular department, frequently its interest as a user of services. On the other hand, the Secretary of Transportation will be in a position to represent the executive view on transportation as a whole, which might take into account the various, occasionally conflicting, views of different departments, and which, in any case, may "provide general leadership in the identification and solution of transportation problems."³⁴²

In international air route cases, participation by the Secretary in proceedings before the Board, with the ultimate decision subject to Presidential approval, could make nominal the Board's participation in the decision-making process. In cases not subject to Presidential approval, however, participation by the Secretary and his staff in making the record before the agency, with the agency retaining independence in disposing of the case, might give the Executive an effective voice without introducing the evils of "political" control that so deeply concerned the legislators of 1937 and 1938.

³⁴¹ H.R. REP. NO. 1701, *supra* note 336, at 9.

³⁴² Pub. L. No. 89-670, 89th Cong., 2d Sess. § 2(b)(1) (Oct. 15, 1966), which is part of the act's Declaration of Purpose.

APPENDIX

CONFIDENTIAL COMMITTEE PRINT
JANUARY 4, 193875TH CONGRESS
3D SESSION H. R.IN THE HOUSE OF REPRESENTATIVES
JANUARY —, 1938

Mr. — introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed

A BILL

To create a Civil Aeronautics Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act, divided into titles and sections according to the following table of contents, may be cited as the "Civil Aeronautics Board Act of 1938":

TABLE OF CONTENTS

Title I—General Provisions

Sec. 1. Definitions.

Title II—Civil Aeronautics Board: Organization

- Sec. 201. Creation of Board.
- Sec. 202. Qualification of members.
- Sec. 203. Term of office.
- Sec. 204. Salary.
- Sec. 205. Employees.
- Sec. 206. Transfer of personnel, property, and appropriations.
- Sec. 207. Expenditures.
- Sec. 208. Conduct of business.
- Sec. 209. Publications.
- Sec. 210. Annual report.

Title III—Civil Aeronautics Board: Powers and Duties

- Sec. 301. Declaration of standards.
- Sec. 302. Transfer of powers and duties.
- Sec. 303. American-flag air-line certificates.
- Sec. 304. Foreign-flag air-line permits.
- Sec. 305. Rates of pay for carriage of mail by air.
- Sec. 306. Regulation of rates and services.
- Sec. 307. Regulation of accounts.
- Sec. 308. Inquiry into air-line management.
- Sec. 309. Access to air-line property.
- Sec. 310. Consideration of complaints.
- Sec. 311. Additional authorization.
- Sec. 312. Application of Act.

Title IV—Other Federal Agencies

- Sec. 401. The Department of State.
- Sec. 402. The Post Office Department.
- Sec. 403. The Maritime Commission.

Title V—Procedure

- Sec. 501. Hearings.
- Sec. 502. Administrative review.
- Sec. 503. Administrative appeals.
- Sec. 504. Judicial appeals.
- Sec. 505. Judicial enforcement.
- Sec. 506. Taking evidence.
- Sec. 507. Witnesses.
- Sec. 508. Disobedience to subpoena.
- Sec. 509. Depositions.
- Sec. 510. Oaths.
- Sec. 511. Service of subpoena.
- Sec. 512. Privilege against self-crimination.

Title VI—Prohibitions

- Sec. 601. Operation without air-line certificate or permit unlawful.
- Sec. 602. Unreasonable rates unlawful.
- Sec. 603. Discrimination unlawful.
- Sec. 604. Rebating and other practices unlawful.
- Sec. 605. Change in tariffs.
- Sec. 606. Interlocking directorates.
- Sec. 607. Holding companies.
- Sec. 608. Other prohibited interests.

Title VII — Penalties

- Sec. 701. General.
- Sec. 702. Prohibited interests.
- Sec. 703. False entries.

Title VIII—Miscellaneous

- Sec. 801. Labor provision.
- Sec. 802. Certified copies of records.
- Sec. 803. Agent for service.
- Sec. 804. Savings provisions.
- Sec. 805. Repeals.
- Sec. 806. Separability.
- Sec. 807. Effective date.

TITLE I—GENERAL PROVISIONS

DEFINITIONS

SECTION 1. As used in this Act, unless the context otherwise requires—

(a) "Air commerce" means (1) the carriage by aircraft of persons, goods, or mail, for hire or reward, and (2) the operation or navigation of aircraft in the conduct or the furtherance of a business or vocation.

(b) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(c) "Air line" means a scheduled air transport service for the carriage of persons, goods, or mail for hire or reward operated in interstate or foreign air commerce.

(d) "Board" means the Civil Aeronautics Board established by the provisions of this Act.

(e) "Citizen of the United States" means (1) a natural person who is a citizen of the United States or its possessions; or (2) a partnership of which each member is a natural person who is a citizen of the United States or its possessions; or (3) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, or of the District of Columbia, of which the president and two-thirds or more of the board of directors or other managing officers thereof, as the case may be, are natural persons who are citizens of the United States or its possessions and in which at least 75 per centum of the voting interest is controlled by persons who are citizens of the United States or its possessions.

(f) "Foreign air commerce" means (1) air commerce carried on wholly within any Territory or possession of the United States (except the Philippine Islands); (2) air commerce between the continental United States (not including Alaska) and any place outside thereof; (3) air commerce between Territories of the United States; (4) between possessions of the United States (including the Philippine Islands); (5) between a Territory of the United States and any foreign country; (6) between a possession of the United States (including the Philippine Islands) and any foreign country; and (7) between a Territory of the United States and a possession of the United States (including the Philippine Islands).

