Procedural Due Process in the Cancellation of Air Mail Route Certificates [Part 1]

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PROCEDURAL DUE PROCESS IN THE CANCELLATION OF AIR MAIL ROUTE CERTIFICATES

ERNST HOWARD CAMPBELL

I HISTORICAL AND CONGRESSIONAL BACKGROUND OF AVIATION INDUSTRY AND AIR MAIL

While the dominant concern in this article is to consider the legality and propriety of the issuance of the order canceling air mail route certificates in February, 1934, the requirements of procedural due process of the Fifth Amendment of the Federal Constitution in promulgating this order, and the litigation resulting therefrom, the historical and congressional background of the aviation industry, with special emphasis upon air mail, will first be briefly surveyed.

The twentieth century has witnessed the genesis, rise, and development of the airplane and air transportation; the American people have become acutely air conscious and air minded; and we are now in the air era. Air transportation commenced in this country with the inauguration of air mail, and air mail has been a great aviation laboratory and has given a marked impetus to the growth and development of aviation in this country. Modern transportation accents speed, and this is the stock in trade of the aviation industry.

When, on December 17, 1903, the Wright brothers, at Kitty Hawk, North Carolina, by the first successful airplane flight, demonstrated that heavier-than-air craft could fly, only a few envisaged the role that the airplane was to occupy in our national economy. Just as had been the case with the railroads, the automobile, and the telephone, commercial aviation experienced considerable difficulty in obtaining responsible capital in the early years of its development.

The progress of air mail reflects in a large measure the growth of the aviation industry. The first air mail service in the United States was conducted from Nassau Boulevard, Long Island, New York, to the post office at Mineola, New York, in 1911. An experimental air mail route was inaugurated between Washington, D.C., and New York City.

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on May 15, 1918, by the Post Office Department in conjunction with the War Department.

Although financial interests commenced to invest in the aviation industry in 1911, at the threshold of World War I, there was virtually no aviation industry in this country, and there were only about twenty types of airplanes in existence. At the outbreak of World War I in 1917, the American Signal Corps, the air arm of the Army, had 142 obsolete airplanes. Under the stimulus of war, capital was attracted to the aviation industry. During World War I, 11,760 airplanes were manufactured in this country for the armed forces. Our production for the Army and Navy combined in January, 1918, was 804, and for October, 1918, was 1,942. By 1918 our plane production was proceeding at the rate of something over 23,000 per year.\(^3\)

The operation of the Washington-New York experimental route was so successful that the Post Office Department immediately began to formulate plans for the extension of air mail service, and during 1920 transcontinental air mail routes were established. The first contracts for the carriage of mail by private operators were awarded on October 15, 1920, and both contracts were for foreign routes, namely, one between Seattle, Washington, and Victoria, British Columbia, and the other between Key West, Florida, and Havana, Cuba. During the early 1920’s air mail service was developed between the large metropolitan cities of the United States. These same years also witnessed the great mass production of the automobile, and at the same time the production of aircraft began to engage men’s attention to an increasing degree. While new models of airplanes were introduced during these years, the aircraft industry was still in its infancy.

A significant factor in stimulating interest in air mail service was the long distance flight made on May 20, 1927, by Charles A. Lindbergh. His great contribution was to focus the attention of the world upon aviation, to make the people of the world aviation conscious, and to challenge the imagination of the American people in the direction of aeronautics. Up to the time of this flight, few appreciated what had been accomplished by the Wright brothers.

The adventuresome aeronautic exploits in the latter 1920’s of Admiral Byrd and others, together with the technological developments in aircraft construction, gave a great impetus to the aviation industry, attracted capital to meet the needs of the industry, and in 1929 over 6,000 airplanes were manufactured in this country. In 1928 and 1929 a great boom took place in the aviation field comparable to the earlier railroad expansion era.\(^4\) With the crash of the stock market in 1929,

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\(^3\) Colonel Edgar S. Gorrell, *The Measure of America’s World War Aeronautical Effort*, Burlington, Vt: The Lane Press, Inc (1940), 34

however, much of the new capital was dissipated; aircraft manufacturing was sharply curtailed; and numerous aircraft manufacturers were obliged to retire from business. Yet in the 1930's there were some men whose confidence in the future of aviation remained unshaken, and aircraft manufacturing became an integral part of our industrial life. Technological advance continued to be made and contributed greatly toward increased speed and safety of operation of aircraft.

The roots of some of the domestic airlines date back to the 1920's, but the present corporate structures of a number of them stem from the general realignment that took place in 1934 after the cancellation of the air mail route certificates. When the Civil Aeronautics Authority assumed office under the Civil Aeronautics Act of 1938, the financial structure of the air transport industry was chaotic. Prior to the enactment of the Civil Aeronautics Act of 1938, it was estimated that of the $120,000,000 of private investment made in American air transportation, over $60,000,000 had been dissipated, and the equity of the entire industry was valued at less than $40,000,000.6 "Half of the private capital which had been invested in the industry had been irretrievably lost. The result of shaken faith on the part of the investing public in the financial stability of the air lines was preventing the flow of greatly needed funds into the industry."8

However, approximately one year and five months after the inauguration of the Civil Aeronautics Authority (now Civil Aeronautics Board), with only a few exceptions, American air carriers were operating "in the black." Prior to the passage of the Civil Aeronautics Act, the domestic air lines experienced great difficulty in borrowing money, but after the passage of this legislation, bankers began to lend generously to them. Air transportation had come to be recognized as a firmly established part of our national economy.7

With the gathering of war clouds over Europe and the inflicting of great devastation over Europe by the German air armada, England and France in 1939 and 1940 placed large orders in this country for aircraft, and May 16, 1940, the late President Franklin D. Roosevelt, in a personally delivered message on national defense before a joint session of Congress, called upon aircraft manufacturers in this country to construct 50,000 airplanes to arm this country to meet the eventualities the aggressor nations presented.

In 1938, aircraft production in this country was valued at $125,000,-000, and 40,000 persons were engaged in aircraft manufacturing. In 1940, aircraft production was valued at $550,000,000, and the number

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6Selig Altschul, Economic Regulation of Air Transport, (1941) 12 J Am L. Com 163
7Testimony of Mr L Welch Pogue, Chairman of C A. B, during Hearings before the Committee on Interstate and Foreign Commerce on H R. 1012, 78th Cong, 1st Sess (1943) 26.
8Ibid, 94, Testimony of Colonel Edgar S. Gorrell.
of persons engaged in this industry reflected a rather steady increase in proportion to the growth of the industry. 8

The growth of aviation proceeded at a relatively normal pace until World War II. This conflict compelled aviation to make measurable progress toward maturity. Up until World War II, the emphasis in the manufacture of aircraft had been upon quality of product and not the quantity, or the mass production thereof. However, the pressure of war demands brought about a shift in emphasis in view of the mass production needed. Energy and drive were directed toward standardization; technological development of aircraft was greatly accelerated, the processes of normal growth and expansion were markedly quickened; incredible mass production of the airplane resulted; and the air transportation and aviation industry of the United States in a large measure shaped the course of World War II.

In May, 1942, the federal government requisitioned approximately 200 of the 260 airplanes then in operation over the domestic commercial airlines. Notwithstanding the fact that the airlines lost 50 per cent of their equipment and 30 per cent of their regular schedules, by virtue of the exercise of bold ingenuity and initiative, airplanes were kept in the air eleven and one-half hours out of every twenty-four as against a prewar average of eight and one-half hours, and thus the commercial airlines made every effort to meet the mounting demands of passengers, mail, and express.

Under the stimulus of World War II, the aviation industry became the largest industry in the country, and involves today a major part of our national economy. Under mass production, the automobile industry turned out products valued at $3,700,000,000 at its all-time peak in 1941, but aviation production has far surpassed this production figure. Aviation production leaped from $280,000,000 in 1939 to $6,400,000,000 in 1942, and the schedule for 1943 called for production of $20,000,000,000 which was more than five times automobile production at its peak and approximately a seventh of our national income. 9

Just as the automobile, in a large measure, transformed our economy, including our cultural, economic, and social life after World War I, so the airplane will inevitably do likewise in the post World War II period. While many anticipate considerable contraction in aircraft manufacturing in the postwar period for the reason that this industry has been geared beyond peacetime needs, many also predict that there will be a great expansion not only in the business of manufacturing civilian airplanes, but also with respect to airlines, air transport facilities, and

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8 World Leadership in Aviation Seen Assured for United States, 2 Civil Aeronautics Journal, No. 21 (November 1, 1941) 270
9 Charles I. Stanton, former Civil Aeronautics Administrator, Aviation—Nation's Largest Industry 4 Civil Aeronautics Journal, No. 7 (July 15, 1943) 91
ground facilities, such as airports, airways, and training and repair facilities which are essential to the solid and firm development of the aviation industry. While aircraft production will probably not continue at the war time pace, the airplane will unquestionably play a very conspicuous role in the postwar period.

An aviation industry of such magnitude inevitably presents a number of problems, the solution of which will require solid and sound administration. In the light of the fact that we have now had aviation for several decades, current problems in this field should be viewed against the background of accumulated administrative experience.

May 16, 1943, the twenty-fifth anniversary of the inauguration of air mail service was commemorated pursuant to a Joint Resolution (H.J. Resolution 108), of the Seventy-eighth Congress. The subject of air mail service appears to have received initial congressional consideration on June 14, 1910, when the late Congressman Morris Sheppard of Texas introduced a bill (H.R. 26833), providing "for an investigation to determine the cost and the practicability of an air mail route." This bill died in the House Committee on Post Offices and Post Roads.

