‘THE SPIRIT OF’ DUE PROCESS AS ADVOCATED BY CHARLES LINDBERGH:
REVISITING PACIFIC AIR TRANSPORT V. UNITED STATES,

98 Ct. Cl. 649 (Ct. Cl. 1942).

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Judicial Studies

by

Thomas C. Clark, II

Professor Shawn Marsh/Thesis Advisor

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The Graduate School

We recommend that the thesis prepared under our supervision by

Thomas C. Clark, II

entitled


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Professor Shawn Marsh, Ph.D., Advisor

Professor Richard Bjur, Ph.D., Committee Member

Professor Matthew Leone, Ph.D., Graduate School Representative

David W. Zeh, Ph.D., Dean, Graduate School

May, 2019
ABSTRACT

Although the Air Mail Affair dominates the country’s headlines as it unfolds throughout the winter and spring of 1934, it is mostly a forgotten chapter in American history. Without warning, President Franklin D. Roosevelt and his Postmaster General James Farley annul the airmail contracts with more than 30 different commercial airlines. On February 9, 1934, Roosevelt enters Executive Order 6591 directing the U.S. Army Air Corps to fly the mail instead of the commercial airlines which are denied a grievance procedure or an opportunity to be heard.

The carriers file suit but the United States Court of Claims does not decide the case until several years later on December 7, 1942. In Pacific Air Transport v. United States, 98 Ct. Cl. 649 (1942), the court holds that Postmaster General Farley justifiably annuls the airmail contracts negotiated by former Postmaster General Walter Brown but the commercial airlines are entitled to payment withheld by Roosevelt and Farley for the airmail services provided in January and February 1934.¹

Following a review of the existing, relevant and possibly persuasive case law from this time period, this treatise analyzes the Pacific Air decision and specifically considers whether President Roosevelt violates separation of powers and offends due process as guaranteed by the Constitution when he abruptly cancels the airmail contracts with the commercial mail carriers.

¹ Pacific Air Transport v. United States, 98 Ct. Cl. 649, 776, 789-90 (Ct. Cl. 1942.)
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historical events culminating in the Air Mail Affair were simultaneously unfolding in the halls of
Congress, in corporate boardrooms and even in the skies above. Ad Astra per Aspera.
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CHAPTER I. INTRODUCTION.

Following his historic transatlantic journey and successfully landing his Spirit of St. Louis single-engine airplane in Paris on May 21, 1927, Charles Lindbergh becomes an instant celebrity, the recipient of intense media focus, the subject of overwhelming public attention and even an American icon. The harrowing flight, the plane named after the jewel of the Louisiana Purchase but constructed on the wharfs of San Diego and - most especially - the pilot capture the world’s attention and inspire the country. American and European newspapers report extensively on Lindbergh and his activities for decades, filling their pages with everything from laudable triumph to personal tragedy. And, among his subsequent, multiple pursuits, Charles Lindbergh even defies a U.S. president.

On February 9, 1934, President Franklin D. Roosevelt signs Executive Order 6591, directing the U.S. Army Air Corps (Air Corps) to assume responsibility for transporting the air mail effective February 19. On the same day Roosevelt enters his order, Postmaster General James A. Farley cancels all air mail contracts with the private airlines. The result is disastrous. Among other challenges, the Air Corps suffers from under equipped aircraft and pilots who are unfamiliar with flying at night as well as unaccustomed with flying in inclement weather. While

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2 Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.


transporting the mail in just a first few short months, the Air Corps suffers 12 pilot fatalities and 66 crashes.\(^6\)

Seven years after his historic flight, Lindbergh remains involved in the airline industry, working at then Transcontinental & Western Air, Inc.\(^7\) He is perhaps the most vocal, high-profile and persuasive critic of Roosevelt’s executive action to remove the commercial airlines from mail delivery.\(^8\) Among other criticisms, Lindbergh argues Roosevelt unjustly denies “due process” to the air carriers when unilaterally cancelling the contracts\(^9\) and he further warns that the ill-advised action gravely threatens the viability of the nascent airline industry.\(^10\)

Roosevelt contends his action is necessary, alleging that the previous Postmaster General of the Hoover administration, Walter F. Brown, “abuse(d) his power” and steered the airmail contracts to some of the major airlines following a series of public meetings or conferences occurring between May and June 1930.\(^11\) Critics later label these Brown meetings with the airline representatives as the “spoils conferences.”\(^12\) Following the change in political power to a Democratic controlled legislature in 1932, Sen. Hugo Black (D-Ala.) and Congress launch an

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\(^8\) Kenneth P. Werrell, “*Fiasco*” Revisited: The Air Corps & the 1934 Air Mail Episode, *Air P. Hist.*, 12, 17 (2010).


investigation into how Brown awards the contracts to the various airlines,\textsuperscript{13} which becomes known as the “air mail scandal.”\textsuperscript{14}

This issue dominates the news headlines during 1934 with newspapers reporting every development including congressional hearings, the Air Corps pilot fatalities and the very public feud between Roosevelt and Lindbergh.\textsuperscript{15} By March 10, 1934, Roosevelt backs down, ends the Air Corps operation and allows the commercial airlines to resume airmail service under new contracts.\textsuperscript{16} Subsequently, Roosevelt also pushes the new Congress\textsuperscript{17} to enact different legislation, which heavily regulates the airline industry and changes the fee structure.\textsuperscript{18} President Roosevelt signs the Air Mail Act of 1934 or the Black-McKellar Act into law on June 12, 1934.\textsuperscript{19}

Although Roosevelt and his Postmaster General, James Farley, reinstitute commercial airmail service within a few short months, several of the airlines affected by the executive order

\begin{itemize}
\item \textsuperscript{13} Paul M. Godehn, et al., \textit{Air Mail Contract Cancellations of 1934 and Resulting Litigation}, 21 J. AIR L. & COM. 253, 254 (1954).
\item \textsuperscript{15} Kenneth P. Werrell, \textit{“Fiasco" Revisited: The Air Corps & the 1934 Air Mail Episode}, AIR P. HIST. 12, 14 (2010).
\item \textsuperscript{16} Justin Libby, \textit{Comments on the Air Mail Episode of 1934}, AIR P. HIST., 44, 46 (2010).
\item \textsuperscript{19} \textit{Conrad Black, Franklin D. Roosevelt: Champion Of Freedom} 322 (2003).
\end{itemize}
The outcome unfolds several years later on December 7, 1942, when the United States Court of Claims holds in Pacific Air Transport v. United States, 98 Ct. Cl. 649 (1942) (Pacific Air) that Postmaster General Farley justifiably annuls the airmail contracts negotiated by former Postmaster General Brown but the commercial airlines are entitled to payment withheld by Roosevelt and Farley for the airmail services provided in January and February 1934.21

After consulting available case law from that time period, this treatise analyzes the Pacific Air decision and specifically considers whether the president violates the separation of powers and offends due process as guaranteed by the U.S. Constitution when he abruptly cancels the airmail contracts. In short, is President Roosevelt’s Executive Order 6591 an example of impermissible executive overreach?

Initially, this analysis considers the facts and circumstances occurring before and into 1934, while tracing the historical narrative that unfolds into the controversial Air Mail Affair and ultimately influences the Pacific Air holding. While recognizing the Court of Claims’ decision, this article then investigates alternative arguments available to the commercial airlines that could have shaped the judicial opinion but the court fails to address. Specifically, this analysis considers whether President Roosevelt undermines the constitutionally guaranteed separation of powers when he invalidates the airmail contracts on February 9, 1934. The U.S. Constitution delegates mail delivery as a congressional responsibility. Additionally, Congress does not authorize the Secretary of War and the Air Corps to provide assistance with mail transportation.

20 Government Maps Defense as TWA Sues on Air Mail, N.Y. TIMES, February 14, 1934, at 1.

when Roosevelt enters his executive order. Later, Congress enacts legislation authorizing this action, but not until March 27, 1934.\textsuperscript{22}

Next, this analysis considers whether Roosevelt and the government violate due process of law, specifically “…condemn commercial aviation without just trial… and (without) the opportunity of a hearing” when cancelling the contracts, as Charles Lindbergh contends.\textsuperscript{23} When cancelling an airmail contract or a route certificate, the government is required to provide the airlines with written notice and a 45 day period to respond.\textsuperscript{24} However, Roosevelt and Farley fail to comply with the notice and hearing provisions\textsuperscript{25} and abruptly transfer the airmail responsibility to the Air Corps instead.\textsuperscript{26} When justifying this, Roosevelt and Farley contend that the airlines participating in Brown’s ‘spoils conferences’ successfully conspire to prevent other airlines from bidding on airmail route contracts, which violates Section 3950, Revised Statutes of the United States (1872) or R.S. 3950.\textsuperscript{27} Under this statute, any violation permits the Postmaster General to “annul” the airmail contract and the carrier is banned from participating in any future governmental contract for a period of five years following the first offense.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{22} Air Mail Act, Pub. L. No. 140, § 1, (1934).
\item \textsuperscript{23} Justin Libby, \textit{Comments on the Air Mail Episode of 1934}, AIR P. HIST. 44, 45 (2010), citing Charles Lindbergh letter dated February 11, 1934 and addressed to President Franklin D. Roosevelt.
\item \textsuperscript{24} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 660 (Ct. Cl. 1942).
\item \textsuperscript{25} Id. at 660.
\item \textsuperscript{26} Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.
\item \textsuperscript{27} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 660 (Ct. Cl. 1942), citing Section 3950, Revised Statutes of the United States (1872). Following codification, it is later cited as 39 U.S.C.A. §432.
\item \textsuperscript{28} Id. at 745, citing Section 3950, Revised Statutes of the United States (1872) or 39 U.S.C.A. §432.
\end{itemize}
The Pacific Air court decision does not consider these issues.\textsuperscript{29} Significantly, another court addresses the airline’s due process argument in another case\textsuperscript{30} preceding the 1942 Pacific Air decision. In Boeing Air Transport, Inc. v. Farley, 75 F.2d 765 (U.S. App. 1935) (Boeing Air), another aggrieved airline from the Air Mail Affair files suit, similarly complaining about the President and the Postmaster General cancelling their airmail contract without notice and hearing.\textsuperscript{31} Here, the U.S. Court of Appeals grants Defendant Farley’s motion to dismiss after finding that proper jurisdiction rests with the U.S. Court of Claims, but not before opining the airline deserves notice and hearing prior to Defendant cancelling the contracts.\textsuperscript{32}

Also gleaned from this time period, additional case law illustrates the potential for executive orders to undermine constitutionally guaranteed separation of powers.\textsuperscript{33} Although decided a decade earlier, United States v. Pan-American Petroleum Co. 6 F.2d 43 (U.S. Dist. 1925) shares very similar factual circumstances with the Air Mail Affair.\textsuperscript{34} Here, a federal district court invalidates a governmental contract with an oil company due to the fraudulent conduct of the Secretary of the Interior and because President Harding’s Executive Order usurps

\textsuperscript{29} Pacific Air Transport v. United States, 98 Ct. Cl. 649 (Ct. Cl. 1942).
\textsuperscript{30} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765 (U.S. App. 1935).
\textsuperscript{31} Id. at 767.
\textsuperscript{32} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 768 (U.S. App. 1935).
\textsuperscript{33} United States v. Pan-American Petroleum Co., 6 F.2d 43 (U.S. Dist. 1925).
\textsuperscript{34} Id.
congressional powers by wrongfully transferring managerial authority over the naval petroleum reserves.  