(g) "Interstate air commerce" means (1) air commerce carried on between any State or the District of Columbia, and any other State or the District of Columbia; (2) air commerce between points within the same State or the District of Columbia, but carried on through the air space over any place outside thereof; and (3) air commerce carried on wholly within the District of Columbia.

(h) "Person" means any natural person, association, partnership, firm, company, corporation, or other association of individuals.

(i) "United States," when used in a geographical sense, means the region, both land and water, known as the United States of America, comprising the several States and Territories, the possessions of the United States (including the Philippine Islands), and the District of Columbia.

TITLE II — CIVIL AERONAUTICS BOARD:

ORGANIZATION

CREATION OF BOARD

SECTION 201. There is hereby created a Civil Aeronautics Board which shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate. The President shall designate annually one of the members of the Board as chairman, who shall be the executive officer of the Board, and one of the members as vice chairman, who shall exercise and perform the powers and duties of the chairman in the event of his absence or incapacity.

QUALIFICATIONS OF MEMBERS

SECTION 202. (a) No person shall be eligible for appointment or continue in office as a member of the Board if he is an officer or director of, or employed by, any person engaged in any phase of aeronautics, or if he is financially interested

in any such person unless he shall file with the Congress, at the time of his appointment and annually thereafter, a statement setting forth the character and extent of his interest.

(b) Not more than two members of the Board shall be members of the same political party.

TERM OF OFFICE

SECTION 203. Each member of the Board shall hold office for a term of six years, except that (1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (2) the terms of office of the members first taking office after the date of the enactment of this Act shall expire, as designated by the President at the time of nomination, one at the end of two years, one at the end of four years, and one at the end of six years after the date of enactment of this Act.

SALARY

SECTION 204. Each member of the Board shall receive a salary at the rate of \$10,000 per year.

EMPLOYEES

SECTION 205. The Board is authorized to appoint, subject to the civil-service laws, a secretary and such officers and employees as it deems necessary to enable the Board to exercise and perform its powers and duties, and the compensation of all such officers and employees shall be fixed in accordance with the Classification Act of 1923, as amended.

TRANSFER OF PERSONNEL, PROPERTY, AND APPROPRIATIONS

SECTION 206. (a) Such personnel and property (including office equipment and official records) as the President shall determine to have been employed or used by the Secretary of Commerce in the exercise and performance of the powers and duties vested in and imposed upon him by the Air Commerce Act of 1926, as amended (44 Stat. 568; U. S. C., 1934 edition, title 49, sec. 17), and by the Secretary of Commerce and the Interstate Commerce Commission in the exercise and performance of the powers and duties vested in and imposed upon them by the Air Mail Act of 1934, approved June 12, 1934, as amended (48 Stat. 933; U. S. C., 1934 edition, title 39, sec. 469), are transferred to the Board upon such date as the President shall specify by Executive order: *Provided*, That the President may except from such transfer such personnel and property (including office equipment and official records) of the Department of Commerce as he shall deem necessary for the exercise and performance of the powers and duties vested in and imposed upon the Secretary of Commerce by section 502 of this Act: *Provided further*, That the transfer of such personnel shall be without change in classification or compensation, except that this requirement shall not operate after the end of the fiscal year during which the transfer is made to prevent the adjustment of classification or compensation to conform to the duties to which such transferred personnel may be assigned: *And provided further*, That such of the personnel so transferred as do not already possess a classified civil-service status shall not acquire such status by reason of such transfer except (1) upon recommendation of the Board within one year after such personnel have been so transferred and certification within such period by the Board to the Civil Service Commission that such personnel have served with merit for not less than six months prior to the transfer, and (2) upon passing such suitable noncompetitive examinations as the Civil Service Commission may prescribe.

(b) Such of the unexpended balances of appropriations available for use by the Secretary of Commerce in the exercise and performance of the powers and duties vested in and imposed upon him by the Air Commerce Act of 1926, as amended (44 Stat. 568; U. S. C. 1934 edition, title 49, sec. 171), and by the Secretary of Commerce and the Interstate Commerce Commission in the exercise and performance of the powers and duties vested in and imposed upon them by the Air Mail Act of 1934, approved June 12, 1934, as amended (48 Stat. 933; U. S. C. 1934 edition, title 39, sec. 469), as the President shall deem necessary, are transferred to the Board upon such date as the President shall specify by Executive order, and shall be available for use in connection with the exercise and performance of the powers and duties vested in and imposed upon the Board by this Act. Unexpended balances of such appropriations not transferred to the Board pursuant to this section shall be impounded and returned to the Treasury.

EXPENDITURES

SECTION 207. The Board is authorized to make all necessary expenditures, at the seat of the Government and elsewhere, for carrying out the provisions of this Act; to cooperate with such organizations as are related to or a part of the commercial aviation industry or the art of aeronautics in the United States or in any foreign country and to attend meetings and conventions when in the public interest; to make investigations and conduct studies in matters pertaining to interstate and foreign air commerce; to acquire and operate such aircraft, navigational facilities, or motor vehicles as are necessary in the exercise and performance of the powers and duties of the Board. Members, employees, or agents of the Board are hereby authorized to travel as the Board may direct, by any means of air, land, or water transportation, including the use of private or public carriers, and to travel to and from airports and centers of population and other points, and such expenditures as are incurred thereby on official business shall be allowed and paid as travel expenses, and not as, or included in, per diem or subsistence allowance, on itemized vouchers therefor approved by the chairman of the Board.