After a number of experimental air mail flights had been made during 1911, the Post Office Department, having recognized the possibility of developing the airplane into a practicable means of aerial transportation, made a recommendation to Congress early in 1912 that an appropriation of $50,000 be made for experimental air mail service, but Congress declined to grant the appropriation. Notwithstanding legislative indifference toward air mail, in 1912 experimental and exhibition air mail flights were conducted in sixteen states, and a request for an appropriation for experimental aerial postal service was presented by the Post Office Department to Congress from year to year.

The request for an air mail appropriation was finally honored by Congress during the fiscal year 1916. During that year advertisements invited bids upon one air mail route in Massachusetts and upon several in Alaska. By reason of the diversion of materials to further the war effort in World War I, appropriate airplanes could not be procured for the proposed service, and no bids were received under those advertisements. A congressional appropriation of $100,000 for the fiscal year ending June 30, 1918, for the establishment of air mail routes gave a tremendous impetus to the development of air mail service. This appropriation made possible the introduction of the regular daily air mail round trip except Sunday, conducted by the Post Office Department.

\[\text{References:}\
\text{REP POSTMASTER GEN (1913) 26; REP POSTMASTER GEN (1914) 23; REP POSTMASTER GEN (1915) 50-51; REP POSTMASTER GEN (1916) 48; REP POSTMASTER GEN (1917) 40; 39 STAT 418; FRANCES A. SPENCER, AIR MAIL PAYMENT AND THE GOVERNMENT, Washington, D. C., The Brookings Institution (1941) 19-20.}\]
Office and War Departments, between Washington, D.C., and New York City during the administration of Woodrow Wilson in 1918.

After the Army retired from the air mail scene in 1918, it did not again reappear in this role until the cancellation of the air mail route certificates in the inclement February of 1934.

Aided by another $100,000 congressional appropriation for air mail for the fiscal year ending June 30, 1920, and by a further appropriation of $800,500 for the fiscal year ending June 30, 1920, air mail continued to advance and to gain in public favor. However, it soon became evident that the Washington, D.C.-New York air mail route was too short to permit any substantial saving of time, and it was discontinued for the reason that Congress had not made a specific appropriation for this particular route. The first two years after the Armistice of World War I witnessed a marked increase in the volume of air mail, great expansion of domestic air mail routes, and the introduction of the first official foreign air mail service in the Western Hemisphere.

That government operation of a transport service for air mail was never envisaged either by Congress or the Post Office Department as a permanent policy was manifested upon many occasions. Congress entertained a strong antipathy to government ownership and operation of this field of transportation. The operation of the air transport service was considered by the postal officials as a temporary excursion into fields adventitious to the Department, necessitated by the lack of satisfactory private contractors.

The Post Office Department operated the air mail service merely as a temporary expedient to convince the public of the practicability of commercial aviation, and to induce private enterprise to enter the field and to interest private capital in the operation of air mail service. The Post Office Department operated the service from May 15, 1918, to August 31, 1927. However, the withdrawal of the Post Office Department from direct governmental operation was not accompanied by an abdication of broad regulatory jurisdiction thereover by the Department. During this pioneering era private capital had to be convinced that there were potential profits to air transport.

II Inauguration of Contracts and Route Certificates for Transportation of Air Mail

With the growing opposition in Congress to governmental operation of air mail service, in 1922 considerable attention had been given to the possibility of establishing a contract mail service. Many bills regarding contract air mail service were drafted and redrafted and discussed at several committee hearings. Legislative action was delayed for the reason that private carriers sought more favorable terms than Congress seemed willing to accede to.

14 Ibid.
gress was willing to grant

Upon authority of Congress contained in the Air Mail Act of 1925, known as the Kelly Bill, entitled “An Act to Encourage Commercial Aviation and to Authorize the Postmaster General to Contract for Air Mail Service”, the Department advertised for proposals for service on twelve routes. This statute provided for the gradual retirement of the Post Office Department from the operation of airplanes for the transportation of air mail and the liquidation of the government air transport service. It also marked a new era in the history of air mail because it empowered the Postmaster General to execute contracts for the conveyance of mail by air.

By reason of the large measure of success attained in the efficient operation and development of the transcontinental air mail, private capital was attracted to air mail transportation; contracts on a number of routes were executed; and these routes were put into operation. In 1926 the first wholly domestic air mail service under private contract was commenced by the Ford Motor Company. A substantial number of air mail routes were thereafter placed in operation. Under existing law, contracts could not be made for a term in excess of four years, and the contracts were made for a four-year term.

The interest of private enterprise in commercial aviation was greatly increased in 1926 by the passage by Congress of a bill known as the “Air Commerce Act of 1926”. Under the terms of this act, the Secretary of Commerce was charged with responsibility of fostering the development of commercial aviation in the United States and was vested with certain broad regulatory powers over aviation.

The Post Office Department continued its relinquishment of flying operations to private contractors, and by August 31, 1927, after more than nine years of pioneering work in air transportation, the Post Office Department had completely relinquished its carrying of air mail, and this service was placed in the channels of private enterprise. By relinquishing the actual operation of air mail transportation, the air mail carriers occupied the same relative position to the Post Office Department as the railroads and steamships with respect to the transportation of mail.

January 4, 1928, Representative Clyde Kelly introduced a bill in the House of Representatives (H.R. 8377). This resulted in the outstanding feature concerning contract air mail service during the fiscal year 1928, namely, the passage of an additional amendment to the Air

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16 Hearings before the House Committee on Post Offices and Post Roads on Commercial Aviation-Air Mail Service, 67th Cong., Pt 1, January 6, 1922, 1 et seq.; Pt II, February 21, 1922, 23 et seq.; Pt III, April 28-29, 1922, 110 et seq.
17 43 Stat. 805
Mail Act of 1925, indorsed by the Post Office Department, called the Kelly Amendment. This amendment authorized the Postmaster General, by negotiation with an air mail contractor who had operated satisfactorily for a period of two years or more, to arrange for the surrender of the contract and the substitution therefor of an air mail route certificate for a period of not to exceed ten (10) years. This amendment further provided that the "certificate may be canceled at any time for willful neglect on the part of the holder to carry out such rules, regulations, or orders [as issued by the Postmaster General for meeting the needs of the postal service and adjusting air mail operations to the advances in the art of flying]; notice of such intended cancellation to be given in writing by the Postmaster General.\footnote{45 \textsc{Stat} 594, c 603} The theory behind this amendment extending the term of the contract was that such an extension would further attract private capital to air mail transportation, and therefore advance the development of air mail service. There was a tremendous increase in air mail almost immediately following the enactment of the Kelly Amendment. Air mail increased from 1,065,000 pounds in 1927 to approximately 13,000,000 pounds in 1935.\footnote{Hours, Wages, and Working Conditions in Scheduled Air Transportation, \textit{Sen Doc No 208, 74th Cong, 2d Sess (1936) 9}}

Before issuing any route certificates in lieu of contracts in accordance with the Kelly Amendment, the Post Office Department was of opinion that additional congressional legislation should be enacted to correct certain inequalities which obtained between air mail contractors. Postmaster General Brown refrained from issuing any route certificate under the Kelly Amendment in the hope that more satisfactory legislation would be enacted. Under the then existing law, the rate of compensation differed widely; some contractors were operating "in the black," while others were "in the red." Some air mail operators were either unwilling or at least reluctant to carry passengers or carried them only to a very limited extent, and therefore depended for their income almost entirely upon air mail revenues. There were also a substantial number of air passenger lines which were finding it extremely difficult to sustain themselves on passenger revenues alone. Accordingly, the Watres Act was enacted to remedy these defects in existing law.

The Watres Act was designed to remove the existing inequitable method of payment and to promote the policy of developing an efficient air transportation service, both for the carrying of passengers and of air mail, and on May 5, 1930, the first air mail route certificates were issued. The Act provides in part:

\begin{quote}
\textit{The Postmaster General may, if in his judgment the public interest will be promoted thereby, upon the surrender of any air mail contract, issue in substitution therefor a route certificate for a period of not exceeding ten years from the}\end{quote}
date started under such contract to any contractor or sub-contractor who has satisfactorily operated an air mail route for a period of not less than two years, which certificates shall provide that the holder thereof shall have the right, so long as he complies with all rules, regulations, and orders that may be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting mail operations to the advances in the art of flying and passenger transportation, to carry air mail over the route set out in the certificate or any modification thereof at rates of compensation to be fixed from time to time; at least annually, by the Postmaster General, and he shall publish in his annual report his reasons for the continuance or the modification of any rates: Provided, that such rates shall not exceed $1.25 per mile. Such certificate may be canceled at any time for willful neglect on the part of the holder to carry out any rules, regulations, or orders made for his guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be canceled.

"Sec 7. The Postmaster General, when in his judgment the public interest will be promoted thereby, may make any extensions or consolidations of routes which are now or may hereafter be established." 22 (Italics supplied)

The passage of the Watres Act marked a turning point in the history of air mail service. The broad regulatory authority conferred by the Watres Act was subsequently reflected in the route certificates. Under the Watres Act the Postmaster General had almost absolute discretion over the following: (1) The location of routes; (2) the conditions of bidding for contracts; (3) consolidation and extension of routes; (4) the amount and quality of mail and passenger service over scheduled routes; (5) the equipment and personnel employed; (6) the system of accounts used by carriers; and (7) the compensation of carriers.

Public aid has played an important part in the introduction of scheduled air transportation and in its subsequent development. Air mail postal revenues for the five-year period from 1925 until 1930 aggregated about $15,000,000, whereas the payments to the carriers and other administrative costs borne by the Post Office Department required an additional $17,000,000. It has been calculated that from 1931 to February 19, 1934, public aid conferred through payments made for the transportation of air mail aggregated $35,236,253. 23

Thus air mail occupied a conspicuous place in our national life on the threshold of the epoch-making cancellation of the air mail route certificates.