After applying the relevant case law, consulting journal articles and law review articles and identifying the relevant statutes, an objective analysis concludes that President Roosevelt’s Executive Order 6591 wrongfully extends into the responsibility of another branch of government and violates separation of powers. The U.S. Constitution assigns the postal duty as a congressional responsibility under Article One, Section Eight. Over time, Congress delegates some postal functions to the Postmaster General. Although the president appoints the Postmaster General, Roosevelt wrongfully substitutes his authority for the Postmaster General’s authority when he signs the executive order, assigning mail delivery to the Air Corps and effectively cancelling the airmail contracts. In doing so, he essentially interferes in the postal responsibility that Congress delegates to the Postmaster General.

Coming close to addressing the due process argument but without doing so, the Pacific Air court seems to imply that the contractual language requiring written notice and a 45-day hearing opportunity is inapplicable since the court finds a violation of federal statute, Section 3950 prohibiting interference in the bidding process. Significantly, the written notice and 45-day hearing requirements are both specified in the airline contracts, or route certificates, as well as in the congressionally enacted McNary-Watres Act. The court’s reasoning conflicts with the

37 Ware v. United States, 71 U.S. 617, 632 (1867), citing Act of March 3, 1825, 1; 4 Stat. at Large 102.
38 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 789-790 (Ct. Cl. 1942.)
Boeing Air decision, where that court holds that a notice and hearing requirement is implied in the applicable federal statute, Section 3950.\textsuperscript{40} Unrelated to the McNary-Watres legislation requiring written notice and a 45-day hearing opportunity, Section 3950 prohibits bid interference and addresses the penalties but lacks specific notice and hearing language.\textsuperscript{41} Despite this, the Boeing Air court holds that a due process right is “read” into Section 3950.\textsuperscript{42} Finally, additional case law from this time period reinforces the Boeing Air court reasoning about the unconstitutionality of denying the airlines notice and hearing opportunities.\textsuperscript{43}

Admittedly, the facts and circumstances culminating in the Pacific Air decision occurred decades ago, but the issues involving this decision remain relevant today as courts continue to grapple with allegations of government overreach, using the executive order as a method to usurp legislative authority and the scope of constitutional protections. Years later Lindbergh’s warning about government’s intrusion echoes as distinctly as the steady hum emanating from his single-engine monoplane as it conquers the Atlantic and advances toward the European horizon on May 21, 1927.

\textsuperscript{40} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 767 (U.S. App. 1935).

\textsuperscript{41} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 745, citing Section 3950, Revised Statutes of the United States (1872).

\textsuperscript{42} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 767 (U.S. App. 1935).

CHAPTER II. LITERATURE REVIEW.

A reasonable amount of literature addresses the Air Mail Affair as it unfolds in front of the nation in 1934 and since that time. In public hearings, a Senate Committee investigates former Postmaster General Brown after he awards various airmail contracts, certificates and route extensions following a series of meetings with airline executives. The Senate investigation, Roosevelt’s very public dispute with Lindbergh and the death of army pilots fuel the public’s interest, prompting intense media attention. The newspapers write extensively about this issue as it develops from airfields to the halls of Congress. In fact, most major newspapers print “a story on the subject half of the days in February and March” and dedicate 30 percent of this coverage to the front page. In addition to the newspaper attention, additional writers also pursue this topic, making it the subject matter of various commercial magazines, textbooks and even academic journals.

On May 15, 1918, Congress approves funding for the first experimental airmail route between New York and Washington, D. C. Multiple pieces of legislation influence and shape the issue over the years, beginning with the Kelly Act of 1925 through the Air Mail Act of 1934. Much of this legislation is broad and far-reaching, addressing both the postal service and the airline industry which is in its infancy. Over the years, various authorities evaluate this legislation and consider its impact on various public priorities especially postal delivery and airline regulation. This article attempts to identify, collect and analyze these factors to gain a

45 Id.
46 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 677 (Ct. Cl. 1942).
broad perspective and more acute understanding of the issues and history affecting the Air Mail Affair.

Conversely, only a limited amount of material discusses the critical judicial opinion, Pacific Air Transport v. United States. Interestingly enough, the holding conflicts with other judicial opinions involving the Air Mail Affair further clouding the outcome. Initially, a commissioner hears Pacific Air Transport v. United States and finds contrary to the U.S. Court of Claims on some issues. Although Commissioner Richard H. Akers agrees that Farley justifiably nullifies the airmail contracts; and, he finds that the airlines secure the route certificates through an open bidding procedure and the evidence fails to corroborate the government’s assertion that the plaintiff airlines receive these contracts through fraud or collusion. Commissioner Akers makes his decision and enters his findings on July 14, 1941, and the U.S. Court of Claims ultimately decides the case on December 7, 1942, several years after the Air Mail Affair concludes.

Significantly, another noteworthy decision precedes Pacific Air, where a different court agrees with the airline’s due process claim before granting the government’s motion to dismiss

47 Pacific Air Transport v. United States, 98 Ct. Cl. 649 (CT. Cl. 1942).


49 Id. at 271.

50 Id. at 261.

51 Pacific Air Transport v. United States, 98 Ct. Cl. 649 (CT. Cl. 1942).
for jurisdictional reasons.\textsuperscript{52} However, the Pacific Air decision receives anemic attention in the literature, commentary and legal analysis,\textsuperscript{53} especially when comparing the court decision to the more voluminous amount of literature discussing the Air Mail Affair. As an additional resource, case law from this time period addresses separation of powers as well as due process issues. This case law assists with understanding how these arguments apply to the Pacific Air holding.

The Pacific Air holding was the last word on a controversial issue. However the court fails to evaluate the separation of powers or the due process arguments in this lengthy 148-page decision.\textsuperscript{54} While it acknowledges the government did not comply with the notice provisions when annulling the airmail contracts, the court remains silent about a Fifth Amendment due process violation.\textsuperscript{55} Likewise, the decision fails to address the Executive action and whether this branch exceeds its authority.\textsuperscript{56} This analysis evaluates these twin arguments and how they apply to the holding affecting such a historic issue.

\textsuperscript{52} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 768 (U.S. App. 1935).

\textsuperscript{53} Research identifies few articles addressing Pacific Air Transport v. United States or the litigation involving the Air Mail Affair. Paul Godehn and Frank Quindry report the U.S. Court of Claims finding that the Plaintiff airlines violate the federal statute (See Paul M. Godehn, et al., \textit{Air Mail Contract Cancellations of 1934 and Resulting Litigation}, 21 J. AIR L. & COM. 253, 261, 272 (1954)), which contradicts the findings of the commissioner who initially hears the case. (\textit{Id.} at 271.) Likewise, Kenneth Werrell agrees the court concludes that the airlines collude to avoid an open bidding process. Kenneth P. Werrell, \textit{“Fiasco” Revisited: The Air Corps & the 1934 Air Mail Episode}, AIR P. HIST., 12, 22 (Spring 2010). Finally, Benjamin Lipsner solely reports on Commissioner Akers’ findings that the airlines did not obstruct the bidding process however he fails to report the U.S. Court of Claims reverses the commissioner’s decision. \textit{Benjamin Lipsner, Airmail Jennies To Jets} 253 (1951).

\textsuperscript{54} Pacific Air Transport v. United States, 98 Ct. Cl. 649 (Ct. Cl. 1942).

\textsuperscript{55} \textit{Id.} at 746.

\textsuperscript{56} Pacific Air Transport v. United States, 98 Ct. Cl. 649 (Ct. Cl. 1942).
CHAPTER III: METHODOLOGY.

This is not an empirical study. This article utilizes the multiple, available resources to consider alternative arguments available to the Plaintiff airlines in Pacific Air when pursuing their cause of action against the federal government. This analysis initially discusses the history affecting the Air Mail Affair and how these circumstances shape the Pacific Air holding. In deference to the U.S. Court of Claims’ decision, this article next investigates alternative arguments available to the plaintiffs but the Pacific Air court fails to consider.

After consulting different journal articles, law review articles and relevant case law, this analysis compares and contrasts these materials to the Pacific Air holding. Boeing Air Transport, Inc. v. Farley is especially relevant, illustrating the significance of the due process issue.\(^57\) Recognizing that plaintiff National Air Transport Company is a similarly aggrieved party whose airmail contract is set aside, the court comments on the due process argument before granting relief in favor of the government.\(^58\) Although this decision occurs years before Pacific Air is finalized, the due process argument for whatever reason does not filter into the later court’s evaluation.\(^59\) Although the Boeing Air court dismisses airline’s petition for jurisdictional reasons, it identifies the due process concerns initially raised by Lindbergh and serves as a valuable resource for this evaluation.\(^60\)

\(^57\) Boeing Air Transport, Inc. v. Farley, 75 F.2d 765 (U.S. App. 1935).

\(^58\) Id. at 767-8.

\(^59\) Pacific Air Transport v. United States, 98 Ct. Cl. 649 (Ct. Cl. 1942).