CONDUCT OF BUSINESS

SECTION 208. (a) A majority of the members of the Board in office shall constitute a quorum.

(b) The Board may exercise and perform its powers and duties notwithstanding vacancies.

(c) The Board shall have an official seal which shall be judicially noticed.

PUBLICATIONS

SECTION 209. The Board shall provide for the publication of its orders, decisions, rules, regulations, and reports in such form and manner as may be best adapted for public information and use. Publications purporting to be published by authority of the Board shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Board therein contained in all courts of the United States and of the several States without further proof or authentication thereof.

ANNUAL REPORT

SECTION 210. The Board shall make an annual report to the Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain such information and data collected by the Board as may be considered of value in the determination of questions connected with the development and control of interstate and foreign air commerce and civil aeronautics, together with such recommendations as to additional legislation relating thereto as the Board may deem necessary.

TITLE III—CIVIL AERONAUTICS BOARD:

POWERS AND DUTIES

DECLARATION OF STANDARDS

SECTION 301. In the exercise and performance of its powers and duties under this Act, the Board shall consider the public interest to require—

(a) The encouragement and development of all phases of aeronautics and of the more abundant, safe, and convenient use of the air space for navigation and for national defense;

(b) The preservation and encouragement of competition among persons operating air lines to the extent necessary to assure the sound development of air transportation;

(c) The systematic extension of the foreign air commerce of the United States and the encouragement of the operation of air-line services over foreign air routes by different persons to the end that no one person shall be the operator of an excessive number of such services over such routes;

(d) The furnishing of adequate and efficient air-line service, without unjust discrimination, undue preference or advantage, or unfair or destructive competitive practices, at the lowest cost consistent with the furnishing of such service;

(e) The receipt, by any person operating an air line, of revenues sufficient to enable such person, under honest, economical, and efficient management, to provide adequate and efficient service; and

(f) The preservation and development of a system of air transportation in interstate and foreign commerce properly adapted to the needs of the commerce of the United States, the Postal Service, and national defense.

TRANSFER OF POWERS AND DUTIES

SECTION 302. Except as hereinafter provided, the Board shall exercise and perform all powers and duties vested in and imposed upon the Secretary of Commerce under the provisions of the Air Commerce Act of 1926, as amended (44 Stat. 568; U. S. C., 1934 edition, title 49, sec. 177), and the Air Mail Act of 1934, approved June 12, 1934, as amended (48 Stat. 933; U. S. C., 1934 edition, title 39, sec. 469).

AMERICAN-FLAG AIR-LINE CERTIFICATES

SECTION 303. (a) The Board is authorized, whenever in its judgment the public interest, convenience, and necessity may require, to issue to any citizen of the United States an air-line route certificate authorizing such person to operate an American-flag air line in interstate air commerce and, subject to the approval of the President, to issue to any citizen of the United States an air-line-operation approval certificate authorizing such person to operate an American-flag air line in foreign air commerce.

(b) Any person who, in good faith, was operating an American-flag air line on December 1, 1937, and rendering adequate and efficient service, as determined by the Board, shall be entitled to an air-line route certificate or an air-line-operation approval certificate, as the case may be, for operation over the route or routes over which such person was operating such air line on such date.

(c) Any certificate shall be renewed at the expiration of the period for which it was issued or renewed, or within such reasonable period prior thereto as the Board may determine, unless the Board shall find that the service rendered by the certificate holder during the term of such certificate has not been consistent with the public interest, convenience, and necessity, or that the public interest, convenience, and necessity will not require such service.

(d) The Board may attach to any certificate such reasonable terms, con-

ditions, or limitations as, in its judgment, the public interest, convenience, and necessity may require.

(e) No certificate shall grant a monopoly, exclusive privilege, immunity, or franchise.

(f) No certificate shall be issued or renewed to remain in effect for a period of time in excess of ten years.

(g) No air-line route certificate may be transferred except upon the approval of the Board as being in the public interest, and no air-line-operation approval certificate may be transferred unless such transfer is approved by the President upon recommendation of the Board as being in the public interest.

(h) The Board may, upon complaint or upon its own motion, after notice and hearing, alter, amend, modify, suspend, or upon application of the holder of any certificate cancel any such certificate if the public interest, convenience, and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this Act or any order, rule, or regulation issued by the Board hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof intentionally fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order, rule, regulation, term, condition, or limitation found by the Board to have been violated.

(i) Any interested person may file with the Board a protest or memorandum of opposition to the issuance, alteration, modification, amendment, cancellation, suspension, revocation, or renewal of a certificate.

FOREIGN-FLAG AIR-LINE PERMITS

SECTION 304. (a) The Board is authorized, whenever in its judgment the interest, convenience, and necessity may require, to issue to any person, subject to the approval of the President, an air-line permit authorizing such person to operate a foreign-flag air line between any foreign country and the United States.

(b) Any person who holds a permit, issued by the Secretary of Commerce under section 6 of the Air Commerce Act of 1926, as amended, which was in effect on December 1, 1937, and which authorizes such person to operate an air line from any foreign country to the United States, shall, subject to the approval of the President, be entitled to receive an air-line permit under this section if the Board finds that the service rendered has been adequate and efficient.