22 46 STAT 259
23 I PUBLIC AIDS TO TRANSPORTATION—GENERAL COMPARATIVE ANALYSIS, and PUBLIC AIDS TO SCHEDULED AIR TRANSPORTATION, Washington, U S Government Printing Office (1940), Pt 1, 30-31
III Pressure Groups in the Aviation Industry

In the light of the multiple facets and ramifications of air mail and of the aviation industry, it is not surprising that pressure groups have been organized within the field of aeronautics to advance the objectives of special interests and to serve as their spearheads in legislative and administrative circles. An appreciation of associational activity in the field of aeronautics is therefore essential to an understanding of the forces behind the legislative and administrative pattern as it has developed in the field of air mail and of aeronautics generally.

"Our government is not the single, integrated unit which many people imagine it to be when they speak of 'the government'; it is, rather, an aggregate of power groups, each of which has an area of action which is not well defined, which is anxious to increase its own power and to absorb power exercised by rival agencies."  

Representative government in the United States has been accompanied by the introduction of a substantial number of organized minority groups in widely diversified fields whose central objectives are to make their needs and desires articulate and to influence the legislative and executive departments of the government, both with respect to the formulation of legislation and with respect to the conduct of administration. Pressure groups have become an "integral part of the democratic process."  

Most American citizens are affiliated with some pressure group, and many are associated with several such groups.

One of our most treasured possessions in the operation of the democratic process under the representative system is that we are acutely sensitive and respectful of the legitimate rights of minorities. Pressure groups may perform a real public service both with respect to the legislative and the administrative process by making articulate the legitimate needs and desires of such groups and by presenting essential data and information which is often of a highly technical character. They thus make possible well-informed, well-reasoned, and well-considered determinations on a great multiplicity of matters, and thereby render a great public service by bringing the expert into the service of the government.

However, while pressure groups per se are not inimical to the public interest and may do much to promote the public interest, it cannot be gainsaid that the action of pressure groups has not always been compatible with the public interest. The potential undesirable tendencies that manifest themselves at times in pressure groups have been well epitomized as follows.

"A weakness in pressure group legislation is that these groups think primarily of their own welfare and not of a

24 Roland Young, This Is Congress, New York, Alfred A. Knopf (1943) 27
25 Ibid
Another weakness is that many groups are under-represented, and other groups, through their highly specialized knowledge of legislative technique and from other causes, are able to exercise influence far more than commensurate with their political backing or with the justice of their demands.\textsuperscript{26}

When powerful pressure groups take the offensive against policies which are clearly in the public interest, at times such action by pressure groups may call for bold strokes in the public interest both from the White House and Congress that will carry with them a tidal wave of public opinion, regardless of the protests of pressure groups. The objectives sought to be attained by various groups must be viewed in the light of the public interest, and legislative and administrative action frequently reflects a compromise, that is, a synthesis of the viewpoints and conflicting demands of various groups.

Some of the leading pressure groups in the field of aeronautics include the Aeronautical Chamber of Commerce of America, a trade association primarily for the aircraft manufacturers in this country; the Air Transport Association of America, a national trade association of the schedule commercial air lines of the United States; the Air Line Pilots Association, an organization of 90 per cent of America's commercial air line pilots; the Air Line Mechanics' Association, International, a labor union which represents air line mechanics; the National Aeronautic Association, a service non-profit organization for promoting and safeguarding the interests of private flying and to serve the consumers of aviation products and services; the United States Chamber of Commerce, operating through its Transportation and Communication Department; the National Association of State Aviation Officials; the National Council on Business Mail, Inc., which is a non-profit association of business firms and associations concerned with securing maximum postal service at minimum cost; the National Aviation Trades Association which seeks to promote the interests of the non-scheduled aviation; Aircraft Owners and Pilots Association, an association of non-scheduled pilots; the American Municipal Association, which is the national federation of state leagues of municipalities. In addition to associational activity, certain powerful companies act independently to influence legislation and administration.

Many of the aviation organizations and associations have branch and regional offices. Within the area of their legitimate needs and desires and through the employment of proper techniques with sound discretion, these groups are entitled to be represented and heard, and are in a position to make a significant contribution to advance the public interest in the field of aeronautics.

\textsuperscript{26} Young, op cit 74-75
IV The Cancellation of the Air Mail Route Certificates

In the early 1930's a number of factors contributed to a growing conviction that evils obtained in the administration of air mail which required corrective action. There were a number of currents abroad which were becoming increasingly articulate to the effect that, contrary to the congressional intent, small air transport companies had been and were being discriminated against and denied the opportunity to transport air mail, and that air mail appropriations and air mail route certificates had been and were being allocated to a few large corporations. The complaints of the small air transport companies against the administration by reason of the fact that they did not hold air mail route certificates increased in number and were pressed with increasing zeal to eliminate this alleged injustice. There was a feeling that a number of devices, accompanied by fraud and collusion, had been employed by the administration to discriminate against the small air transport lines with respect to conveying air mail. In addition, some felt the compensation which had been paid to the commercial air lines for a number of years for the transportation of air mail had been grossly excessive, and had approached a national scandal.

When the late President Franklin D. Roosevelt and the New Deal took over the reigns of government in 1933, the new administration was determined to wage war upon existing economic abuses and to take affirmative action to prevent the exploitation of the public. February 9, 1934, Postmaster General Farley issued an order which canceled the domestic air mail route certificates.

The air mail route certificates affected by the cancellation order were awarded during the administration of Postmaster General Walter Folger Brown on March 5, 1929. As Farley had been active in Democratic politics for a long time, Brown likewise had also been active in Republican politics for some time before becoming Postmaster General in the Hoover administration. Postmaster General Brown had served under Harding and Coolidge as chairman of the Joint Congressional Committee on Reorganization of Executive Departments, Assistant Secretary of Commerce under Hoover, and had also actively supported William Howard Taft, Theodore Roosevelt, and Hiram Johnson. Such was the man whose administration of air mail route certificates was to be called into question.

After an examination of the facts surrounding the awarding of the air mail route certificates under Brown's administration, Postmaster General Farley stated that he was satisfied that the air mail route certificates awarded during the administration of ex-President Hoover, would be returned.

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27 Inaugural Address of President Franklin D. Roosevelt, Sen. Doc No 1, 73d Cong 1st Sess (1933) 102
were obtained through fraud and collusion, and a concerted conspiracy
to eliminate competitive bidding so as to aid a favored few Maladmin-
istration of the Post Office Department by Brown was charged upon
the following grounds:

First, it was alleged that the air mail route certificates were awarded
to air lines which were invited to attend the so-called Spoils Confer-
ences held in the Post Office Department in May and June, 1930, by
virtue of definite agreement between Brown, his associates, and assistahts
to divide territory and contracts without competitive bidding

Second, the legality of the air mail route certificates for two trans-
continental routes awarded in 1930 was challenged

Third, the policy of extending existing air mail routes rather than
opening the new services for competitive bidding was assailed as contr-
ary to the intent of Congress, as unlawful, and as an unfair denial
of opportunity to the new air transport companies to enter the field

Fourth, payments to air mail carriers under the administration of
Brown were asserted to have been excessive, and conducive to inefficient,
high cost operation by the existing air mail carriers

Fifth, unfair competition was asserted to have been fostered by the
policy of the Post Office Department of extending air mail routes into
territory pioneered by passenger transport companies and by subsidizing
new passenger services over air mail routes after passenger transport
companies had established passenger transport services

Solicitor Karl A Crowley of the Post Office Department also con-
cluded that the air mail route certificates in question had been obtained
as a result of fraud, conspiracy, and collusion between the Post Office
Department officials and the holders of the route certificates, and there-
fore the same could be annulled by any of the methods presently to be
set forth

The following possible methods were available to effect cancellation
of the air mail route certificates:

(1) By an executive order of the President under the Independent
Offices Act. The Act provides in part:

"Whenever it shall appear to the President, in respect of
any contract entered into by the United States prior to June
16, 1933, for the transportation of persons and/or things, that
the full performance of such contract is not required in the
public interest, and that modification or cancellation of such
contract will result in substantial savings to the United States,
the President is hereby, upon giving sixty days' notice and
opportunity for public hearing to the parties to such contract,
authorized, in his discretion, on or before April 30, 1935, to
modify or cancel such contract. Whenever the President shall
modify or cancel any such contract, he shall determine just
compensation therefor; and if the amount thereof, so deter-
mined by the President is unsatisfactory to the individual,
firm, or corporation entitled to receive the same, such individual, firm, or corporation shall be entitled to receive such portion thereof as the President shall determine and shall be entitled to sue the United States to recover such further sum as, added to said portion so received, will make up such amount as will be just compensation thereof. (Italics supplied)

(2) By an order of the Postmaster General issued pursuant to any one of the following:

a The air mail route certificates provided that such certificates might be canceled at any time for wilful neglect on the part of the holder to carry out any rules, regulations, or orders made for his guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five (45) days allowed within which to show why the certificate should not be canceled. The route certificates also provided that upon sixty days' notice to the carrier, the Postmaster General from time to time might modify the route by an extension or extensions, or diminish or modify the service prescribed and make such adjustments in the compensation of the carrier as he might deem proper.

b Under the Watres Act, provision was made for the cancellation of route certificates at any time for wilful neglect on the part of the holder to carry out any rules, regulations, or orders made for his guidance, notice of such intended cancellation of route certificates to be given in writing by the Postmaster General and forty-five days allowed within which to show cause why the certificate should not be canceled.

c Section 1846 of the Postal Laws and Regulations, which contains no provision for notice and hearing prior to discontinuance of curtailment of air mail service, provides:

"The Postmaster General may discontinue or curtail the service on any mail route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, the contractor to be allowed as full indemnity, one month's extra pay, on the amount of service dispensed with and a pro rata compensation for the amount of service retained and continued."

d Section 3950 of the Revised Statutes of the United States, under which Postmaster General Farley acted in canceling the air mail route certificates, contained no provision for notice and hearing prior to cancellation of such certificates. It provides:

"Combinations to prevent bids. No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to
bid for any such contract; and if any person so offending is a contractor for carrying the mail, his contract may be annulled; and for the first offense the person so offending shall be disqualified to contract for carrying the mail for five years, and for the second offense, shall be forever disqualified.