\(^60\) Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 767-8 (U.S. App. 1935).
Similarly, case law from this time period assists with analyzing the separation of powers issue. United States v. Pan-American Petroleum Co. is analogous to the Air Mail Affair although the court decides this matter a decade before the Air Mail Affair unfolds.\textsuperscript{61} This holding offers a thoughtful analysis and thorough discussion about the potential for the executive order to intrude into the purview of another branch of government.\textsuperscript{62} Based on this collective evaluation, this analysis finds President Roosevelt violates separation of powers by intruding into the legislative domain as well as violates the airlines’ due process rights by denying them notice and an opportunity to be heard when cancelling their contracts. Further findings justify government acting within the constitutional framework, granting citizens and business alike the opportunity to be heard and allowing an early developing industry the opportunity to grow without governmental interference and, assuming adequate regulatory provisions exist, only reluctantly interfering in its progress. Recognizing that economic success fuels a country,\textsuperscript{63} the government that interferes least governs best.

\textsuperscript{61} United States v. Pan-American Petroleum Co., 6 F.2d 43 (U.S. Dist. 1925).

\textsuperscript{62} Id. at 87.

\textsuperscript{63} Many authorities recognize the economic importance in a country’s standing, including those identified in “Impact of Nineteenth Century Missouri Courts upon Emerging Industry: Chambers of Commerce or Chambers of Justice?” Mo. L. Rev. 51, 52 (1998), authored by a different Hon. Thomas C. Clark.
CHAPTER IV. HISTORICAL BACKGROUND OF THE AIR MAIL AFFAIR.

A dynamic history affects the unfolding events of 1934. For several years following the First World War, mail delivery is the primary source of income for commercial aviation. During these early years of aviation, passenger travel is less lucrative, so the airlines rely heavily on the federal airmail subsidies for their fiscal livelihood. It is not until 1936 that passenger travel income surpasses the income from airmail subsidies.

During the years preceding the Air Mail Affair, Congress passes multiple pieces of legislation and different presidential administrations attempt to influence airline development. In 1925, Congress enacts the Contract Air Mail Act or the Kelly Act, authorizing the Postmaster General to privatize the airmail service, create the different airmail routes and award those contracts to the lowest bidder. After the carrier proves they offer a dependable service, the

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67 As the namesake of the legislation, Rep. Clyde Kelly (R-Pa.) is recognized as the father of the airmail system. William Berchtold, The Air Mail Affair: A critical appraisal of the Administration’s recent blunder, with suggestions for the formation of a sound and permanent air policy, 237 THE N. AM. REV. 5, 438 (1934).

68 The Postmaster General selection process evolves through history. Originally, the President nominates an individual who is subject to Senate approval for this cabinet level appointment. Ware v. United States, 71 U.S. 617, 633 (1867). In 1971, Congress removes the Postmaster General as a cabinet level position and reforms the selection process. Instead of Presidential appointment, the Postmaster General is elected by the Board of Governors of the United States Postal Service. (http://www.si.edu.)

Postmaster General may opt to exchange the carrier’s airmail contract for a route certificate for a longer period but not to exceed 10 years.\textsuperscript{70}

Recognizing the value of the aviation industry and its economic potential, Congress next enacts the Air Commerce Act in 1926.\textsuperscript{71} This subsequent legislation authorizes the Secretary of Commerce to further develop the economic potential of the nascent airline industry.\textsuperscript{72} Then, during the Hoover administration, Congress passes the Air Mail Act of 1930.\textsuperscript{73} Also known as the McNary-Watres Act, this latest legislation empowers then Postmaster General Walter Brown to award airmail routes to the lowest bidder transporting the mail based on a space-mileage basis, not the mail weight.\textsuperscript{74} The legislation allows for a new compensation method that provides the airlines with a stimulus to transport passengers as well as the mail.\textsuperscript{75} Congress intends McNary-Watres to stabilize the industry and steer the more experienced airlines toward financial independence and away from the traditional, steady diet of federal subsidies.\textsuperscript{76}

\textsuperscript{70} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656 (Ct. Cl. 1942).


\textsuperscript{74} With this payment change, airlines are no longer subsidized based on the collective weight of the mail transported. REP. No. 107, 85\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 10 (1957); Timothy Ravich, \textit{National Airline Policy}, 23 U. MIAMI BUS. L. REV. 1, 7 (2014).

\textsuperscript{75} REP. No. 107, 85\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 10 (1957).

\textsuperscript{76} William Berchtold, \textit{The Air Mail Affair: A critical appraisal of the Administration’s recent blunder, with suggestions for the formation of a sound and permanent air policy}, 237 THE N. AM. REV. 5, 438 (1934).
The McNary-Watres Act empowers Brown. He uses his influence to improve the efficiency of the airmail service as the overall cost to transport the mail decreases from $1.09 per mile in 1929 to 38 cents per mile in 1933. Under this legislation, he extends several airmail routes, hoping to inspire the airlines to expand passenger service while consolidating the airline industry into a more manageable entity. Prior to McNary-Watres, the existing airmail routes reflect a haphazard system (patchwork) of “illogical lines” stemming from only one transcontinental route. Pursuant to his authority under McNary-Watres, Brown bolsters both the airmail and passenger service by redesigning the airmail map, reconfiguring the north to south routes and, perhaps most importantly, adding two east to west transcontinental routes.

On May 19, 1930, Brown meets with some of the airline executives to discuss the recently enacted McNary-Watres legislation, his proposed route extensions, as well as an additional two “independent, competing” transcontinental routes that the Postmaster General especially favors. The Post Office discloses this event to the public and distributes a press release, announcing the meeting and specifically identifying by name the participating passenger and airmail carriers.

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80 *Id.* at 700.


At the meeting, Brown encourages the airline executives to meet, discuss and decide among themselves which airlines serve which of the newly proposed airmail routes. When entering its decision years after these events, the Court of Claims finds that Brown tells the airlines that he is not obligated to implement their proposals but “…he desired suggestions and recommendations as to whether (the airlines) could agree on the operator who should perform the service in a given area and that he would give careful consideration to their suggestions and recommendations.”

Later, critics label the airline executive meetings, both with and without Brown, as the “spoils conferences.” Under Brown’s approach, he hopes to extend the carrier routes under the existing contracts but without advertising for competing bids. Brown recognizes that some operators are more experienced, safe and fiscally sound than others and he undoubtedly fears advertising would prompt bids from incapable providers or “irresponsible bidders.” In his estimation, a successful restructuring necessitates some of the multiple, smaller companies to

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83 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 701 (Ct. Cl. 1942).
84 Id. at 702.
consolidate or merge into a fewer number of larger, more manageable airlines equally qualified
to expand passenger travel.  

On June 4, 1930, the airlines report to Brown in writing that they agree on air carriers for
seven of the 12 routes Brown proposes but do not agree on a carrier for the remaining, more
controversial airmail lines, including the two additional transcontinental routes. Brown is
disappointed that the airlines are unable to agree on service providers for the “longer and more
controversial” routes and can only agree on the shorter, less significant routes, which prompts
Brown to act.

Consequently, Brown creates and allocates the two transcontinental airmail routes
supplementing the sole transcontinental route operated by United at the time. Pursuant to his
plan to establish three independently operated transcontinental routes, Brown awards Aviation
Corporation with the southern route between Atlanta and Los Angeles and he awards
Transcontinental & Western Air, following their merger, with the central route between New
York and Los Angeles and through St. Louis.


253, 264 (1954).

253, 264 (1954).

92 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 708 (Ct. Cl. 1942).

Under Brown’s direction, the restructured aviation industry thrives and the amount of passenger travel triples in the next few years. Although later congressional hearings reveal that Brown is sometimes autocratic and arbitrary, his vision and leadership elevate the U.S. air transportation system to the best in the world, all while the country is experiencing the economic turmoil of the Great Depression.

As 1932 unfolds, much of the country is experiencing deep economic hardship as the Great Depression continues but the fall election marks a sea change in political power as the Democrats replace the Republicans in the White House and both houses of Congress. Roosevelt convincingly defeats Hoover and the Democratic controlled Congress catapults to a nearly two-to-one advantage in the Senate and an even more commanding three-to-one lead in the House. With a change in administrations James A. Farley replaces Brown as the new Postmaster General.

Looking to build on their electoral success in 1932, Democrats begin researching issues – “real or fabricated” – involving former President Hoover that they can manipulate into a campaign issue for the upcoming 1934 midterm elections. Brown’s “spoils conferences”

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96 *Id.* at 15.


98 CONRAD BLACK, FRANKLIN D. ROOSEVELT: CHAMPION OF FREEDOM 321 (2003). James A. Farley actively participates in Roosevelt’s initial 1932 presidential campaign. When Roosevelt addresses his supporters on election night, Farley stands next to the President-elect who describes his future Postmaster General as one of the two people most responsible for victory. *Id.* at 249.

Beginning in September 1933, Sen. Hugo Black (D-Ala.) and his Senate investigative committee collect documents, hold hearings and question witnesses about the circumstances surrounding the “spoils conferences,” the decision-making to retain the private airlines for mail delivery and if this conduct violates federal statutes requiring competitive bidding. The Committee subpoenas the financial records of many aviation industry leaders, including Lindbergh, even demanding records of stock transactions since 1924. Ultimately, the Senate committee uncovers some suspicious, questionable activity surrounding the allocation of airmail contracts and Black argues that these practices resemble a “conspiracy to defraud the government.”