(c) The Board may, subject to the approval of the President, attach to any such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest, convenience, and necessity may require.

(d) No permit shall grant a monopoly, exclusive privilege, immunity, or franchise.

(e) No permit may be transferred unless such transfer is approved by the President upon recommendation of the Board as being in the public interest.

(f) Any permit issued under the provisions of this section may, subject to the approval of the President, be altered, modified, amended, suspended, canceled, or revoked by the Board.

(g) Any interested person may file with the Board a protest or memorandum of opposition to the issuance, alteration, amendment, cancellation, suspension, or revocation of a permit.

RATES OF PAY FOR CARRIAGE OF MAIL BY AIR

SECTION 305. The Board is authorized to fix and determine fair and reason-

able rates of compensation for the transportation of mail by aircraft and service connected therewith over each route, or each class of routes, including rates for the transportation of mail by other means than aircraft whenever such transportation is made necessary by conditions of emergency arising from aircraft operation; to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation over each route or each class of routes: *Provided*, That the amount paid the person operating the air line shall in no instance exceed (1) for transportation in interstate air commerce, 35 cents per direct aircraft statute mile authorized by the Postmaster General for an average load of not exceeding three hundred pounds, plus $3\frac{1}{2}$ cents for each additional one hundred pounds of mail, or fraction thereof, and (2) for carriage in foreign air commerce, \$2 per direct aircraft statute mile authorized by the Postmaster General for an average load of not exceeding eight hundred pounds, plus \$1 per pound per one thousand miles, or fraction thereof, for excess over eight hundred pounds; such loads for both interstate air commerce and foreign air commerce to be computed at the end of each calendar month on the basis of the average mail load carried per statute mile over the route during such month: *Provided further*, That the Postmaster General may, upon application by any person operating an air line, authorize such person for his own convenience to transport mail on any unauthorized trip with the understanding that the weights of mail so transported will be credited to regular authorized schedules and no mileage compensation will be claimed therefor: *Provided further*, That the President, whenever in his judgment the public interest so requires, may increase the maximum amount herein prescribed for the carriage of United States mail in foreign air commerce in an amount not to exceed 100 per centum of such maximum amount.

REGULATION OF RATES AND SERVICES

SECTION 306. (a) The Board is authorized to supervise, regulate, and control all rates, fares, charges, classifications, regulations, practices, and services incident to the carriage of persons or goods by air, of any person operating an American-flag air line: *Provided*, That in exercising and performing its powers and duties under this subsection in respect of foreign air commerce, the Board shall do so consistently with any obligation assumed by the United States in any treaty or convention that may be in force between the United States and foreign countries and shall take into consideration any applicable laws and requirements of any such foreign country.

(b) The Board may from time to time establish such just and reasonable classifications or groups of air lines as the nature of the services performed by such air lines shall require; and such just and reasonable rules, regulations, and requirements, pursuant to and consistent with the provisions of this Act, to be observed by the persons operating air lines so classified or grouped, as the Board deems necessary in the public interest.

(c) Every person operating an American-flag air line shall file with the Board, and print and keep open to public inspection, tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for such transportation by aircraft and all services in connection therewith, between points served by it and between points served by it and points in the United States served by any other common carrier when through service and through rates shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. Tariffs shall be published, filed, and posted in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is authorized to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void.

(d) Any person may make complaint in writing to the Board that any individual or joint rate, fare, charge, classification, rule, regulation, or practice, filed

and posted as provided herein by any person operating an American-flag air* line, is or will be in violation of this Act. Whenever, after notice and hearing, upon complaint or upon its own motion, the Board shall be of the opinion that any such individual or joint rate, fare, or charge demanded, charged, or collected by any such person, or by any such person in conjunction with any other common carrier, or any classification, rule, regulation, or practice whatsoever of such person or persons affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge, or the maximum or minimum or the maximum and minimum rate, fare, or charge, thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective; and the Board shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing upon complaint or upon its own motion, establish through service and joint rates, fares, charges (or the maxima or minima, or the maxima and minima thereof), classifications, rules, regulations, or practices applicable to interstate or foreign air commerce and the terms and conditions under which such through service shall be operated.

(e) Whenever, after notice and hearing, upon complaint or upon its own motion, the Board is of the opinion that the divisions of joint rates, fares, or charges applicable to interstate or foreign air commerce, or interstate or foreign transportation in conjunction with other common carriers, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, the Board shall prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers. The Board may require the adjustment of divisions between such carriers from the date of filing the complaint or entry of order of investigation, or such other date subsequent thereto as the Board finds justified.

(f) In the exercise of its power to prescribe just and reasonable rates, the Board shall give due consideration, among other factors, to the inherent advantages of transportation by air lines; to the effect of the rates upon the movement of traffic; to the need, in the public interest, of adequate and efficient transportation service by such air lines at the lowest cost consistent with the furnishing of such service; and to the need of revenue sufficient to enable such air lines, under honest, economical, and efficient management, to provide such service.