The President directed Farley to cancel the air mail route certificates, but to check with Attorney General Cummings before taking this action. After conferring with Attorney General Cummings, the Attorney General stated he wanted to study it over night. On the following morning Farley and Solicitor Crowley of the Post Office Department went to the Attorney General's office. Mr Cummings stated that there were "unquestionably adequate grounds" for cancellation. Then General Foulois, chief of the Army Air Corps, was telephoned and asked, "Can the Army carry the mail temporarily?" He answered, "Of course we can fly the mail."

Thereupon on February 9, 1934, Postmaster General Farley issued a cancellation order which became effective at midnight February 19, 1934, pursuant to alleged authority vested in him by Section 3950 of the Revised Statutes of the United States and by virtue of the general powers of the Postmaster General without giving notice and hearing to the air transport companies in question prior to the cancellation. This order affected twenty-six domestic air mail routes, flown by twelve air transport companies. The companies involved were: American Airways, National Air Transport, Western Air Express, Boeing Air Transport, Pacific Air Transport, Northwest Airways, Kohler Aviation Corporation, Pennsylvania Air Lines, Eastern Air Transport, National Park Airways, United States Airways, and Transcontinental and Western Air. Most of the companies affected received notice of the cancellation through the medium of the press before they received formal notice of the cancellation from the Post Office Department. The air mail route certificates of Pan American Airways, Inc., covering foreign air mail routes were not included in the cancellation order.

After the issuance of the annulment order by Mr. Farley, President Roosevelt issued an executive order directing the Post Office, War, and Commerce Departments to cooperate to the end "that necessary air mail service be afforded". He ordered the Secretary of War to place at the disposal of the Postmaster General sufficient airplanes, employees and equipment for the transportation of mail "during the present emergency." Effective at midnight February 19, 1934, all service by the private air mail contractors was discontinued in accordance with the Postmaster General's order No. 4959. The Army continued to perform...
service on various routes until May 31, 1934. Between February 20 and May 31, 1934, a total of 1,719,919 miles were flown by the Army fliers incident to the transportation of air mail.

Senator Black vehemently denounced the air mail route certificates awarded during Brown’s administration, and defended Farley’s cancellation order. Senator Robinson of Arkansas, Democratic leader of the Upper House, declared that fraud and collusion, coupled with connivance of former Postmaster General Brown, had tainted the awarding of the annulled air mail route certificates. Senator Lewis (Democrat) of Illinois also defended the administration’s course in canceling the air mail route certificates.

Charles A. Lindbergh, one of the first to protest the summary cancellation of the air mail route certificates, telegraphed President Roosevelt on February 11, 1934, protesting against the cancellation of the certificates, declaring that every American individual or organization has the right to a fair trial, and that no improper acts had been established on the part of the companies.

Farley replied directly to Lindbergh on February 14, 1934, telegraphing him that he was certain that “if you were in possession of all the facts, you would not feel that any injustice had been done or will be done.” Lindbergh’s protest elicited a varied reaction. In many quarters his protest was ardently supported, while in others it was sharply criticized.

The cancellation order provoked widespread protest from executives of the air lines affected and from many others interested in aviation. The air transport companies denied the charges upon which the cancellation order was premised and requested an opportunity to be heard prior to the cancellation of the route certificates. Former Postmaster General Brown denied the charges upon which the cancellation order was based.

On the whole, the press opinion at first supported the cancellation of the air mail route certificates by the Administration. It was viewed as a swift move to prevent the repetition of the fraud and graft which had accompanied the construction of the railroads of this country, and thus a warning to grafters. There was a widespread feeling that radical action was imperative to correct an exceedingly complicated situation saturated with abuses, moral, economic, political, and financial. However, there came to be a growing feeling in some quarters that while the government had doubtless done the popular thing by canceling all its domestic

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34 Rep Postmaster Gen (1934)
35 Air Mail Contracts—Telegram of Charles Lindbergh, 78 Cong Rec., Pt 3, 2391 (1934)
36 Farley’s Letter to Senator Black (1934) 138 Commercial & Financial Chronicle, Pt 1, 1156-8
37 Air Mail, 78 Cong Rec., Pt 3, 3137 (1934)
38 Senate Air Mail Investigating Committee Hearings, op cit Pt 6, 2350-1
air mail route certificates, it was questionable in the minds of many if it had done the right thing.

With the increasing number of fatalities among the Army pilots, there was a decided reaction reflected in public opinion, which became manifest in the press. There was a unanimity of opinion in all circles that the winter of 1934 was one of the most severe this country had experienced in many years. Following the mounting Army casualties in the transportation of air mail, there was a growing public conviction that perhaps the action of the Administration might have been precipitate. This ghastly loss of human life caused widespread alarm and unrest in official circles.

The President became quite exercised and concerned because of the increasing number of Army fatalities, and therefore on March 7, 1934, sent a communication to the United States Senate in which he stated that he believed that new contracts should be negotiated with commercial air carriers as soon as possible to carry the greater part of our air mail. He stated that he believed that new contracts should be negotiated with commercial air carriers as soon as possible to carry the greater part of our air mail. In order to protect the public interest and to provide for new contracts on a basis of honest payment for honest service, he suggested the pattern for new legislation. He pointed out that we must avoid the evils of the past, and at the same time encourage the sound development of the aviation industry. He suggested that new air mail contracts be let for a period of not exceeding three years on full, open, and fair competitive bidding, with a limitation of the rate of compensation, above which no contract would be awarded. He stated emphatically that any combinations, agreements, or uncompetitive bidding should be prevented, and such action should be a basis for cancellation of contracts. He recommended that no air mail contract should be sublet or sold to any other contracting company, nor should a mail contractor be allowed to merge or consolidate with another company holding an air mail contract, and that no contract should be made with any company, old or new, any of whose officers were party to the obtaining of former contracts under circumstances which were clearly contrary to good faith and public policy. The President concluded that the enactment of legislation along the lines suggested would establish a sound, stable and permanent air mail policy, and the knowledge that the experienced Interstate Commerce Commission, a quasi-judicial body, will hereafter regulate air transportation routes and air mail compensation, would remove uncertainty as to routes and air mail compensation.

A House Concurrent Resolution was passed to discontinue the carrying of air mail by the Army Air Corps. March 30, 1934, the Post Office Department issued an advertisement for temporary air mail service.
This advertisement provided that “No bids shall be considered or received from any company which previously had a contract for the carriage of air mail and whose contract was annulled under Section 3950 of the Revised Statutes, as all such concerns were disqualified by law to contract for carrying the mail for five years after the annulment of the contract.”

While the resumption of air mail service by private enterprise was under consideration, a Special Senate Investigating Committee was busily engaged in investigating air mail certificates and the former holders thereof. The hearings before this Senate Committee were conducted from September 26, 1933 to May 25, 1934, and fill nine volumes, with a total of 4,180 pages.

The primary objects and purposes of this investigation were to ascertain if the air mail route certificates had been obtained by the contractors through fraud, agreement, and collusion, and without competitive bidding, and to secure the requisite facts and information to enable Congress to enact efficacious regulatory legislation on the subject of air mail. The currents of an aroused public opinion, demanding that the facts be ventilated regarding the whole subject of air mail, gave birth to it.

The Senate Committee investigation proved fruitful in focusing attention upon the need of effective congressional regulatory legislation. It enabled Congress to re-examine the basis of existing legislation, and to view it from a high vantage point; it made it possible for Congress to comprehend more fully the implications of air mail, and to appreciate the necessity of coping with changed conditions. Evaluated by objective criteria, it is clear that the Senate Air Mail Investigating Committee made a marked contribution in informing the legislative judgment of Congress, and in paving the way for more appropriate regulatory legislation respecting the whole subject of air mail transportation.

No useful purpose would be served by recapitulating the testimony contained in the long record of the Committee. Suffice it to observe, that the evidence was in sharp conflict with respect to the central question at issue, namely, whether air mail route certificates were allocated during Postmaster General Brown's administration by collusion and an agreement to eliminate competitive bidding.

42 42 January 31, 1934, William P MacCracken, Jr., was served with a subpoena duces tecum to appear before the Senate Air Mail Investigating Committee, and to bring all books of account and papers “relating to air mail and ocean mail contracts.” MacCracken appeared on that day; stated he was a lawyer, a member of the firm of MacCracken and Lee; that he was ready to produce all papers he lawfully could, but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; and that it is not within the power of the attorney to waive such privilege which belongs exclusively to the client.

On the following day, MacCracken and his law partner, Lee, permitted
A by-product of the air mail investigation was a quiet shake-up in the Post Office Department which affected all officials who had any representatives of the commercial air lines whose air mail route certificates were cancelled, to examine papers in their files which related to the air mail route certificates, and these representatives removed some of these papers from their files. The destruction and removal of papers and documentary data formed the gravamen of the charge of contempt against MacCracken.

February 12, 1934, MacCracken was arrested and was held under a warrant issued on February 9, 1934, after he had declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934 (See Senate Doc. No. 162, 73d Cong. (1934) 16, 34, 198-199).