Black’s committee introduces evidence of Brown’s “high-handed treatment” of some, but prevents Brown from testifying despite the former Postmaster General’s repeated requests to appear and defend his policies. Understandably some accuse Black and his committee of

106 Black’s professional career prospers under Roosevelt, who appoints him to the U.S. Supreme Court in 1937. DAVID M. O’BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY (2005).
conducting a less than impartial investigation and, although effective in generating front page headlines, none of the investigation positively influences public policy.\textsuperscript{107}

A longtime critic of the airmail system operating under the Republican Hoover Administration,\textsuperscript{108} Sen. Black leads the hearings extending into May 1934, vociferously arguing that Brown fraudulently allocates the airmail contracts.\textsuperscript{109} Among other revelations surfacing in the Black proceedings occurring at the height of the Great Depression, the executive of United Air witnesses his initial $253.00 airline investment grow to a value of $35 million.\textsuperscript{110}

While the news of exorbitant salaries of some airline executives shock the public, some airlines and their executives understandably profit after investing in the speculative stock of the airline industry during the bull market years of 1927 to 1929.\textsuperscript{111} Some aviation stocks rise dramatically in the initial market boom preceding the Great Depression but this rise in value is not isolated to the aviation industry because other stocks also benefit as a consequence of the speculation market.\textsuperscript{112} Just days before Roosevelt enters his fateful order, Post Office Solicitor Karl Crowley reviews the Black Committee evidence and issues a brief concluding that Brown

\textsuperscript{107} William Berchtold, \textit{The Air Mail Affair: A critical appraisal of the Administration’s recent blunder, with suggestions for the formulation of a sound and permanent air policy}, 237 The N. Am. Rev. 5, 438 (1934).
\textsuperscript{108} Id.
\textsuperscript{110} SCOTT BERG, LINDBERGH 291-2 (1998).
\textsuperscript{111} William Berchtold, \textit{The Air Mail Affair: A critical appraisal of the Administration’s recent blunder, with suggestions for the formulation of a sound and permanent air policy}, 237 The N. Am. Rev. 5, 438 (1934).
\textsuperscript{112} Id.
fraudulently awards the airmail contracts after conspiring with the carriers to prohibit competitors from bidding on the routes.113

On February 9, 1934 and without warning, President Roosevelt signs Executive Order 6591, directing the Air Corps to transport the airmail beginning February 19 and effectively cancelling the airmail contracts with over 30 different airlines.114 The President argues executive action is necessary, contending that the Brown airmail contracts are negotiated through collusion and fraud.115 Officially Postmaster General James Farley cancels the air mail contracts on the same day but only after participating in a conference at the White House,116 further corroborating that Roosevelt directs the action.117 The following day, The Washington Post headline reads: “Charging fraud and collusion, President Roosevelt yesterday directed the cancellation of all air mail contracts with domestic companies, thus reshaping if not collapsing the nation’s network of

113 Justin Libby, Comments on the Air Mail Episode of 1934, AIR P. HIST. 44 (2010). Karl Crowley is personally familiar with the events leading up to the Air Mail Affair. Prior to his appointment as Post Office Solicitor, he works as a lobbyist for a client seeking but is unsuccessful obtaining an airmail contract. William Berchtold, The Air Mail Affair: A critical appraisal of the Administration's recent blunder, with suggestions for the formulation of a sound and permanent air policy, 237 THE N. AM. REV. 5, 438 (1934).


private transport concerns.”118 In fact Roosevelt is so anxious to cancel the contracts and remove the private airlines, he disregards Farley’s request to delay the Air Corps start day until June 1 to accommodate a transition period,119 a decision the President would undoubtedly regret.

When later responding to the airline lawsuits, Roosevelt and Farley contend that the airlines participating in Brown’s ‘spoils conferences’ conspire to prevent other airlines from bidding on airmail contracts or route extensions, which violates federal statute Section 3950.120 Violating Section 3950 empowers the Postmaster General to “annul” the airmail contract and ban the carrier from participating in any future contract for a period of five years following the first offense.121 Additionally, the contractual language allows the Postmaster General to cancel the certificate “for willful neglect on the part of the holder to carry out any rules, regulations or orders made for its guidance…”122 When doing so, the Postmaster General must provide both written notice and provide the airline with 45 days to respond.123 In this instance, the Postmaster General does neither.124


120 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 745, 767, citing Section 3950, Revised Statutes of the United States (1872).

121 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 745, 767, citing Section 3950, Revised Statutes of the United States (1872).

122 Id. at 660.

123 Id. at 660.

Before acting, Roosevelt consults some within his administration. In the days before February 9, he asks the Post Office to contact the chief of the Army Air Corps, Benjamin Foulois, about the army air arm’s ability to transport the mail. Just prior to this time, Foulois is actively lobbying the legislature and advocating for an independent air branch of the military to conduct air missions but both the administration and Congress repeatedly thwart him. At this time, the U.S. Air Force does not exist but the prescient Foulois sees the value of achieving air superiority in combat situations and he is the leading advocate for a separate air service that functions independently of the army.

While he undoubtedly views the President’s inquiry as more closely resembling an order rather than a request, he also considers transferring the mail as an opportunity to gain support for his plans to convert the Air Corps into an independent military operation. After discussing the matter with his staff but breaching army protocol when bypassing the military Chief of Staff Gen. Douglas MacArthur, Foulois confirms the Air Corps’ ability to meet this challenge and responds they can be ready in a week to ten days.

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125 In addition to serving as the chief of the Army Air Corps since 1931, Foulois is a leader in military aviation and remains passionate about flying, even piloting the plane that drops a baseball to Babe Ruth at a height of 250 feet in a publicity stunt receiving media attention. John Shiner, Benjamin Foulois and the Fight for an Independent Air Force, AVIATION’S GOLDEN AGE: PORTRAITS FROM THE 1920s AND 1930s 74, 78, 80 (1989).

126 Id. at 74, 83.

127 Id. at 80-83.

128 Id. at 74, 77.


130 Id. at 74, 83.
As one of the first to criticize Roosevelt’s unilateral action and challenge his executive authority, Lindbergh emerges as the major opponent of the contract cancellation. Although his historic flight occurs seven years earlier, he is still a national celebrity and active in the aviation industry where he works for Transcontinental & Western Air, Inc. Lindbergh does not serve in any official management capacity within the company nor does he negotiate the airmail contracts, but Lindbergh believes his employer heavily contributes to the undervalued aviation industry as well as the economy and, equally important, he believes Roosevelt is treating the airline industry unfairly.

Lindbergh sends the President a telegram dated February 11, 1934, and simultaneously releases a copy to the media. Among other criticisms, Lindbergh reminds the President that certain inalienable, constitutionally guaranteed rights bind us as Americans. Specifically, he alleges that Roosevelt’s decision to cancel “the air mail contracts condemns the largest portion of commercial aviation without just trial.” Further, he reminds Roosevelt of the fundamental right to a fair trial and alleges the President’s actions “do not discriminate between innocence and guilt and places no premium on honest business.”

136 Justin Libby, Comments on the Air Mail Episode of 1934, AIP HIST. 44, 45 (2010), citing Lindberg letter.
137 Justin Libby, Comments on the Air Mail Episode of 1934, AIP HIST. 44, 45 (2010), citing Lindberg letter.
138 Justin Libby, Comments on the Air Mail Episode of 1934, AIP HIST. 44, 45 (2010), citing Lindberg letter.
Further, Lindbergh asserts that companies and their officers “have not been given the opportunity of a hearing (and) improper acts by many companies have not been established.”\(^{139}\) While reminding the President that America currently leads the world in every aspect of aviation, including the quality of airlines, aircraft and equipment, Lindbergh also warns that the hasty, misguided decision “will damage all American aviation.”\(^{140}\) Within days of the contract cancellation, *The New York Times* reports Lindbergh’s fateful comments that “the lives of men inexperienced in mail operations, and flying planes not equipped with radio, or blind flying instruments may be risked.”\(^{141}\)

As two of the country’s most popular figures square off on this controversial subject matter that later includes military fatalities, the Air Mail Affair unsurprisingly receives intense media attention throughout the first half of 1934.\(^{142}\) Both the president and the partisan Congress challenge Lindbergh to defend the industry and some of the more inflammatory revelations leading to the multiple contract cancellations. For more than two hours on March 16, the media record and photograph Lindbergh in a congressional caucus room where he addresses some of

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\(^{139}\) Justin Libby, *Comments on the Air Mail Episode of 1934*, AIR P. HIST. 44, 45 (2010), citing Lindberg letter.

\(^{140}\) Justin Libby, *Comments on the Air Mail Episode of 1934*, AIR P. HIST. 44, 45 (2010), citing Lindberg letter.

\(^{141}\) Kenneth P. Werrell, “*Fiasco* Revisited: The Air Corps & the 1934 Air Mail Episode”, AIR P. HIST. 12, 17 (2010), citing *Action on Air Mail Unfair, Lindbergh Tells President*, N.Y. TIMES, February 12, 1934, at 1. Lindbergh’s prolific flying career includes extensive experience flying the mail. Prior to his transatlantic crossing, he works as a pilot at Roberts Airlines flying the mail between St. Louis and Chicago, where he frequently endures harsh weather conditions that even force him to jump from his airplane at times. CHARLES LINDBERGH, *THE SPIRIT OF ST. LOUIS* 6 (1953).

\(^{142}\) Kenneth P. Werrell, “*Fiasco* Revisited: The Air Corps & the 1934 Air Mail Episode”, AIR P. HIST. 12, 14, 17 (2010).
the aviation industry’s more questionable practices but insists they are condemned without an opportunity to be heard.143

While defending his beloved – yet controversial – aviation industry under the glare of the media spotlight, Lindberg utilizes his vast skill set to articulate well-reasoned, measured and accurate responses144 much like he utilizes a string and a globe145 to measure the distance between New York and Paris when calculating the amount of fuel necessary for his transatlantic journey. When confronted by multiple detractors and skeptics, Lindbergh seems to resemble that string, with unwavering resiliency he resists the intense pressure of the public spotlight, deflects the criticism and communicates146 with the precision of higher mathematics. Later that same day, Lindbergh endures another interrogation, this one led by the special assistant to the attorney general and an investigator from the Black Committee while in the presence of a stenographer.147 In this session, Lindbergh answers questions for more than three hours while addressing industry accusations and deflecting personal attacks.148

Notwithstanding Lindbergh’s concerns about due process denied, the Roosevelt decision invites disaster. Even before beginning the operation, the Air Corps suffers two fatalities on

144 Id.
145 While overseeing the construction of his single engine monoplane in San Diego, Lindberg locates a globe in a public library and stretches a string across the surface between New York and Paris to measure the distance of the transatlantic flight, a factor necessary to calculate the plane’s anticipated fuel consumption. CHARLES LINDBERGH, THE SPIRIT OF ST. LOUIS 83-84 (1953).
147 Id.
148 Id. at 295.
February 16 while conducting practice flights.\textsuperscript{149} During the first week of the operation, another three pilots die, another five are critically injured, and the Air Corps accrues a collective $300,000.00 in property damage.\textsuperscript{150} Beginning with the first Air Corps pilot fatalities in February and extending into March, each day seems to unveil a different “horror story.”\textsuperscript{151}

Several factors contribute to the operation’s demise. Flying combat missions during the day when the enemy is visible is substantially different than flying the mail at night for great distances in varying weather conditions.\textsuperscript{152} Also, aviation technology is largely undeveloped in the 1930s. Further, there is not any radar navigation devices or ground control coordination to assist the pilots.\textsuperscript{153}

Also, the Air Corps’ planes lack the blind-flying instruments and radios that the commercial air pilots utilize while conducting their nighttime mail runs.\textsuperscript{154} Foulois recognizes this deficiency and he upgrades the army plane instruments, ensuring each plane includes a radio receiver, directional compass and an artificial horizon in the days immediately preceding the operation.\textsuperscript{155} While the army hastily trains the pilots on using the new instruments, many resist relying on these and instead continue to trust their flying instincts even when encountering

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\textsuperscript{149} Kenneth P. Werrell, “Fiasco” Revisited: The Air Corps & the 1934 Air Mail Episode, AIR P. HIST. 12, 18 (2010).