(g) Whenever any person operating an American-flag air line shall file with the Board a tariff stating a new individual or joint rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, the Board is authorized and empowered upon complaint of any person or upon its own motion, at once, and, if it so orders, without answer or other formal pleading by the interested person operating the air line but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, or such rule, regulation, or practice; and, pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the person operating the air line affected hereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, charge, or classification, or such rule, regulation, or practice, for a period of ninety days, and if the proceeding has not been concluded and a final order made within such period the Board may, from time to time, extend

* The original text of § 306(d) read in part:

Any person may make complaint in writing to the Board that any individual or joint rate, fare, charge, classification, rule, regulation, or practice, filed and posted as provided herein by any person operating an American-flag air classification, rule, person operating an American-flag air line is or will . . .

Insofar as the discrepancy in the original text was obviously a typographical error, the corrected version was included in the text.—Ed.

the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when it would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided*, That this subsection shall not apply to any initial tariff filed by any person operating an American-flag air line upon the effective date of this subsection.

REGULATION OF ACCOUNTS

SECTION 307. (a) The Board is authorized to prescribe, in its discretion, the form of any and all accounts, records, and memoranda to be kept by any person operating an American-flag air line.

(b) No member, officer, or employee of the Board shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts except insofar as he may be directed to do so by the Board or by a court.

INQUIRY INTO AIR-LINE MANAGEMENT

SECTION 308. The Board is authorized to inquire into the management of the business of any person operating an American-flag air line and, for this purpose, to obtain from such person, and from any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, such full and complete reports and other information as may be necessary to enable the Board to exercise and perform its powers and duties.

ACCESS TO AIR-LINE PROPERTY

SECTION 309. The Board shall at all times have access to the lands, buildings, or equipment of any person operating an American-flag air line, and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by any such person; and it may employ special agents or examiners, who shall have authority, under the orders of the Board, to inspect and examine such lands, buildings, equipment, accounts, records, memoranda, documents, papers, and correspondence.

CONSIDERATION OF COMPLAINTS

SECTION 310. The Board is authorized to consider any complaint made by any person with respect to anything done or omitted to be done by any person operating an air line in contravention of any provision of this Act or of any requirement established pursuant hereto. Upon such complaint, or upon its own motion, the Board may investigate whether any such person has failed to comply with any such provision or requirement. If the Board, after notice and hearing, finds that such person has failed to comply with any such provision or requirement, the Board shall issue an appropriate order to compel such person to comply therewith. Whenever the Board is of the opinion that any complaint does not state facts which warrant an investigation and action on its part, it may dismiss such complaint without hearing.

ADDITIONAL AUTHORIZATION

SECTION 311. The Board is authorized to perform any and all acts, to issue and amend orders, and to make and amend all general and special rules and regulations which may be necessary in the exercise and performance of its powers and duties.

APPLICATION OF ACT

SECTION 312. The provisions of this Act shall apply to any receiver of any person operating an air line and to any operating trustee and, to the extent found by the Board to be reasonably necessary for the administration of this Act, to any person having direct or indirect control over, or affiliated with, any person operating an air line.

TITLE IV — OTHER FEDERAL AGENCIES

THE DEPARTMENT OF STATE

SECTION 401. The Secretary of State shall, consistent with the public interest and at the instance of the Board, negotiate with any foreign government with a view to entering into appropriate agreements, as determined by the Board and subject to the approval of the President, with any such foreign country for the purpose of the establishment or development of foreign air commerce, including air routes and services.

THE POST OFFICE DEPARTMENT

SECTION 402. (a) With respect to the character of service to be rendered and the equipment to be employed by any person operating an air line which carries United States mail by aircraft, the Postmaster General is authorized to specify—

- (1) the weight of mail to be so carried;
- (2) the space in the aircraft required for such mail;
- (3) the facilities in the aircraft required for the security of such mail;
- (4) the terminals and stops for mail so carried; and
- (5) the schedules of any air line, subject only to safety requirements

determined by the Board.

(b) The Postmaster General shall pay for the carriage of United States mail by aircraft in accordance with rates fixed by the Board.

(c) In any case where air services are performed between the United States and any foreign country or foreign countries by aircraft owned or operated by the nationals of both countries, the Postmaster General shall not pay a higher rate to the foreign-flag air line for transporting mail by aircraft between the United States and such foreign country or foreign countries than such foreign country or foreign countries pays for transporting mail by aircraft on American-flag air lines between such foreign country or foreign countries and the United States.

(d) The Postmaster General may require any person operating an American-flag air line carrying the United States mails to transport on any aircraft he operates, without charge, all duly accredited officers and employees of the Post Office Department, while traveling on official business relating to the transportation of mail by aircraft, upon the exhibition of their credentials.

(e) The Postmaster General is authorized to make such rules and regulations, not inconsistent with any order, rule, or regulation made by the Board under the provisions of this Act, as may be necessary for the safe and expeditious carriage of the United States mail by aircraft.

THE MARITIME COMMISSION

SECTION 403. The provisions of the Merchant Marine Act of 1936 (49 Stat. 1985; U. S. C. 1934 edition, Supp. II, title 46, sec. 1101), granting authority for construction aids, are hereby extended under the authority of the Maritime Commission to aircraft engaged in foreign air commerce, except those provisions relating to Government construction for charter, and the provisions of such Act, granting authority to pay construction and operating differential subsidies, are hereby extended under the authority of the Maritime Commission to lighter-than-air aircraft engaged in foreign air commerce.