The case of Jurney v MacCracken, 294 U.S. 125, 55 Sup Ct 375, 79 L ed. 802 (1935), involved a petition for habeas corpus brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr., against Chesley W. Jurney, the Sergeant-at-Arms of the Senate of the United States. The Supreme Court of the District of Columbia denied the petition. The Court of Appeals of the District of Columbia, with two justices dissenting, reversed the judgment of the Supreme Court of the District of Columbia, and remanded the case to the trial court with directions to discharge the prisoner from custody. MacCracken v Jurney, 63 App. D.C. 342, 72 F. (2d) 560, 566 (1934). By reason of the importance of the question presented, the United States Supreme Court granted certiorari. Jurney v MacCracken, 293 U.S. 543, 55 Sup Ct 113, 79 L ed. 648 (1935).

The United States Supreme Court held that in the event the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance. The Court, speaking through the late Justice Brandeis, pointed out that the power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795; and since then it has been exercised on several occasions (Jurney v MacCracken, 294 U.S. 125, 55 Sup Ct 375, 79 L ed 802 (1935)).

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The Court observed that it was not here concerned with an extension of congressional privilege, but rather with the vindication of the established and essential privilege of requiring the production of evidence, and that for this purpose, the power to punish for a past contempt is an appropriate means.

The Court observed that it was conceded that the Senate was engaged in an inquiry which it had the constitutional power to make; that the Senate Committee had authority to require the production of papers as a necessary incident of the power of legislation; and that arrests could be made to insure their production.

The net effect of the decision in Jurney v MacCracken is that the concept of the power of the Senate to punish for contempt has been declared to be broader than it was theretofore deemed to be. The MacCracken decision is sound and well-considered; the power to compel attendance of witnesses and the production of germane documents relating to proposed legislation is essential in the legislative process. (See United States—Nature of Senate's Power to Arrest for Contempt (1934-35, 83 U.S. 35, 55 Sup Ct 375, 79 L ed 802, 1935).)

Under this decision, while the scope of the power to punish for contempt is narrow, and may not be exercised to punish an act which does not obstruct the functions of the Senate, still where the act is of an obstructive nature, the fact that the obstruction has since been removed, or that is removal has been rendered impossible, does not render the act any less punishable for contempt.

The power to secure relevant and requisite information by congressional investigations and to compel the attendance of witnesses, presentation of documents, and to receive testimony have long been treated as an attribute of the power to legislate. The power of legislative bodies, both federal and state, to conduct investigations to insure efficient discharge of legislative functions is well recognized. McGran v Daugherty, 273 U.S. 135. However, the power to punish a recalcitrant witness extends only so far as it...
connection with the holders of air mail route certificates under Post-
master General Brown. As a result, virtually no official who had dealt
with the holders of the air mail route certificates under Brown, remained
in the position that he had held under Brown.

Commencing May 7, 1934, the Army discontinued performing service
on a number of routes; by June 1, 1934, the air mail routes had been
restored to private enterprise, and the Army's experience of carrying
the air mail was brought to a close.\footnote{The Postal Bulletin, Nos
16416, 16418, 16420, 16421, 16422, and 16428}

Several air transport companies were \textit{persona non grata} to the Admin-
istration when new contracts were let in May, 1934, because it was
asserted that they had participated in the May-June, 1930, conferences,
and therefore were disqualified for a period of five years from holding
such a contract.

To be eligible, the former holders of air mail route certificates had
to purge themselves of officials of their organizations who had partici-
pated in the so-called Spoils Conferences of 1930. Talented and highly
trained executives of all of the commercial air lines whose route certi-
ficates were canceled had to be discharged for a period of five years.
Meanwhile these individuals had to remain outside of the American
commercial air transport industry for the five-year period. All of the
officials and heads of the commercial air lines who attended the so-called
Spoils Conferences and whose air mail route certificates were canceled,
involuntarily retired from American aviation, and were compelled to
liquidate their holdings in the commercial air lines at forced sale.
While the commercial air lines whose contracts were canceled were not com-
pelled to change their corporate names as a condition precedent to
qualifying under the temporary air mail contracts, some of them found
it expedient to do so at that time. Thus American Airways, Inc became
American Airlines; Eastern Air Transport, Inc became Eastern Air
Lines, and Western Air Express, Inc became Western Air Lines.

The advent of the temporary contracts witnessed the introduction
of twelve new air mail carriers into the field of air mail transportation,
some of whom had been active in their demands for cancellation. They
now obtained about thirty per cent of the business in the less desirable,
sparsely populated areas.

A survey of the temporary contract era shows it did not afford any
sound permanent basis for air mail administration for the reason that
competitive bidding led to a lack of integration of services. One company
might obtain two bids for services in entirely different parts of the
country, with all the attendant difficulties that implies. Moreover, many

is necessary by compelling the production of evidence to effectuate the
legislative functions within the prescribed limits of the Constitution. Since
the withdrawal of papers might seriously impede the work of congress-
ional investigating committees, the decision affords a salutary check against
its recurrence.
companies presented low bids and operated at a loss by reason of the fact that it was felt this would enable them perhaps to obtain operating rights on a given route later. In addition, it resulted in a marked inequity in payment for essentially the same service to different contractors.

Section 8 of the Air Mail Act of 1934,44 provided that any person otherwise eligible under this 1934 statute, shall be eligible to contract for carrying air mail notwithstanding the provisions of Section 3950 of the Revised Statutes. This provision of the 1934 Act was, in turn, eliminated from the Civil Aeronautics Act of 1938.45

It is significant that Section 8 of the Air Mail Act of 193446 also provided that any company alleging that it held a claim against the Government on account of any air mail contract which had been annulled, was afforded the privilege of prosecuting such claim as it might have against the United States for the cancellation of such contract in the Court of Claims of the United States, provided such suit were brought within one year from June 12, 1934.

V Litigation for Relief in Constitutional Courts

Proved Unavailing

"Hundreds of thousands of words were written and printed in the form of statements, interviews, and speeches [concerning the cancellation of the air mail route certificates] during the bitter controversy which followed. It flowered on the floors of the Senate and House of Congress, and developed into a series of unceasing partisan debates. The Post Office Department maintained its original position that the contractors had met in 'collusion' in the office of the former Postmaster General. The operators denied 'collusion' and asked for trial or hearings."47

Shortly following the cancellation of the air mail route certificates, actions were instituted against Postmaster General Farley by the companies affected by his cancellation order of February 9, 1934, and

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44 48 Stat 937
45 52 Stat 1029
46 48 Stat 937 The Air Mail Act of 1934, as amended, set up a tripartite administrative organization for the regulation of air mail, consisting of the Postmaster General, the Interstate Commerce Commission, and the Secretary of Commerce, and provided a temporary antidote to safeguard against the recurrence of certain flagrant malpractices, pending the drafting of legislation of a permanent character. 48 Stat 933 and 49 Stat 614

The Civil Aeronautics Act of 1938 resulted in the introduction of controlled competition within the framework of private enterprise via certificates of convenience and necessity, thereby reflecting a sharp departure from the chaotic competitive bidding contract method which had therefore obtained in the regulation of air mail. George W Lupton, Jr., New Route Certificates Under the Civil Aeronautics Act of 1938 (1941) 12 Air L Rev 103-52; 52 Stat 984, § 401 (a)

47 THE AIRCRAFT YEAR BOOK FOR 1935, New York, Aeronautical Chamber of Commerce of America, Inc (1935) 120-21
later, actions were commenced against the United States by the air mail lines affected by this order

One of the companies affected by the cancellation order, namely, the Transcontinental and Western Air Lines, Inc., brought suit against Farley in the District Court of the United States for the Southern District of New York to restrain the enforcement of the cancellation order. The plaintiff contractor asserted that it had complied with the terms and conditions of its route certificate, and, in reliance upon it, had made a large investment in equipment adapted to carry on the business of a carrier of air mail, passengers, and express running into millions of dollars, and it had established a good will as a going concern. The plaintiff corporation was not served with any charges against it previous to the issuance of the cancellation order. No hearing was held by the Post Office Department, nor was any opportunity given to it to make a defense to any charges prior to the cancellation. The order of annulment, the plaintiff contended, would result in the disqualification of the company for a period of five years from bidding on any government air mail contract. The plaintiff contended that this administrative order operated to destroy its business by forcing it to discontinue its air mail service, and would cause a dispersal of its organization and personnel. Therefore it sought an injunction restraining the Postmaster General from proceeding with the order of annulment, and otherwise from interfering with its route certificates.

The plaintiff obtained an order directing Postmaster General Farley and Mr. John J. Kiely, Postmaster of New York, to show cause why they should not be restrained from carrying out annulment of the route certificates. Federal Judge John C. Knox, who signed the show cause order, declined, however, to issue a temporary injunction pending the hearing. The injunction was sought on the following grounds: (1) It was charged that the cancellation order was illegal because it went beyond the power, authority, and jurisdiction of the Postmaster General. (2) The cancellation order was also asserted to be illegal because it would deprive the plaintiff corporation of property without due process of law and without just compensation in violation of the Fifth Amendment of the Constitution of the United States. (3) It was also charged that the cancellation would result in irreparable damage to the complainant, its stockholders, and the public who use complainant’s airplanes.

The District Court, speaking through Judge Knox, held that the Court had no jurisdiction over the case because the government of the United States had not consented to suit; that the action was tantamount to one for specific performance of a contract; so he denied a motion for an injunction to restrain Postmaster General Farley from putting into effect his order annulling air mail route certificates. The Court held
that Mr. Farley, in his person, was not subject to injunctive relief. In his opinion, Judge Knox stated:

"I am nevertheless, impressed by what seems to me beyond controversy, namely, that the carriage of mails is essentially and fundamentally a function of the government—it is characteristically so, it is the province of the executive branch of the government, either rightly or wrongly, in a particular case, to name the instrumentality that shall carry its mails.