\textsuperscript{150} SCOTT BERG, LINDBERGH 293 (1998).

\textsuperscript{151} Id. at 293-4.


\textsuperscript{153} Kenneth P. Werrell, “Fiasco” Revisited: The Air Corps & the 1934 Air Mail Episode, AIR P. HIST. 12, 17 (2010).


\textsuperscript{155} Id.
\end{flushleft}
challenging weather conditions. Finally, the 1934 winter weather is especially inclement, producing considerable amounts of rain, snow and fog, further complicating the flying conditions. The harsh weather proves heavily problematic as the army pilots fly in “open-cockpit machines,” which expose them to the punishing elements.

The decision presents economic consequences also. Roosevelt’s action threatens both the airline industry’s stability and their long-term viability, invites economic turmoil and jeopardizes America’s standing as the premiere air transport system in the world. A successful, efficient airmail system not only brings the country “closer together” but it fosters a successful business environment. Instead, the Roosevelt decision prompts economic ruin with many airlines reducing flight schedules and laying off employees. Immediately following the Executive Order, Transcontinental & Western Air President Richard Robbins asks Roosevelt and Farley to reconsider the decision, explaining the airmail revenue would allow his company to spend another $3.5 million on new flying equipment in the upcoming months. Instead, the action


160 Id. at 14.

161 Id. at 17.

forces Robbins to furlough employees and restructure a minimal passenger flight schedule following the February 19 changes.163

At the time of the contract cancellation, the United airline executive’s massive investment growth164 is an exception to the factual circumstances detailing the airline industry’s fiscal health. In fact, few airlines are able to break even or realize small profits in 1933, with some even battling massive operating losses prior to this time.165 Prior to the Roosevelt intervention, Brown’s hope to expand passenger service and decrease the airline dependence on the mail subsidy was materializing because the passenger revenues were increasing to a level that many airlines would have been profitable within three to five years without the mail subsidy.166

Following an extensive public clamor, Roosevelt eventually reverses himself. On March 10, he withdraws Executive Order 6591 and allows the airlines to resume responsibility for transporting the mail.167 However, the President insists that the new airmail contracts restrict the mail delivery term to three years, not the previous ten years as allowed under the McNary-Watres legislation.168 Further, he demands that any airlines or former participants in the Brown ‘spoils conferences’ are ineligible for the newly solicited airmail routes.169


164 Id. at 291-2.


166 Id.

167 Justin Libby, Comments on the Air Mail Episode of 1934, AIR P. HIST. 44, 46 (2010).

168 Id.

169 Id.
While this new action prevents 31 individuals and former airline executives from participating in future aviation contracts and essentially banishes them from the industry, some of the affected airlines maneuver around Roosevelt’s restriction by changing their names. For example, American Airways changes to American Airlines, Eastern Air Transport changes into Eastern Airlines, United Aircraft becomes United Airlines and Transcontinental & Western Air changes its name to Trans World Airlines.

On March 27 Congress formally authorizes Roosevelt’s action reassigning executive departments to assist with mail delivery. The legislative language duplicates the language in Roosevelt’s Executive Order 6591. Later that summer, Roosevelt signs the Air Mail Act of 1934 effectively disassembling the previous McNary-Watres legislation. Engineered by the White House, the Black-McKellar Act mandates that multiple federal agencies regulate the airlines and significantly reduces the postal subsidies.

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172 Air Mail Act, Pub. L. No. 140, § 1, (1934).
173 Air Mail Act, Pub. L. No. 140, § 1, (1934); Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.
The 78-day operation is considered a “dismal failure” and by May 8, the commercial airlines are flying the mail again. Before commercial air service resumes however, the Air Corps suffers 12 fatalities, 66 accidents and completes just over 65 percent of all scheduled flights. If the loss of life is not bad enough, the operating expenses rise to 77 cents per mile during the presidential experiment, nearly double the cost of the commercial airlines operating expenses just months earlier.

The Air Mail Affair introduces political consequences also. Many conclude that the issue is “a setback and an embarrassment” for the President. Even the President’s own son, Elliott, who works as an editor at an aviation publication, criticizes his father’s involvement in the issue. Perhaps, the American writer Walter Lippmann summarizes the issue best when he opines that “The issue had deep repercussions for Roosevelt because for the first time since taking office his authority is challenged, making him appear both fallible and impenitent.” The criticism, the consequences and the potentially lasting political impact are not missed on

183 SCOTT BERG, LINDBERGH 296, summarizing Walter Lippmann’s comments.
Roosevelt, who later remarks to his press secretary that the administration would avenge\textsuperscript{184} this regrettable experience with Lindbergh while threatening “(w)e will get that fair-haired boy.”\textsuperscript{185}

\textsuperscript{184} And he does. In the years preceding World War II, Lindbergh makes a series of radio broadcasts and public speeches discouraging American entry into the European conflict. In response, Roosevelt paints Lindbergh as a Nazi, although repeated efforts to wiretap his conversations fail to reveal any proof. CONRAD BLACK, FRANKLIN D. ROOSEVELT: CHAMPION OF FREEDOM 537 (2003). After the U.S. enters the war, Roosevelt works to keep Lindbergh from serving in the military despite the former aviator’s determination to fight following the attack on Pearl Harbor. Eventually, Lindbergh overcomes these obstacles and he serves admirably for his country. John J. Dwyer, \textit{FDR v. Lindbergh: Setting the Record Straight}, \textit{The New American} (2014).

\textsuperscript{185} DAN HAMPTON, \textit{The Flight: Charles Lindbergh’s Daring and Immortal 1927 Transatlantic Crossing} 264 (2017).
CHAPTER V: THE PACIFIC AIR DECISION.

Nearly nine years pass from the time Lindbergh initially raises his due process concern on February 11, 1934\textsuperscript{186} and the Pacific Air court ultimately decides the matter on December 7, 1942.\textsuperscript{187} Before the U.S. Court of Claims enters judgment, Commissioner Richard H. Akers reviews the facts and issues surrounding the Air Mail Affair and initially decides the case.\textsuperscript{188}

In fact, Commissioner Akers hears evidence on this matter over a collective 63-day time period, covering more than two years between April 26, 1938 and June 11, 1940.\textsuperscript{189} He hears from a substantial number of witnesses in three different venues, Washington, D.C., Sanford, North Carolina and Los Angeles.\textsuperscript{190} He receives 769 exhibits into evidence and the trial transcript totals 7,164 pages.\textsuperscript{191} Ultimately, the commissioner decides that the Roosevelt administration terminates the airmail agreements in good faith\textsuperscript{192} but equally finds the evidence “insufficient to substantiate the claims of the administration that contracts or route certificates were secured through fraud or collusion…”\textsuperscript{193} Further, he concludes the plaintiffs are entitled to

\textsuperscript{186} Justin Libby, \textit{Comments on the Air Mail Episode of 1934}, \textit{AIR P. HIST.} 44, 45 (2010), citing Lindbergh letter.

\textsuperscript{187} Pacific Air Transport v. United States, 98 Ct. Cl. 649 (Ct. Cl. 1942).

\textsuperscript{188} This author is unable to locate the Commissioner Richard Akers decision and, instead, relies on the Pacific Air Transport court summary and other secondary materials.


\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.} at 259-260.

\textsuperscript{192} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 765 (Ct. Cl. 1942).

$364,423.43 in collective damages for the services performed in January and February 1934. Finally, he decides that plaintiffs are not liable under any of the counterclaims pursued by the government.

Although the Pacific Air decision addresses multiple airmail routes and several different air carriers throughout the opinion, the holding solely applies to the three different Plaintiff airlines operating five specific airmail routes. They include Pacific Air Transport, Boeing Air Transport and United Air Lines Transport Corporation. Pacific Air Transport is the Plaintiff in No. 43029, involving route eight between Seattle and Los Angeles. It receives the contract and begins operating this airmail route beginning September 15, 1926. Following two years of satisfactory service and as allowed by statute, Pacific Air Transport exchanges the airmail contract for a route certificate on May 27, 1930, with the Postmaster General’s approval. When receiving the route certificate, Pacific Air Transport posts the statutorily required surety or bond. On July 1, 1930, and also pursuant to statute, the Postmaster General extends Pacific Air

195 Id.
196 Originally, Vern C. Gorst is the low bidder on this route first advertised on July 15, 1925 but he promptly sublets this route to Pacific Air Transport with the Postmaster General’s written approval on March 19, 1926. Pacific Air Transport v. United States, 98 Ct. Cl. 649, 654 (Ct. Cl. 1942).
197 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 655 (Ct. Cl. 1942).
198 Id.
199 Id.
Transport route eight to include the additional distance between Los Angeles and San Diego.\textsuperscript{200} Pacific Air Transport operates route eight through February 19, 1934.\textsuperscript{201}

Boeing Air Transport is the plaintiff in No. 43030 and begins operating airmail route 18 between Chicago and San Francisco on July 1, 1927.\textsuperscript{202} Following two years of satisfactory service and as allowed by statute, Boeing Air Transport exchanges the airmail contract for a route certificate on October 21, 1930.\textsuperscript{203} When receiving the route certificate, Boeing Air Transport provides the required surety.\textsuperscript{204} Although Boeing Air Transport does not request an extension on the Chicago/San Francisco airmail route, Postmaster Brown later directs Boeing Air Transport to expand Route 18 to include an additional, extended route between Omaha and Watertown, South Dakota, effective January 16, 1932.\textsuperscript{205}

As the plaintiff in No. 43031, Boeing Air Transport also operates route five between Salt Lake City and Seattle which it acquires from Varney Air Lines, Inc. beginning October 1, 1933.\textsuperscript{206} Originally two separate routes known as route five and route 32, these routes eventually merge into a single airmail route on May 27, 1930.\textsuperscript{207} Initially, Varney Air Lines, Inc. is the low

\textsuperscript{200} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 663 (Ct. Cl. 1942).