TITLE V — PROCEDURE

HEARINGS

SECTION 501. The Board is authorized at any time to institute an inquiry, on its own motion or on request of any person interested, as to any matter arising under the provisions of this Act, or of any rules, regulations, or orders made under the provisions of this Act, and is authorized to make any order relating to the inquiry.

ADMINISTRATIVE REVIEW

SECTION 502. In addition to the powers specifically conferred upon the President in sections 303 and 304 of this Act, the exercise or performance of any other power or duty of the Board which is not subject to review by courts of law shall be subject to the general direction of the President, except that the exercise and performance by the Board of the following routine executive and administrative powers and duties shall be subject to the general direction of the Secretary of Commerce: (1) The preparation of estimates of appropriations and (2) the accounting for public funds.

ADMINISTRATIVE APPEALS

SECTION 503. (a) If any order is made by the Board under this Act to the alleged injury of any person, such person may, within thirty days from the date of the issuance thereof, file with the Board a petition for a review of such order and may request a hearing or rehearing thereon, as the case may be.

(b) Upon a decision adverse to the petitioner under subsection (a) of this section, he shall pay to the Board, to be covered into the Treasury as miscellaneous receipts, an amount equal to such portion of the costs of the hearing or rehearing as the Board may determine and, in any case, the petitioner may be required by the Board before the hearing or rehearing to furnish bond, with such surety as it may approve, to cover such costs.

JUDICIAL APPEALS

SECTION 504. Any person aggrieved by an order issued by the Board in a proceeding to which such person is a party, except a final order approved by the President under sections 303 and 304, may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Board be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Board, and thereupon the Board shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Board shall be considered by the court unless such objection shall have been urged below. The finding of the Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Board, the court may order such additional evidence to be taken before the Board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying,

and enforcing or setting aside, in whole or in part, any such order of the Board shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended. The commencement of proceedings under this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

JUDICIAL ENFORCEMENT

SECTION 505. If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term or condition of any license, certificate, or permit, the Board, or its duly authorized agent, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, or condition and enjoining upon them obedience thereto.

TAKING EVIDENCE

SECTION 506. The Board, for the purpose of any inquiries or hearings, may administer oaths, examine witnesses, require the preservation of evidence, and issue subpoenas running to any place in the United States for the attendance and testimony of witnesses, or the production or discovery of books, papers, documents, exhibits, memoranda, and other evidence, or the taking of depositions before any designated individual competent to administer oaths for the purposes of this Act.

WITNESSES

SECTION 507. Witnesses summoned or whose depositions are taken shall receive the same fees and mileage as witnesses in the courts of the United States.

DISOBEDIENCE TO SUBPENA

SECTION 508. In case of failure to comply with any subpoena issued under authority of this Act, the Board may invoke the aid of any United States district court or the United States court of any Territory or other place to which this Act applies. The court may thereupon order the person to whom the subpoena was issued to comply with the requirements of the subpoena or to give evidence with respect to the matter in question. A failure to obey the order may be punished by the court as a contempt thereof.

DEPOSITIONS

SECTION 509. (a) The Board may order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation.

(b) Depositions may be taken before any officer authorized to take depositions under the laws of the United States, or of any State, Territory, possession, or the District of Columbia, upon reasonable notice given in writing by the party proposing to take such deposition stating the name of the witness and the time and place of the taking of his deposition.

OATHS

SECTION 510. Any notary public or other officer authorized by law of the United States or of any State, Territory, possession, or the District of Columbia, to take acknowledgements of deeds; any consular officer of the United States; or any member, officer, or employee of the Board or of the Department of Commerce

designated in writing for the purpose shall be competent to administer oaths for the purposes of this Act.

SERVICE OF SUBPENA

SECTION 511. For the purposes of this Act, any subpena may be served personally or sent by registered mail or by telegraph.

PRIVILEGE AGAINST SELF-CRIMINATION

SECTION 512. No person shall be excused from attending and testifying or from producing books, papers, documents, exhibits, memoranda, and other evidence in obedience to the Board, or in any cause or proceeding instituted by the Board, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-crimination, to testify or produce evidence, documentary or otherwise; except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

TITLE VI—PROHIBITIONS

OPERATION WITHOUT AN AIR-LINE CERTIFICATE OR PERMIT UNLAWFUL

SECTION 601. After one hundred and twenty days after the effective date of this section, it shall be unlawful for any person to operate an air line in interstate or foreign air commerce unless such person holds a certificate or permit authorizing him to operate such air line, or to abandon any route or part thereof, for which a certificate has been issued by the Board, or any stop on such route, without the approval of the Board: *Provided*, That this section shall not operate to prevent the Board from authorizing temporary or emergency operation or suspension of service whenever, in its judgment, the public interest may require: *Provided further*, That pending the determination of any air-line certificate application the continuance of such operation shall be lawful.

UNREASONABLE RATES UNLAWFUL

SECTION 602. It shall be unlawful for any person operating an American-flag air line to charge, demand, collect, receive, or make any unjust or unreasonable rate, fare, charge, classification, regulation, or practice; and any such rate, fare, charge, classification, regulation, or practice that is unjust or unreasonable is hereby declared to be unlawful.