"Any action that is designed to compel the government to select a particular instrumentality in the carrying of the mails necessarily must be directed against the United States. I am constrained to hold, therefore, that in this suit the United States is an indispensable party. In the absence of its consent here to be sued, this court is without jurisdiction of the subject matter set forth in the bill.

"The government is not named as a defendant. In the absence of its consent here to be sued, this court is without jurisdiction of the subject matter set forth in the bill.

"As regards the defendants, Kiely and Farley, it may be said they assume to act in their official capacities. They are duly constituted agents of the government charged with the duty of handling the mail and directing the way in which it shall be handled.

"I cannot, it seems to me, give injunctive relief as against them without affecting the interest of the United States in the execution of its governmental function of carrying the mail."

Thereupon an appeal was prosecuted to the United States Circuit Court of Appeals; the decision of the lower Court was there affirmed on essentially the same grounds as those of the District Court. The Court pointed out that it is well settled that if the interest of the United States is substantially affected, the suit cannot be maintained, since the United States cannot be made a party to such a suit without its consent. The Court pointed out that the fact that the United States is not named as a party in the record is not the only consideration by which the question of jurisdiction is resolved, but the vital and determinative factor is the effect of the judgment. It was also stated that even though the United States is not joined as a formal party defendant, if its interest is so directly involved that it is the real party in interest, and any relief that might be given in such a suit will operate against the sovereign, the United States is an indispensable party, and the suit cannot be maintained in the absence of consent of the Government of

1946]  

PROCEDURAL DUE PROCESS  

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49 Transcontinental & Western Air, Inc. v. Farley, Postmaster General, 71 F. (2d) 285 (1934) (C. C. A.); Cancellation of Air Mail Contracts by Postmaster General (1934) 5 Air L. Rev. 307.
50 U S ex rel Goldberg v. Daniels, 231 U S 219, 34 Sup Ct 84, 58 L ed. 191 (1913).
51 Louisiana v. McAdoo, 234 U S 627, 34 Sup Ct 84, 58 L ed 1506 (1914).
the United States to be sued. Moreover, the Court ruled in effect that the United States is an indispensable party, and since an indispensable party is not joined, the suit must be dismissed as to such party.

In the course of the opinion the Court stated that by virtue of Article 1, Section 8 of the Constitution of the United States, Congress has been given power to make all laws which shall be necessary and proper for carrying into execution the powers vested in the national government to establish post offices and post roads, and to control and operate the carrying of the mails. The Court said the operation of the mails is a governmental function. It also pointed out that the duty of the Postmaster General to superintend the business of his department generally, and to execute all laws relative to the postal service, is provided by statute.

The Court stated that the courts will not interfere with the exercise of discretion or judgment by the Postmaster General, and that individuals will not be permitted to carry on activities which interfere with the discharge of the postal functions of the national government.

The Court made it clear that the cases in which the courts had granted relief were cases in which the Postmaster General had made an erroneous finding that the mails were being used as a medium to obtain money and property by false and fraudulent pretenses, the courts decline to direct the manner in which the mails are to be transmitted within the postal system for this is a matter under the control of the Post Office Department. The courts will enforce ministerial duties required of executive officers by mandates of Congress, and will enjoin acts which transcend the statutory authority or jurisdiction with which executive officers have been clothed, but they will not interfere with matters entrusted by Congress to the discretion of the heads of executive departments of the government. Upon appeal to the United States Supreme Court, a petition for a writ of certiorari was denied.

In the case of Boeing Air Transport, Inc et al v James A Farley, an Individual, in the Supreme Court of the District of Columbia, the plaintiff sought to enjoin the defendant, the Postmaster General of the United States, who was sued as an individual, from canceling certain contracts of the plaintiff for the transportation of air mail. The complaint alleged that the defendant, without notice or opportunity for hearing, purporting to act in his capacity as Postmaster General, but in reality acting individually, without legal examination of the facts, and

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52 In re Debs, 158 U S 564, 15 Sup Ct 900 39 L ed 1092 (1894); Ex Parte Jackson 96 U S 727 24 L ed 877 (1877)
53 17 STAT 283, 42 STAT 24
54 Transcontinental & Western Air, Inc v Farley, 293 U S 603 55 Sup Ct 119, 79 L ed 695 (1934)
55 File No 57 040, Supreme Court of the District Columbia (now District Court of the United States for the District of Columbia)
without legal authority, issued an order which purported to cancel the route certificate held by the plaintiff.

A motion to dismiss was filed, in which it was contended that the suit was in fact one against the United States and that a decree would operate as a decree for specific performance against the United States.

June 7, 1934, Justice O'Donoghue sustained the motion to dismiss, holding, in an oral opinion delivered from the bench, that the suits were essentially against the United States, that the due process clause of the Fifth Amendment of the Constitution of the United States had not been violated, and if the plaintiff had been damaged, it had an available remedy by suit in the Court of Claims.

The same ruling was also made by the Supreme Court of the District of Columbia in *National Air Transport, Inc v Farley*, Equity No 57,041; *Pacific Air Transport, Inc v Farley*, 57,042; and *Varney Air Lines, Inc v Farley*, Equity No 57,043.

These four air transport companies then appealed to the United States Court of Appeals for the District of Columbia. That Court observed the air mail route certificates awarded to the air transport companies were not subject to annulment by the Postmaster General for conspiracy to prevent bidding, under Section 3950 of the Revised Statutes of the United States, in the absence of notice to the companies and an opportunity afforded them for a hearing on the question whether they were parties to a combination to prevent bidding in violation of the statute.

Section 3950 does not expressly provide for notice for a hearing as a condition precedent to the annulment of an air mail route certificate, but the Court concluded that a provision therefor may be read into the statute by implication; otherwise it would be clearly unconstitutional. Hence it is clear that the Court of Appeals of the District of Columbia unequivocally observed that the order of the Postmaster General of February 9, 1934, purporting to annul the air mail route certificates, was void if the companies affected were not given notice or accorded a hearing prior to the issuance of the cancellation order. This Court also stated that the route certificates were property of the companies of which they could not be deprived without due process of law under the Fifth Amendment; rights against the United States arising out of a contract with it are protected by the Fifth Amendment. The Court also stated that when the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals; and "if they

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62 THE WASHINGTON LAW REPORTER, 465

87 Boeing Air Transport, Inc v James A Farley, an Individual, 64 App Div 162, 75 F 2d 765 (1934) (involved four cases).

88 Southern Ry Co v Virginia, 290 US 190, 54 Sup Ct 148, 78 L ed 260 (1933)

89 Lynch v US, 292 US 571, 54 Sup Ct 840, 78 L ed 1434 (1934)
repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state, a municipality, or a citizen. Still the Court pointed out that, while the Government may breach its contract the same as an individual, and while it may not be required in equity specifically to perform its contract upon a wrongful breach thereof, an adequate remedy at law has been provided by suit for damages in the Court of Claims of the United States. The bills were accordingly dismissed.

The Court concluded that “technically speaking, there was not an outright breach by direct cancellation of a contract” in the instant case, but rather an attempt on the part of the Postmaster General to annul the route certificates through statutory authority; however, there could be no annulment as provided by statute without notice and opportunity to be heard. The Court concluded:

“The effect of the order, therefore, is to breach the contract, and, if the breach of the contract operated to deprive plaintiffs of their property rights, they have an adequate and complete remedy at law. What has occurred in these cases amounts to a breach of contracts by the Postmaster General. Whether properly or improperly breached cannot be determined in this action, but remains to be established in the appropriate action at law.” (Italics supplied)

On appeal to the United States Supreme Court, writ of certiorari was denied.

An action was also instituted by the Pennsylvania Airlines, Inc. against Postmaster General Farley. The plaintiff company appealed from a decree of the Supreme Court of the District of Columbia dismissing a bill filed to enjoin the annulment of an air mail route certificate held by the plaintiff. The United States Court of Appeals for the District of Columbia affirmed the judgment of the lower court, stating this case is controlled by the opinion and decree in Boeing Air Transport, Inc. a Corporation v. James A. Farley, and associated cases, decided and filed concurrent therewith.

VI RELIEF SOUGHT IN COURT OF CLAIMS

Since the holders of the air mail route certificates had been unsuccessful in their attempt to secure redress in the cases examined supra, they turned to the Court of Claims of the United States, and in June, 1935, demands for more than $14,000,000 were filed with the Clerk of that Court, challenging the legality of the annulment of the air mail route certificates. The following claims were filed:

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60 Sinking Fund Cases, 99 U.S. 700, 25 L. ed. 496 (1878)
63 64 App. Div 162, 75 F. (2d) 765 (1935)
<table>
<thead>
<tr>
<th>Company Name</th>
<th>Amount</th>
</tr>
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<tbody>
<tr>
<td>Pacific Air Transport</td>
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<tr>
<td>Boeing Air Transport</td>
<td>1,156,573.68</td>
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<tr>
<td>Boeing Air, Transport</td>
<td>287,931.62</td>
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<td>United Air Lines Transport Corporation</td>
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<td>Pennsylvania Air Lines, Inc</td>
<td>554,726.60</td>
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<tr>
<td>National Park Airways, Inc</td>
<td>257,653.39</td>
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<tr>
<td>American Airways, Inc</td>
<td>4,050,000.00</td>
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<tr>
<td>United States Airways, Inc</td>
<td>335,498.81</td>
</tr>
<tr>
<td>Eastern Air Transport</td>
<td>2,164,274.71</td>
</tr>
<tr>
<td>Transcontinental &amp; Western Air, Inc</td>
<td>2,684,280.92</td>
</tr>
<tr>
<td>Kohler Aviation Corporation</td>
<td>138,368.01</td>
</tr>
<tr>
<td>Western Air Express, Inc</td>
<td>774,435.00</td>
</tr>
<tr>
<td>Northwest Airways, Inc</td>
<td>531,378.73</td>
</tr>
</tbody>
</table>

Four of the holders of the air mail route certificates, namely, American Airways, Transcontinental and Western Air, Inc., Northwest Airways, and Western Air Express early offered to settle their claims for an aggregate of $601,511, which they claimed was the amount of the earnings which had accrued pursuant to operations under their air mail route certificates prior to the date of annulment. Postmaster General Farley favored settlement of the air mail cases and requested an opinion of Attorney General Cummings with respect to the advisability of effecting a settlement. Attorney General Cummings rendered an opinion which favored settlement of the claims by compromise. It stated:

“There can be no reasonable doubt that the arrangements, understandings and agreements out of which the route certificate (contract) grew, were highly irregular, and interfered with the freedom of competition contemplated by the statutes...”