\textsuperscript{201} Id. at 655.

\textsuperscript{202} Similarly, Edward Hubbard and Boeing Airplane Company are the low bidder on this route first advertised on November 15, 1926 but Hubbard later sublets this route to Boeing Air Transport with the Postmaster General’s written approval on April 29, 1927. Pacific Air Transport v. United States, 98 Ct. Cl. 649, 664 (Ct. Cl. 1942).

\textsuperscript{203} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 664 (Ct. Cl. 1942).

\textsuperscript{204} Id. at 665.

\textsuperscript{205} Id. at 666.

\textsuperscript{206} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 671 (Ct. Cl. 1942).

\textsuperscript{207} Id. at 669.
bidder on the previous route five between Elko, Nevada and Pasco, Washington, first advertised on July 15, 1925. Additionally, Varney Air Lines, Inc. is also the low bidder on another Pacific Northwest airmail route, route 32, and enters into a contract with the government to transport the mail beginning September 23, 1929. Later, Postmaster General Brown finds that the public interest is better served by consolidating these routes, pursuant to the McNary-Watres Act. Varney Air Lines, Inc. continues to operate this consolidated airmail route five until October 1, 1933, when Boeing Air Transport sublets the route with Postmaster General approval and acquires Varney Air Lines Inc.’s assets, including “physical properties.”

United Air Lines Transport Corporation is the plaintiff in No. 43032 after merging with National Air Transport, Inc. As the low bidder, National Air Transport, Inc. is awarded route 17 between New York and Chicago, beginning September 1, 1927. Following two years of satisfactory service and as allowed by statute, National Air Transport exchanges the airmail contract for a route certificate on October 22, 1930 with the Postmaster General’s approval. When receiving the route certificate, National Air Transport posts the necessary bond. On December 28, 1934, and well after the contract cancellation, National Air Transport, Inc. merges with three other airlines into United Air Lines Transport Corporation, which assumes the

209 Id. at 668.
210 Id. at 669.
211 Id. at 671.
212 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 669 (Ct. Cl. 1942).
213 Id. at 671-3.
214 Id. at 673.
215 Id. at 673.
ownership interest in National Air Transport, Inc.’s cause of action against the Postmaster General. 216

Similarly, United Air Lines Transport Corporation is the plaintiff in No. 43033 following the National Air Transport, Inc. merger. 217 Initially, National Air Transport, Inc. is the low bidder on airmail route three between Chicago and Dallas, 218 which it operates from May 12, 1926, until February 19, 1934. 219 After two years of satisfactory service and as allowed by statute, National Air Transport exchanges the airmail contract for a route certificate on May 3, 1930. 220 When receiving the route certificate, National Air Transport provides the necessary surety. 221 Following the merger in late 1934, United Air Lines Transport Corporation assumes the ownership interest in National Air Transport, Inc.’s cause of action against the Postmaster General. 222

After Roosevelt reverses himself and restores commercial airmail delivery, the government forbids any of the more than 30 airlines, including plaintiffs, whose certificates were cancelled on February 9, from resuming an airmail schedule. 223 Eventually, all three Plaintiff air carriers merge into the United group. 224 Also within the United group is a management

216 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 672 (Ct. Cl. 1942).
217 Id. at 672-4.
218 Id. at 674-5.
219 Id. at 675.
220 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 675 (Ct. Cl. 1942).
221 Id. at 675-6.
222 Id. at 672.
224 Id.
corporation, United Air Lines, Inc. Subsequently, United Air Lines, Inc. successfully bids on the routes previously awarded to the three former, separate air carriers, Pacific Air Transport, Boeing Air Transport and National Air Transport. United Air Lines, Inc. is not prohibited from bidding on these routes in spring 1934 since it did not possess a certificate cancelled on February 9.

Ultimately, the Pacific Air court sides with Roosevelt. The court holds that the Plaintiff airlines violate Section 3950, justifying the Roosevelt administration’s decision to annul the mail contracts. Disagreeing with Commissioner Akers, the court finds that the plaintiffs and other carriers “made a combination to avoid competitive biddings” through their collective agreement. Further, the court concludes that the plaintiffs enter these agreements and combinations to prevent competitive bidding for the airmail contracts at the expense of others seeking these contracts; the same air carriers seek to preserve the system using the high rates of payment and the air carriers wish to remain in favor with the Postmaster General who enjoys considerable discretionary power over the industry.

The majority opinion specifically faults plaintiffs, the United group, as well as Aviation Group, the former Transcontinental Air Transport and former Western Air Express for entering into a combination and agreement with the Postmaster General that they would not bid on

226 Id.
227 Id.
228 Id. at 789.
229 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 776 (Ct. Cl. 1942).
230 Id. at 764-5.
contracts during the competitive bidding process unless the Postmaster General selected that carrier for that specific route. The court further holds that these same carriers agree to use their influence to dissuade others from bidding on contracts.

In a concurring opinion, Judge Benjamin Horsley Littleton agrees with the outcome but does not agree with the court that plaintiffs participate in a combination or agreement ‘to prevent the making of any bid for carrying the mail,’ as prohibited in Section 3950. Littleton emphasizes that plaintiffs’ five route certificates are all awarded following an open competitive bidding process and well before the May 1930 conference. He disagrees that plaintiffs enter a scheme to protect their rates considering United Air possesses the only transcontinental airmail route and the Postmaster General proposes to add two additional transcontinental lines which is against the airline’s financial interests.

Although finding the airmail contracts are properly annulled, the court holds that the plaintiffs are entitled to payment for delivering the mail from January through February 1934. Specifically, the court awards Pacific Air Transport an amount of $59,519.32 for unpaid services along route eight, Boeing Air Transport an amount of $143,441.68 for mail delivery along route 18 and an additional $42,931.62 for unpaid services along route five, and United Air Lines Transport Corp., as the successor to National Air Transport, Inc., an amount of $66,748.80 for

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231 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 764 (Ct. Cl. 1942).
232 Id.
233 Id. at 794.
234 Id. at 794.
236 Id. at 790.
mail delivery along route 17 and an additional $51,782.01 for unpaid services along route three, totaling $364,423.43 in damages. Likewise, the court rejects the Roosevelt administration counterclaim request.

Rep. Clyde Kelly (R-Pa.) is unimpressed. Like Lindbergh, he criticizes the Roosevelt decision, concluding “(t)here is no showing to warrant such a drastic and arbitrary act as the cancellation of all contracts without a hearing. There was no justification for destroying all contracts...” Further dispelling any fraud allegations, 31 of the 34 cancelled airmail contracts are awarded between 1925 and 1927 following a competitive bidding process that includes three to nine interested parties per contract. The remaining three cancelled contracts or certificates are awarded by then “Postmaster General Brown to the lowest responsible bidder.”

Significantly, all five contracts involved in the Pacific Air lawsuit are awarded following a competitive bidding process.

Considerable publicity precedes the Roosevelt decision to unilaterally annul all the airmail contracts. The highly public Senate hearings and investigations reveal shocking

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238 Id. at 793.


240 Id.


242 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 768 (Ct. Cl. 1942).
economic gains by some carriers and their owners. Among other revelations surfacing in the Black proceedings occurring at the height of the Great Depression, the executive of United witnesses his initial $253.00 airline investment grow to a value of $35 million.

With convenient timing and occurring just days before Roosevelt acts, Post Office Solicitor Karl Crowley issues a written opinion concluding that the government can cancel the contracts through any number of methods, including 1) presidential executive order, 2) a breach of contract action under McNary-Watres, 3) an order from the Postmaster General based on the federal statute preventing bid-conspiring, 4) an order from the Postmaster General upon a finding that the contracts are fraudulently awarded or, finally, 5) a postal regulation permitting the Postmaster General to cancel contracts when in the public interest. Although the Post Office Solicitor cites the presidential executive order as an acceptable method, he advises against this alternative. Instead, he recommends nullification pursuant to all three latter methods previously described: 3) an order of the Postmaster General pursuant to the federal statute preventing bid-fixing, 4) an order from the Postmaster General based upon a finding that the contracts are fraudulently awarded and, finally, 5) a postal regulation permitting the Postmaster General to cancel contracts when in the public interest.

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245 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 748 (Ct. Cl. 1942).

246 Id.

247 Id.
Ironically, the Post Office Solicitor cites the breach of contract alternative as a viable option but recommends against engaging the McNary-Watres statute as the preferred method to discontinue the contracts.\textsuperscript{248} Specifically, the statute allows the government to terminate any agreement if the carrier fails to observe any “rule, regulation or order.”\textsuperscript{249} Conspiring to circumvent the bidding process and steer specific route certificates to specific air carriers arguably violates the postal service rules and regulations. Interestingly, Crowley confirms this is a viable cause of action, but he still recommends against Roosevelt acting under this option.\textsuperscript{250}

### A. President Roosevelt Moves to Annul Airmail Agreements under Section 3950 Alleging Competitive Bidding Violations

In clear language, the McNary-Watres legislation authorizes the Postmaster General to terminate an airmail agreement and outlines the grievance procedure.\textsuperscript{251} More specifically, “(s)uch certificate may be cancelled 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 45 days allowed the holder in which to show cause why the certificate should not be cancelled.”\textsuperscript{252}

\textsuperscript{248} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 748 (Ct. Cl. 1942).

\textsuperscript{249} Id. at 656.

\textsuperscript{250} Id. at 748.

\textsuperscript{251} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656 (Ct. Cl. 1942). Through much of the airmail legislation’s history, Congress consistently includes a grievance procedure following a contract termination. Prior to the McNary-Watres legislation requiring a 45-day written notice requirement and opportunity to be heard, the Kelly Amendment specifies a 60-day written notice requirement and opportunity to be heard on any cancellation. Pacific Air Transport v. United States, 98 Ct. Cl. 649, 769 (Ct. Cl. 1942).