DISCRIMINATION UNLAWFUL

SECTION 603. It shall be unlawful for any person operating an American-flag air line to make any unjust or unreasonable discrimination in any rate, fare, charge, practice, classification, regulation, or service for or in connection with any air-line service, directly or indirectly, by means of any device; or to make or to give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality; or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

REBATING AND OTHER PRACTICES UNLAWFUL

SECTION 604. It shall be unlawful for any person operating an American-flag air line, unless otherwise provided by or under authority of this Act, to engage or participate in any air-line service in interstate or foreign air commerce unless his tariffs have been filed and published in accordance with the provisions of this

Act and with the regulations made thereunder; and it shall be unlawful for such person (a) to charge, demand, collect, or receive a greater or less or different compensation for such air-line service, or for any service in connection therewith, between the points named in any such tariff than the rates, fares, or charges specified in the tariff then in effect; or (b) to refund or remit by any means or device any portion of the rates or charges so specified; or (c) to extend to any person any privileges or facilities in such air-line service, or employ or enforce any classifications, regulations, or practices affecting such rates or charges, except as specified in such tariff.

CHANGE IN TARIFFS

SECTION 605. It shall be unlawful for any person operating an American-flag air line to make any change in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder specified in any effective tariff of such person, except after thirty days' notice of the proposed change, filed and posted in accordance with section 306 (c). Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may, in its discretion and for good cause shown, allow such change, upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

INTERLOCKING DIRECTORATES

SECTION 606. After one hundred and twenty days after the effective date of this section, it shall be unlawful—

(a) For any person operating an American-flag air line to have and retain an officer or director who is an officer, director, stockholder, or member, or who has a representative or nominee who is an officer, director, stockholder, or member, in any other person operating an air line, unless such relationship shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby;

(b) For any person who is an officer or director of any person operating an American-flag air line to hold the position of officer, director, stockholder, or member, or to have a representative or nominee who is an officer, director, stockholder, or member in any other person operating an air line, unless such relationship shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby;

(c) For any person operating an American-flag air line to have and retain an officer or director who is an officer, director, stockholder, or member, or who has a representative or nominee who is an officer, director, stockholder, or member, in any other person who is engaged in any phase of aeronautics other than the operation of an air line, unless such relationship shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby;

(d) For any person who is an officer or director of a person operating an American-flag air line to hold the position of officer, director, stockholder, or member, or to have a representative or nominee who is an officer, director, stockholder, or member, in any other person who is engaged in any phase of aeronautics other than the operation of an air line, unless such relationship shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby;

(e) For any person operating an American-flag air line to have and retain an officer or director from and after one hundred and twenty days after a finding by the Board, upon a hearing duly had, that the financial or other interest of such person, or of his representative or nominee, in any person engaged in any business (other than a person engaged in any phase of aeronautics or whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person), is detrimental to the public interest in the operation or management of the person operating the American-flag air line; or

(f) For any person to hold the position of officer or director of any person operating an American-flag air line from and after one hundred and twenty days after a finding by the Board, upon a hearing duly had, that the financial or other interest of such person, or of his representative or nominee, in any person engaged in any business (other than a person engaged in any phase of aeronautics or whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person), is detrimental to the public interest in the operation or management of the person operating the American-flag air line.

HOLDING COMPANIES

SECTION 607. After one hundred and twenty days after the effective date of this section, it shall be unlawful—

(a) For any person operating an American-flag air line to have and retain an officer or director who is an officer, director, stockholder, or member, or who has a representative or nominee who is an officer, director, stockholder, or member, in any other person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person, unless such relationship shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby;

(b) For any person who is an officer or director of a person operating an American-flag air line to hold the position of officer, director, stockholder, or member, or to have a representative or nominee who is an officer, director, stockholder, or member, in any other person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person, unless such relationship shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby; or

(c) For any person, whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person, to buy, acquire, hold, own, or control, directly or indirectly any share of stock or other interest in any person operating an American-flag air line, unless such purchase, acquisition, holding, ownership, or control shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby: *Provided*, That the provisions of this subsection shall not apply to any bona fide investment trust not formed or operated for the direct or indirect purpose of avoiding the provisions of this subsection so as to prevent the buying, acquiring, holding, or owning by it of shares of stock or other interest in any such person, within such reasonable limitations as the Board may by regulation prescribe, but no regulation of the Board shall permit any such investment trust either by itself or in combination with other interests with which it may be affiliated to acquire actual control in any such person.

OTHER PROHIBITED INTERESTS

SECTION 608. After one hundred and twenty days after the effective date of this section, it shall be unlawful—

(a) For any person operating an American-flag air line to buy, acquire, hold, own, or control, directly or indirectly, any share of stock or other interest in any

other person engaged, directly or indirectly, in any other phase of aeronautics, unless such purchase, acquisition, holding, ownership, or control shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby: *Provided*, That the provisions of this subsection shall not apply to any interest in any landing area, hangar, or other ground facility necessarily incidental to the performance by any such person of any of his services, nor to any share of stock or other interest in any other person whose principal business is the maintenance or operation of any such landing area, hangar, or other ground facility; or

(b) For any person engaged, directly or indirectly, in any phase of aeronautics, otherwise than in operating an air line, to buy, acquire, hold, own, or control, directly or indirectly, any share of stock or other interest in any person operating an American-flag air line, unless such purchase, acquisition, holding, ownership, or control shall have been authorized by order of the Board, upon due showing in the form and manner prescribed by the Board that the public interest will not be adversely affected thereby.