“It is our opinion that the irregularities referred to are not such as to justify or require criminal prosecution. Such irregularities would, however, be pertinent and vital factors in the event of further litigation.

“The controversy is, therefore, one which, in the exercise of a sound discretion may appropriately be compromised. The matter is complicated and continued litigation would be both prolonged and burdensome. In the opinion of the Department, it appearing that a settlement can be effected without the payment of any damages because of the cancellation complained of, a termination of the litigation would be to the interest of the Government. We advise, therefore, that the offer should be accepted.”

On March 5, 1945, over ten years after the date of the cancellation of the route certificates, the last of these actions commenced in the Court of Claims by the holders of air mail route certificates affected by the cancellation order of Postmaster General Farley, was dismissed.

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44 Cases Docketed in Court of Claims, 2 U. S. L. WEEK (No. 43, June 25, 1938) 15; ibid. (No. 44, July 2, 1938) 11.
The following cases instituted in the Court of Claims by air mail certificate holders to recover damages by reason of the cancellation of the air mail route certificates were dismissed on the dates and upon payment of the amounts designated below:

<table>
<thead>
<tr>
<th>Action</th>
<th>File No</th>
<th>Date of Dismissal</th>
<th>Amt Paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Parks Airways, Inc v U S</td>
<td>43035</td>
<td>October 4, 1937</td>
<td>$16,964 16</td>
</tr>
<tr>
<td>American Airways, Inc v U S</td>
<td>43036</td>
<td>June 29, 1936</td>
<td>$315,568 47</td>
</tr>
<tr>
<td>American Airways, Inc v U S</td>
<td>43037</td>
<td>June 29, 1936</td>
<td></td>
</tr>
<tr>
<td>Transcontinental &amp; Western Air, Inc v U S</td>
<td>43045</td>
<td>June 29, 1936</td>
<td>183,865 26</td>
</tr>
<tr>
<td>Western Air Express, Inc v U S</td>
<td>43048</td>
<td>June 29, 1936</td>
<td>50,711 43</td>
</tr>
<tr>
<td>Northwest Airways, Inc v U S</td>
<td>43049</td>
<td>June 29, 1936</td>
<td>51,365 87</td>
</tr>
<tr>
<td>Eastern Air Transport, Inc v U S</td>
<td>43044</td>
<td>May 6, 1940</td>
<td>85,999 44</td>
</tr>
<tr>
<td>Kohler Aviation Corporation v U S</td>
<td>43046</td>
<td>November 12, 1940</td>
<td>9,653 48</td>
</tr>
<tr>
<td>Pennsylvania Airlines, Inc v U S</td>
<td>43034</td>
<td>March 4, 1944</td>
<td>24,109 20</td>
</tr>
<tr>
<td>U S Airways, Inc v United States</td>
<td>43038</td>
<td>March 5, 1945</td>
<td>18,077 18</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td>$756,314 49</td>
</tr>
</tbody>
</table>

The records of the Court of Claims and of the Department of Justice show that the settlements effected in the above ten cases were made on the basis of payment to the carrier of the amount earned but unpaid at the time the cancellation order became effective, computed in accordance with the terms of the route certificate and contract under which the carrier was operating.

We now consider the determinations of the Court of Claims Commissioner Richard H. Akers with respect to claims of other holders of air mail route certificates.


66 The numbers indicated refer to the case file number in the Court of Claims of the United States
were obtained through open competitive bidding, and the route certificates were issued under the governing statute, the Watres Act, which was in effect at the time of their issuance. He found the record did not substantiate the claims of the Government of the United States that these contracts or route certificates were obtained through fraud, collusion, or a conspiracy on the part of plaintiffs or their predecessors in interest.

Commissioner Akers concluded that whether Postmaster General Farley was justified in the public interest, by virtue of his general power, in annulling the route certificates, is a mixed question of law and fact which is for the Court to determine.

December 7, 1942, in the same five cases heard before Commissioner Akers, the Court of Claims of the United States handed down a decision in which all the judges sitting agreed that the air mail route certificates had been legally canceled in February, 1934, but all of the judges did not agree with respect to the grounds and reasoning upon which the decision should be premised. The plaintiffs in these cases belong to the group known as Boeing or United. The three companies involved or their predecessors, held, on February 19, 1934, (the effective date of the cancellation order) five route certificates to transport mail for the United States for compensation.

The plaintiffs asserted in these suits that they were not guilty of violation of Section 3950 of the Revised Statutes, and that they were not guilty of any other conduct which justified the cancellation; that the route certificates were contracts which the defendant breached by the cancellation; and that plaintiffs are entitled to damages for the breach.

On the other hand, the defendant asserted that plaintiffs did violate Section 3950 of the Revised Statutes, and that they were guilty of other corrupt and unlawful conduct which justified the defendant in cancelling the route certificates; that in any event the certificates were not contracts, and imposed no legal obligations upon the defendant upon which a claim for damages for breach can be predicated; that if the certificates were contracts, plaintiffs can, under Section 1846 of the Postal Rules and Regulations, recover only one month's compensation. In addition, the defendant asserted counter-claims against plaintiffs for large amounts for alleged overpayments made to plaintiffs during the several years prior to cancellation. Moreover, the Government contended that all domestic air mail contracts and route certificates executed prior to March, 1933, are void for the reason that they are.

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67 Richard H. Akers, Report (filed July 14, 1941, Court of Claims of the United States, involving the above five cases) 197-8.

against public interest and against public policy in view of the fact
that the holders of air mail route certificates had been grossly over-
paid. The record made in these cases, which were consolidated for trial,
is voluminous; it is the longest record ever made in any case presented
to the Court of Claims.

Judge Madden, whose opinion was concurred in by Chief Justice
Whaley, stated that at the time of the so-called Spoils Conferences, the
May-June conferees may have been thinking principally in terms of
extension, but the contemplated process of extension and subletting was
an evasion of the Watres Act. Judge Madden observed:

"The agreement of the conferees to accept extensions as
requested by Brown and hand them over to his nominees could,
so far as the participants in the conference were concerned,
have had no other purpose than to give selected operators the
emoluments of air mail contracts without giving competitors,
who might be willing to do the work for less, the opportunity to
bid. The conferees' agreement was in this respect in violation
of R S 3950 and made their air mail contracts liable to an-
nullment. It was an agreement to participate in a process of
evasion and pretense to circumvent the well-known purpose and
policy of a recently enacted statute, for the purpose of prevent-
ing the making of bids for carrying the mail.

"The Watres Act provided for extensions and the Postal
Laws provided in another place, U S C Title 39, Sec 445, for
subletting. Assume that, by a sharp combination of the two
devices a public official could lawfully circumvent the spirit
and intent of each of the statutory permissions, for the purpose
of defeating the legal requirement of competitive bidding. That
still would not license the leading figures in the industry, bent
on monopolizing the business and maintaining prices, to agree
in advance to play their parts, not required by law, to accom-
plish the desired monopolistic end. They are not clothed with
the statutory discretion which we have assumed for the public
official, of preventing competitive bidding by sharp maneu-
vering. Their agreement is a naked agreement to take volun-
tary steps to prevent competitive bidding. Plaintiffs made
such an agreement, and thereby became vulnerable under R S
3950."

Judge Madden stated that the record showed a second valid ground
existed for annulment under Revised Statutes, Section 3950, that is, the
so-called Spoils Conference agreement carried with it an understanding
that even if the Postmaster General should be required to advertise for
bids, still there would be no competitive bidding by those who had
participated in the Conference.

Judge Madden also was convinced that the record showed a third
reason for annulment, closely related to the first, whereby plaintiff
Boeing Air Transport's contracts became liable to annulment, that is,

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88 Pacific Air Transport et al v U S, 98 Ct Cl 649, 786 (1942)
that plaintiffs were called upon to accept an extension and sublet it to a person designated by Postmaster General Brown. Demands were made upon Mr. Brown to establish an air line from Omaha to Watertown, South Dakota, and he requested Boeing Air Transport, Inc., which had the transcontinental line through Omaha, to take this lateral line as an extension. It appeared that Boeing did not want this extension for the reason that it was small and unprofitable, and he was not required by law to take it. However, several small operators desired to obtain this extension, but Brown was not willing to let them bid for it. Judge Madden found Boeing agreed to take this extension, to assist Brown in preventing competitive bidding for it, and to hold it until Brown should select an operator to whom it would be awarded by sublease, and not through competitive bidding; that Brown never determined upon an operator, and therefore Boeing, who did not want the extension, had it, and several operators who did want it were prevented from bidding on it. Judge Madden concluded that the Watertown incident, taken by itself, was a violation of Section 3950 of the Revised Statutes; that it was an agreement to prevent competitive bidding, and reflected compliance by plaintiffs with the spirit of the agreement made at the Conference.