\textsuperscript{252} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656 (Ct. Cl. 1942), citing McNary-Watres Act, § 2, 46 Stat. 259 (1930).
Roosevelt and his administration ignore this cause of action available under McNary-Watres. Unsurprisingly, Roosevelt instead moves to act under a statute conducive to his narrative of the Air Mail Affair. Section 3950, Revised Statues of the United States (1872) or 39 U.S.C.A. §432 states:

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 five years and for the second offense shall be forever disqualified.253

Roosevelt points to many deficiencies in Brown’s methods. First, the Roosevelt administration alleges that the Plaintiff air carriers violate the statute through corrupt, unlawful conduct by avoiding the competitive bidding process and steering Brown’s newly created 12 airmail routes to certain airlines and effectively dividing the spoils among themselves.254 Specifically, Roosevelt contends that Brown circumvents the competitive bidding process when he awards the transcontinental routes, assigning these lucrative routes to his preferred candidates. As an example, the administration is highly critical that Brown awards the middle or central transcontinental route to the newly formed Transcontinental & Western Air, Inc. after Brown

253 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 752, 767 (Ct. Cl. 1942), citing Section 3950, Revised Statutes of the United States (1872) or 39 U.S.C.A. §432.
suggests this merger. Even more importantly to his critics, Brown disregards a competitor’s lower bid.

Second, Roosevelt asserts that Brown abuses his discretion when interpreting the statutory language to award route extensions, or a new, separate airmail route stemming from the main route, to a specific air carrier while avoiding the competitive bidding process. For example, Brown awards a carrier with an extension route understanding that the same air carrier will sublet the route to a different carrier meeting Brown’s approval. In effect, this is awarding a route to the latter air carrier without competitive bidding.

Third, the Roosevelt administration faults Brown for converting the airmail contracts into route certificates and extending the parties’ contractual obligation into as long as a ten year term, although the statute allows this. Intent on changing this discretionary power, Roosevelt persuades the heavily Democratic Congress in 1934 to eliminate the certificate conversion option and effectively terminating the ten year contractual term. Finally, the Roosevelt administration also criticizes the payment methods funding the operators and, likewise, he persuades a

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255 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 720 (Ct. Cl. 1942). Transcontinental & Western Air, Inc. receives the middle route which is defined as New York to Los Angeles and through St. Louis. Pacific Air Transport v. United States, 98 Ct. Cl. 649, 707-8, 778, 784 (Ct. Cl. 1942).

256 Id. at 784.

257 Id. at 775-7.

258 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 776-7 (Ct. Cl. 1942).

259 Id. at 776-7.


subsequent Congress to eliminate Brown’s space-weight system and lower the fees to “…(not) exceed 33 and a third cents per mile for transporting a load not to exceed 300 pounds.”

B. Brown Aims to Develop Air Travel System Following McNary-Watres Legislation

Between 1925 and 1927 and before Walter Brown’s arrival, the previous Postmaster General both advertises and competitively bids each proposed airmail route before ultimately awarding each of the five contracts involved in the lawsuit. Following his appointment as Postmaster General on March 4, 1929, Brown aims to support commercial aviation by making the industry self-sufficient and less reliant on public subsidies. At this time, the passenger industry is struggling financially with many passenger routes mirroring the airmail routes. Similarly, he recognizes the expense and inefficiency of the airmail system that has developed over time into an “illogical” system of multiple routes with some created following political pressure.

In February 1930, Brown forwards to Congress his recommendations to improve the system. The new McNary-Watres legislation reflects some, but not all, of the Brown

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263 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 768 (Ct. Cl. 1942).
264 Id. at 684.
267 Id. at 684.
recommendations proposed in his bill H.R. 9500.269 Specifically, Brown recommends that the legislation maintain a competitive bidding clause but the Postmaster General retain the flexibility to award certain airmail routes through negotiation when in the “public interest.”270 While he recognizes competitive bidding is cost-effective, efficient and preferable in almost all other governmental spending decisions, Brown believes that competitive bidding is a “myth” in the airmail business because only a “limited number of responsible bidders”271 exist in the industry.

To Brown, his proposal to award contracts through negotiation is critical to shielding the postal service from irresponsible bidders who are less experienced, possibly unsafe and fiscally unsound.272 His attempt to balance the industry with a healthy representation of responsible and self-sufficient providers is also reflected in his frequently repeated decision – but first announced at the May 1930 conference – to add two additional transcontinental routes “independently and competitively operated.”273 Under Brown’s approach, the additional east/west transcontinental routes make the transportation system more efficient by reaching more of the country. Then, he can consolidate or even eliminate some of the multiple, illogical shorter lines.274

269 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 695 (Ct. Cl. 1942).
274 Id. at 700.
Additionally, Brown’s proposed H.R. 9500 recommends that the Postmaster General make any route extensions or consolidations when in the public interest to do so.\textsuperscript{275} To promote passenger travel, he further recommends a payment system based on a space-mileage basis, thus abandoning the previous system of subsidizing mail delivery based on the weight of the mail transported.\textsuperscript{276} By revising the payment system, the passenger airlines utilizing larger planes can transport the mail as well.\textsuperscript{277}

Ultimately, Congress passes the McNary-Watres legislation which is later signed by President Hoover on April 29, 1930.\textsuperscript{278} The new legislation denies Brown’s proposal to award contracts by negotiation and without advertising, in favor of the traditional approach embracing a competitive bidding process.\textsuperscript{279} However, the new legislation allows the Postmaster General to make both route extensions and consolidations when in the public interest. \textsuperscript{280}

1. \textbf{Competitive Bidding}

Brown seeks to solve “some of the important airmail problems” by merging this service with the passenger travel industry to create “a national network of air-mail (sic) and passenger

\textsuperscript{275} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 686-7 (Ct. Cl. 1942), citing H.R. 9500, 71\textsuperscript{st} Cong., § 6 (1930).
\textsuperscript{276} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 690 (Ct. Cl. 1942), citing H.R. 9500, 71\textsuperscript{st} Cong., § 4 (1930).
\textsuperscript{277} REP. No. 107, 85\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 10 (1957).
\textsuperscript{278} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 690 (Ct. Cl. 1942).
service.”  Brown attempts to restructure the illogical, inefficient airmail map that grew over time without a regard for need by designing an airmail service with the flexibility to accommodate passenger travel. He realizes that some airmail routes are not only unprofitable and expensive, others are created following congressional political pressure.

Further, Brown recognizes the value of the competitive bidding concept, but he also believes it restricts his ability to overcome some of the industry problems. For this reason, Brown advocates for the flexibility to negotiate with qualified air carriers without advertising and without competitive bidding because of the “limited number of prospective… responsible bidders.”

Despite Brown’s preference, competitive bidding remains statutorily required when Congress passes McNary-Watres in spring 1930. However, this new legislation expands the Postmaster General’s discretion over passenger travel which is struggling financially. Recognizing that many passenger routes mirror the airmail routes, Brown aims to expand

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281 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 683, 700, 772 (Ct. Cl. 1942).
282 Id. at 684, 688, 770.
283 Id. at 683, 769, 770.
284 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 770 (Ct. Cl. 1942).
285 Id. at 688.
286 This legislation is signed by the president on April 29, 1930. Pacific Air Transport v. United States, 98 Ct. Cl. 649, 771 (Ct. Cl. 1942).
passenger travel, improve efficiency and reduce rates by combining services, specifically allow mail carriers to transport passengers as well as the mail. 288

By creating a comprehensive national passenger and airmail service, Brown is attempting to grow the industry, expand competition and enhance the quality of service. 289 Much of Brown’s conduct involving the transcontinental routes reveals his motives, captures his concerns and illuminates his intentions. Recognizing there are a “limited number” of capable carriers, Brown believes Aviation Corp. (Aviation) is the most responsible air carrier to operate the southern route between Atlanta and Los Angeles. 290 The carrier fits Brown’s criteria as a strong, dependable operator, one of only a few qualified to manage this demanding route. 291 Further, it is “separately owned” and competitively managed from the other candidates operating or seeking to operate another transcontinental passage. 292 Additionally, Brown expects Aviation to distribute portions of the route to other qualified air carriers 293 after considering “the pioneering rights,” a term reflecting an air carrier’s commitment and length of service to a region. 294 Aviation does this.


291 Id. at 717.

292 Id. at 708, 717, 779.

293 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 717 (Ct. Cl. 1942).

294 When expanding the passenger travel and airmail delivery system, Brown believes in pioneering rights or the equities developed by the carriers in their various regions. Under this philosophy he defers to the proven, qualified carriers who have invested time and effort in a region, “created good will” in commercial aviation and helped “persuade people to fly.” Pacific Air Transport v. United States, 98 Ct. Cl. 649, 688, 772 (Ct. Cl. 1942).
When merging with Delta Airlines in July 1930, Aviation agrees to subcontract to Delta an extension from either Atlanta or Birmingham to Dallas, assuming Aviation receives the southern transcontinental route. Demonstrating their commitment to this region, Delta is a long time operator of airmail routes between Dallas and Atlanta.

When awarding the central or middle transcontinental route, Brown likewise seeks a responsible provider and he remains true to his philosophy favoring pioneering rights. Following the spoils conference, Western Air Express and Transcontinental Air Transport are the two primary contenders expressing interest in the middle transcontinental route. Both provide a reliable, proven service to portions of this route between New York and Los Angeles. However, Brown prefers these two operators “combine their resources” to effectively operate the new route. Later, these two carriers merge with Pittsburgh Aviation to form Transcontinental & Western Air, Inc. before the post office advertises for bids.

As critics point out, Brown awards the contract to Transcontinental & Western Air over the lower bid tendered by W.A. Letson’s United Avigation. Letson forms United Avigation immediately prior to the advertisement for bids and even expresses his intention to dissolve the

296 Id. at 717-8.
297 Id. at 687-8.
298 Id. at 720.
299 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 687 (Ct. Cl. 1942).
300 Id. at 720.
301 Id.
302 Id. at 784.
airline depending on the contract’s outcome. When learning about the competing bid, William McCracken of Transcontinental Air Transport suggests that the advertisement require that the bidder maintain at least six months of night flying experience delivering airmail.

Subsequently, the post office includes this requirement in the advertisement soliciting bids for the middle transcontinental route. Obviously, this requirement precludes United Avigation as a bidder because it is a newly formed carrier without any record of air service, but the newly merged Transcontinental & Western Air is not excluded since Western Air has extensive experience flying the mail at night.