TITLE VII—PENALTIES

GENERAL

SECTION 701. (a) Any person who violates any provision of this Act other than sections 601, 606, 607, or 608, or any order, rule, or regulation issued hereunder, or any term, condition, or limitation of any certificate issued hereunder, shall be subject to a civil penalty of \$500 for each such violation. If such violation be a continuing one, each day during which such violation continues shall be deemed a separate violation. The Board is authorized to remit or mitigate any penalty incurred under this section if it finds the existence of mitigating circumstances sufficient to justify such action, except that the Postmaster General is authorized to exercise such power with respect to any violation of any rule or regulation issued by the Postmaster General under authority of this Act.

PROHIBITED INTERESTS

SECTION 702. Any person who is convicted of a violation of any provision of sections 601, 606, 607, or 608 shall be subject to a fine of not to exceed \$10,000 or imprisonment for not more than three years, or both.

FALSE ENTRIES

SECTION 703. Any person who shall willfully make any false entry in any book of accounts or in any records or memoranda kept by any person operating an American-flag air line, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such accounts, records, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the person operating the air line, shall be deemed guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not to exceed \$5,000 or imprisonment for a term of not more than three years, or both: *Provided*, That the Board may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

TITLE VIII—MISCELLANEOUS

LABOR PROVISION

SECTION 801. It shall be a condition upon the holding of an air-line-route certificate or an air-line-operation approval certificate that the rate of compensa-

tion, maximum hours, and other working conditions and relations of all air-line pilots and other employees of the holder of such certificate shall conform to decisions heretofore made by the National Labor Relations Board, notwithstanding any limitation included in any such decision as to the period of its effectiveness. This condition shall not be construed as restricting the right of any such employees by collective bargaining to obtain higher rates of compensation or more favorable working conditions and relations. It shall further be a condition upon the holding of any such certificate that the holder shall comply with title II of the Railway Labor Act, as amended. Any violation of the Railway Labor Act, as amended, or any of the provisions of this section by an air line holding such certificate shall be deemed a violation of this Act and the Board shall, when such violation is found to exist by it, as the penalty, forthwith suspend any such certificate granted under the provisions of this Act until such violations have ceased.

CERTIFIED COPIES OF RECORD

SECTION 802(a) A certified copy under the seal of the Board or of any executive department or independent establishment mentioned in this Act shall be admissible to prove any record or document kept or filed in the office of the Board or the department or establishment.

(b) A certificate under the seal of the Board or any executive department or independent establishment mentioned in this Act stating that after diligent search no record or document of a specified kind and tenor is found to exist in the office of the Board or of the department or establishment shall be admissible to prove that such document is not there contained or was not issued therefrom up to the date of making such certificate.

AGENT FOR SERVICE

SECTION 803. It shall be the duty of each person operating an American-flag air line, within sixty days after the effective date of this section, to designate in writing an agent in the District of Columbia upon whom service of all notices and process and all orders, decisions, and requirements of the Board may be made for and on behalf of such person in any proceeding or suit pending before the Board, and to file such designation in the office of the secretary of the Board, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and process and orders, decisions, and requirements of the Board may be made upon such person by leaving a copy thereof with such designated agent at his office or usual place of residence in the District of Columbia, with like effect as if made personally upon such person; and, in default of such designation of such agent, the service of any notice or other process in any proceeding before said Board, or of any order, decision, or requirement of the Board, may be made by posting such notice, process, order, decision, or requirement in the office of the Secretary of the Board.

SAVINGS PROVISIONS

SECTION 804. (a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges which have been issued, made, or granted by the Secretary of Commerce, the Bureau of Air Commerce, the Interstate Commerce Commission, or the Postmaster General, under any provision of law repealed or amended by this Act or in the exercise of duties, powers, or functions transferred to the Board by this Act, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Board or by operation of law.

(b) The provisions of this Act shall not affect suits or proceedings pending upon the effective date of this section; and all such suits or proceedings shall be continued, judgments or decisions therein rendered, and appeals therein taken, in

the same manner and with the same effect as if this Act had not been enacted. No suit, action, or other proceeding lawfully commenced by or against any agency or officer of the United States, in relation to the discharge of official duties, shall abate by reason of any transfer of powers and duties from such agency or officer to the Board under the provisions of this Act; but the court, upon motion or supplemental petition filed at any time within twelve months after such transfer, showing the necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the Board.

(c) The provisions of this Act shall not affect any proceeding pending before any executive department or independent establishment of the Government on the effective date of this section, but any such proceeding shall be continued, orders therein issued, and appeals therefrom taken in the same manner and with the same effect as if this Act had not been enacted.

REPEALS

SECTION 805. Sections 3, 4, 5, 6, 7, 9, 10, 11, 13, 15, 17, 18, and 19 of the Act of June 12, 1934, as amended (48 Stat. 933; U. S. C. 1934 edition, title 39, sec. 469); section 3 (f) (except the first two sentences) and section 3a of the Air Commerce Act of 1926, as amended (44 Stat. 568; U. S. C. 1934 edition, title 49, sec. 177); and the Act of March 8, 1928, (45 Stat. 248; U. S. C. 1934 edition, title 39, secs. 465 (a) and (b)), as amended, are hereby repealed.

SEPARABILITY

SECTION 806. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

EFFECTIVE DATE

SECTION 807. The provisions of this Act except this section and section 201 shall become effective ninety days after enactment.