Judge Madden reached the conclusion that the evidence in the record shows the plaintiffs engaged in three respects in the conduct prescribed by Section 3950 of Revised Statutes, and therefore their air mail certificates became subject to annulment. He stated, "It was not necessary to decide, and we do not decide, to what extent, if at all, these route certificates had the usual legal attributes of contracts."

Finally, Judge Madden ruled that the annulment of plaintiffs' route certificates on February 19, 1934, did not operate to effect a forfeiture of air mail pay earned by plaintiffs before annulment, and that plaintiffs may recover the amount of such accrued pay.

The defendant, the United States, contended it was entitled to recover counterclaims against plaintiffs on certain grounds; these counterclaims were denied.

In short, the Madden opinion, which was concurred in by Chief Justice Whaley, concludes:

(1) That there were valid grounds for the annulment of plaintiffs' route certificates, and that the several annulments did not constitute breaches of contract

(2) That the plaintiffs are entitled to the compensation which accrued before the annulments

(3) That the defendant is not entitled to recover on its counterclaims.

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71 Ibid
Judge Jones concurred both in the reasoning and in the result of the Madden opinion, but added certain comments. He pointed out that the great new industry of air transportation was fraught with risks and losses and called for daring as well as vision; that Postmaster General Brown sought broader authority than was finally given to him; and that after studying the Watres Act, Brown called in the representatives of the industry and informed them what he wanted done, and advised them that under a liberal construction of the Act he was authorized to pursue the method which he outlined.

Judge Jones stated:

“Naturally they went along. What else could they do? They had their investments, as well as being responsible for the savings of many small investors who had faith in the future of aviation. It was what the responsible administrator not only invited them to do, but even insisted be done. While they entered the agreement or combination to prevent competitive bidding with full knowledge that it was contrary to law, and this made the contracts subject to cancellation under Section 3950 of the Revised Statutes, their fault was not as great as if they had initiated the move.

“There was no concealment. It was done openly. The meetings were held in the Department building. Press releases were issued.

“Postmaster General Brown was not justified in going to the lengths he did. He was the dominant type. He was struggling at the leash. In his enthusiasm and determination he went beyond the limits of his authority.

“Under the guise of extensions, routes were let that by no reasonable construction could be classified as extensions. In this way, actual route contracts were let without complying with the statutory requirement of competitive bidding. These contracts were ultra vires, in addition to being violative of Section 3950, supra. These were all so interwoven as to give practically the entire set-up a false bottom, and there was no practical place to draw the line.

“For these reasons I think that Postmaster General Farley was thoroughly justified in cancelling these contracts and re-letting them in accordance with the law. He was fully authorized to take this course. In thus removing any question of validity the further development of the industry was put on a more solid basis. Regardless of any question of collusion these contracts were properly canceled.”

Judge Littleton wrote a special concurring opinion in which he concurred in the result, but upon entirely different grounds from those of Judge Madden and Judge Jones. He stated that he could not concur in the ultimate findings and in the opinion that there was a combination or agreement entered into with or by the plaintiffs during the conferences.

called by the Postmaster General in May, 1930, or at any other time to prevent competitive bidding in contravention of Section 3950 of the Revised Statutes

The vehemently taken position of Judge Littleton would lose its peculiar force if it were paraphrased, and I therefore take the liberty of quoting from it at length. It reads in part:

"Whatever plan may have been in the mind of Postmaster General at the time of the May 1930 conference, which the prevailing opinion finds was agreed to by the parties at that conference, was not only opposed by plaintiffs at that time but also in subsequent years. All of plaintiffs' contracts which ever came into existence had been legally issued long prior to this time and came about through open competitive bidding. No fraud, conspiracy, or illegal acts were involved and their route certificates were issued under the governing statute in effect at the time of their issuance. There is no contention to the contrary, and the prevailing opinion so finds. These contracts and route certificates were in no way affected by the events which occurred at the May 1930 conference. The May 1930 conference discussed the establishing of new routes and had nothing to do with contracts already in existence. At that time plaintiffs had only the transcontinental route and obviously it was detrimental to their interests to have additional transcontinental routes established. Up to the time of the conference they vigorously opposed the additional routes because of the adverse effect it would have on their income from existing routes. Over their objection the Postmaster General proceeded with his determination to establish not only the transcontinental routes but various routes throughout the country. None of the recommendations at the conference for which extensions were granted by the Postmaster General was in favor of plaintiffs nor were any of the routes on which the parties failed to reach an agreement for a recommendation, routes for which plaintiffs were making any claim. The suggestion that plaintiffs entered into a combination or agreement and observed it in order to protect their rates is not, in my opinion, supported by the record. It is difficult to see how plaintiffs would be parties to an agreement which was so directly opposed to their interests in the event the agreement was carried out and wherein they would and did obtain nothing. Not only do I think there was no agreement arrived at, at the May conference of the character referred to in the prevailing opinion but, in any event, I cannot see plaintiffs as party to any such combination or arrangement.

"The meeting was open to the public. The publicity representative for the Post Office Department was present and issued a press release at the time. During the period of the conference, the Second Assistant Postmaster General reported to Congress that the conference was being held and minutes were kept of what occurred. Intelligent men of the
type here involved would hardly follow such a course in connection with an unlawful combination or conspiracy.

"Plaintiffs were not only opposed to the transcontinental routes which the Postmaster General wanted to and did establish but they were opposed to the lengths to which the Postmaster General went in making extensions. The prevailing opinion treats all these extensions as a part of the general plan formulated at the May conference. Plaintiffs' representatives vigorously opposed these extensions and went to the extent of initiating one or perhaps two investigations by Congress of these acts of the Postmaster General. It hardly seems reasonable to say that these parties entered into a combination or agreement and scrupulously observed it when at the same time they were in active opposition to what the Postmaster General indicated he was going to do, and also having these acts of the Postmaster General investigated by Congress.

"I think the record not only fails to show the existence of a combination or agreement within Section 3950 of the Revised Statutes but also shows facts directly opposed thereto. I do not think that anything Postmaster General Brown did after the May conference was in any way controlled or governed by any agreement at that conference. Certainly not so far as these plaintiffs were concerned. He was a man of strong determination and much interested in aviation and the air mail service. In his zeal to do what he may well have thought was for the best interests of the service he exceeded the authority given him by Congress and failed to observe Sections 3949 and 3709 of the Revised Statutes, U.S.C., Tit. 139, Section 429, and Tit. 41, Sec. 5, and the Watres Act. When it later appeared to the Postmaster General that express mail routes and letting air mail contracts, extended investigations were made both by the Congress and by the Post Office Department. The results of these investigations were reported to Postmaster General Farley and on the basis thereof, after careful consideration, he came to the conclusion that it was in the public interest to annul and cancel all existing route certificates and he did so.

Judge Littleton was nevertheless of the opinion that these route certificates were subject to cancellation even in the absence of fraud or an agreement to prevent competitive bidding on the part of the plaintiff companies. He concluded:

"Having proceeded in that way on the basis of what was substantial evidence and having in mind the peculiar nature of these route certificates which, in my opinion, were subject to cancellation, his action of annulment and cancellation should

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Section 3949 of the Revised Statutes of the United States, Title 39, U.S.C., § 429 provides for competitive bidding in awarding contracts for carrying the mail. Section 3709 of the Revised Statutes of the United States provides for competitive bidding for contracts for supplies or services of departments of the government.

be approved and sustained. In the circumstances, the propriety
or legality of the Postmaster General's action in 1934 was
not affected by the fact that plaintiffs were not parties to any
fraud or conspiracy nor had entered into any combination
or agreement to prevent the making of any bid for carrying
the mail within the meaning of Section 3950.\(^ \text{77} \)

The Court of Claims entered judgment in favor of plaintiffs to cover
accrued compensation due to the holders of the air mail route certifi-
cates prior to the cancellation in the total sum of $384,423.43

February 4, 1943, the plaintiffs filed a motion for a new trial in the
Court of Claims of the United States to correct certain alleged errors of
fact and errors of law contained in the findings and opinion of December
7, 1942. March 1, 1943, plaintiffs' motion for new trial was over-
ruled. For a time it appeared that plaintiffs would prosecute an appeal
to the Supreme Court of the United States, and an extension of time
until July 30, 1943 within which to file a petition of certiorari in the
United States Supreme Court was sought, and granted. However, the
appeal from the judgment of the Court of Claims was abandoned.\(^ \text{78} \)

June 23, 1943, the Director of the Bureau of the Budget, Harold D
Smith, transmitted a schedule of judgments rendered by the Court of
Claims against the United States to the President at the White House,
and stated in a letter of transmittal of the same that since these
constituted an obligation of the Government, lawfully imposed, and
which must be paid, an appropriation therefore was necessary. The
President transmitted this schedule of judgments to the President
of the Senate, and in his letter of transmittal he stated that he con-
curred in the comments and observations of the Director of the Bureau
of the Budget in his letter of transmittal of the same to the President.\(^ \text{79} \)

Public Law 140 (78th Congress, Chapter 229, 1st Session, Section
203(a)), signed by President Roosevelt on July 12, 1943, provided for
the payment of these judgments of the Court of Claims; these judg-
ments were satisfied in November, 1943.

The foregoing constitutes the litigation which arose out of the can-
cellation of the air mail route certificates, during the period in excess
of a decade since the issuance of the cancellation order.

(To be continued)

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\(^{76}\) Pacific Air Transport, et al v U S, 98 Ct Cl 649, 796-797 (1942)

\(^{78}\) General Docket, Court of Claims of the United States, No 68, File
Nos 43029-43033

\(^{77}\) Sen Doc No 78, 78th Cong, 1st Sess (1943) Judgments Rendered by
the Court of Claims—Communication from the President of the United
States Transmitting Pursuant to Law, a Schedule of Judgments Rendered
by the Court of Claims; 89 Cong Rec, Pt 5, 6457 (1943)