Transcontinental & Western Air is “separately owned” and independently operated from the other two airlines operating the southern and northern transcontinental route, an important consideration to Brown. Additionally, the new corporation is “financially strong” and stable economically, in Brown’s opinion. And prior to the merger, the two carriers provide a reliable

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304 Id. at 781-2.
305 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 781-2 (Ct. Cl. 1942). Sometime later, the Acting Postmaster General Coleman asks the then Acting Attorney General John Lord O’Brien about the legality of the night flying requirement. Subsequently, O’Brien advises Coleman that in his opinion this particular requirement is illegal. Id. at 783.
307 Id. at 700, 708, 779.
308 Id. at 779.
service along the route between New York and Los Angeles, further satisfying Brown’s concern for pioneering rights.

When insisting on two additional transcontinental routes that are separately owned and independently operated, Brown is expanding the market and generating economic opportunity. Arguably, he further improves the efficiency of the airmail system by adding two additional transcontinental routes and eliminating some of the multiple shorter lines. Brown’s decision is unpopular with some, including plaintiff. At this time, the United group operates the only existing transcontinental airmail route between New York and San Francisco and opposes Brown’s plan. Contrary to the allegation that he colludes with the plaintiffs, Brown’s action clearly opposes the United group’s interests.

309 Prior to their merger, Transcontinental Air Transport operates an air passenger service over this same route between New York and Los Angeles. Similarly, Western Air operates a passenger service between Kansas City and Los Angeles. Pacific Air Transport v. United States, 98 Ct. Cl. 649, 779 (Ct. Cl. 1942).

310 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 687 (Ct. Cl. 1942).


312 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 707 (Ct. Cl. 1942). At this time, the United group, the United system or United Aircraft and Transport Corporation is the strongest aviation entity in the country. National Air Transport operates the eastern one-half of the transcontinental route between New York and Chicago and Boeing Air Transport system operates the western one-half of the route between Chicago and San Francisco. The United system also includes Pacific Air Transport and later, in August 1930, it acquires Varney Lines, Inc. as well. Id.

313 While recognizing the additional transcontinental routes would impact their business, the United group further realizes that Brown is intent on expanding routes to create a national network. Pacific Air Transport v. United States, 98 Ct. Cl. 649, 707-8 (Ct. Cl. 1942).
2.) **Route Extensions**

Additionally, the new McNary-Watres legislation authorizes the Postmaster General to make extensions or consolidations of routes when in “the public interest.”\(^{314}\) When awarding extensions and making route consolidations, Brown can correct the illogical growth of the airmail map.\(^{315}\) He believes that this legislative language, which he interprets broadly, allows him to designate a carrier for a specific route without competitive bidding.\(^{316}\)

When Brown convenes what critics later refer to as the “spoils conference,”\(^{317}\) he assembles the air operators, asks them to recommend specific carriers for specific proposed routes and report back to him about their recommendations.\(^{318}\) Although Brown believes the legislation allows the Postmaster General to extend routes from existing lines without competitive bidding and when in the public interest, he does not act prematurely. Instead, he seeks advice from the Comptroller General, who ultimately approves one proposed route extension and disapproves another.\(^{319}\) When responding to Brown’s proposal to expand air service, the Comptroller General does not discourage this practice, offering even tacit approval. More specifically or vaguely he opines:


\(^{315}\) *Id.* at 684.

\(^{316}\) *Id.* at 699, 775.


\(^{318}\) Pacific Air Transport v. United States, 98 Ct. Cl. 649, 697, 701-3 (Ct. Cl. 1942).

\(^{319}\) *Id.* at 777.
No hard and fast rule may be laid down in advance for the determination of the question whether a proposed extension of an airmail route – an improvement of an existing route “by slight additions” – may be made and competitive bidding eliminated, because the facts in each particular matter of proposed extension are for consideration and may vary in each case. It may be stated generally, however, that any extension of an established route must have as its basis the public need stipulated by the law as necessary to be found and determined by the Postmaster General, an immediate relationship to the basic project and existing service to be extended, and such subordinate relationship to the exiting route as to be merely an extension thereof rather than a major addition thereto.\footnote{Pacific Air Transport v. United States, 98 Ct. Cl. 649, 714 (Ct. Cl. 1942).} 

The \textit{Pacific Air} court notes that Brown awards only two route extensions affecting the plaintiffs.\footnote{\textit{Id.} at 730.} Initially, the court does not fault his decision to extend Pacific Air Transport’s route by 120 miles, or the distance between Los Angeles and San Diego, considering the air carrier already operates the 1,141 mile route between Seattle and Los Angeles known as route eight.\footnote{\textit{Id.} at 730.} According to the court, the second route extension is problematic, reflects decision-making contrary to the statute and undermines competitive bidding.\footnote{\textit{Id.} at 789.} Specifically, Brown asks Boeing Air Transport to operate a 259-mile extension between Omaha and Watertown, South Dakota that extends from route 18.\footnote{\textit{Id.} at 730, 789.} Ironically, Boeing Air Transport does not request this extension because it views this specific route as unprofitable.\footnote{\textit{Id.} at 730, 789.} Ultimately, plaintiff accedes to the Postmaster General’s request with the understanding that Brown would later designate another
operator to sublet this specific route extension.\footnote{326} Brown never does designate another air carrier to operate or sublease the Omaha and Watertown extension and, as Boeing Air Transport fears, it operates this route extension at a financial loss until the entire route is cancelled in February 1934.\footnote{327}

Although Boeing Air Transport accepts this extension when it is “detrimental to its interests,”\footnote{328} the court criticizes Brown for failing to advertise and open this route to competitive bidding as well as cites this specific example as reason for annulling the contracts.\footnote{329} Again, the court fails to appreciate Brown’s collective considerations. There is a limited number of responsible, competitive operators pursuing any given route, including this extension between Omaha and Watertown. Specifically, Brown expresses concerns about “the lack of experience or financial responsibility” of the other two or three carriers interested in this route.\footnote{330}

3.) Airmail Contract Converts into Route Certificate

Similar to previous legislation, the McNary-Watres amendment of 1930 allows the Postmaster General to convert an airmail contract into a long-term route certificate when finding it is in the “public interest.”\footnote{331} Pursuant to the statute, the Postmaster General may issue a route

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\footnote{326} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 789 (Ct. Cl. 1942).

\footnote{327} \textit{Id.} at 789, 795.

\footnote{328} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 795 (Ct. Cl. 1942). In his concurring opinion, Judge Littleton cites Boeing’s objection to the extension for financial reasons as evidence of disproving the carrier engages in any fraud, conspiracy or illegal acts. \textit{Id.} at 794-5.

\footnote{329} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 789 (Ct. Cl. 1942).

\footnote{330} \textit{Id.} at 730.

certificate to a carrier in exchange for the airmail contract, assuming the carrier has provided a satisfactory service for a minimum of two years.\textsuperscript{332} Like a contract extension, the route certificate shall not exceed ten years from the date of the original airmail contract.\textsuperscript{333} In consideration for a route certificate, the holder delivers a performance bond to the postal service as a form of security.\textsuperscript{334}

As Lindbergh advocates, the lengthier certificates complement the airlines’ ability to make sound fiscal decisions affecting both equipment upgrades and aircraft safety. Congress first recognizes the necessity of awarding air certificates for lengthier time periods when it passes the Kelly Amendment in 1925.\textsuperscript{335} The House Committee report explains that increasing certificate length “is necessary because of the fact... (airmail carriers) …must necessarily invest large amounts of capital in equipment and operating expenses without receiving an adequate return under a short-term contract.”\textsuperscript{336} Before exchanging a carrier’s airmail contract for a route certificate, the carrier must prove it can provide a dependable service for a given time period.\textsuperscript{337}

Similarly, the McNary-Watres Congress embraces this philosophy and recognizes this unique industry requires time to implement the substantial investment decisions affecting the capital, property and equipment necessary for undertaking of mail and passenger travel.\textsuperscript{338}

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332 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656 (Ct. Cl. 1942).
333 \textit{Id}.
334 \textit{Id.} at 656, 665, 671, 673, 676.
338 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 769 (Ct. Cl. 1942).
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Following the recently approved legislation, Brown exercises this option with all the Plaintiff airlines at various times between May and October 1930, upgrading all five contracts to route certificates and due to expire well after February 19, 1934.\textsuperscript{339} Complying with the statutory language, the plaintiffs provide the Postmaster General with proper surety.\textsuperscript{340} The 1930 Congress recognizes and, as Brown understands, the airlines invest considerably in everything from airplanes to ground facilities and these same carriers make significant, long term expenditures and therefore rely on lengthier route certificates.\textsuperscript{341}

As the technology evolves during this time period, airlines are constantly replacing equipment while faced with twin economic and safety concerns.\textsuperscript{342} For example, Pacific Air Transport utilizes single engine airplanes when transporting the mail along the west coast in 1926, but it upgrades its inventory and purchases three Fokker and six Ford trimotor airplanes in 1931.\textsuperscript{343} The trimotor airplanes are rapidly outdated and promptly replaced. By 1933, Pacific Air Transport purchases dual-motor Boeing airplanes functioning with greater speed and efficiency.\textsuperscript{344} Faced with similar economic considerations, technological advances and safety concerns, the remaining two plaintiffs made similar decisions over the same time period.\textsuperscript{345} As

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  \item \textsuperscript{339} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 655, 664-5, 670, 673, 675 (Ct. Cl. 1942).
  \item \textsuperscript{340} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656, 665, 671, 673, 676 (Ct. Cl. 1942).
  \item \textsuperscript{341} Id. at 743.
  \item \textsuperscript{342} Id. at 742.
  \item \textsuperscript{343} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 742 (Ct. Cl. 1942).
  \item \textsuperscript{344} Id.
  \item \textsuperscript{345} Id.
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the parties facing these costly expenditures argue, sooner or later equipment becomes obsolete making “long-term contracts imperative.”

Extending the airmail contracts into certificates following two years of proven service is beneficial and advantageous for both sides. The postal service and its customers benefit from a lengthier contractual term because it ensures dependable service following two years of proven performance. Similarly, the carriers can rely on a steady income source over a lengthy time period which is necessary for long term planning. To perform efficiently, effectively and safely, operators must adjust to the evolving technology and this time in history is not an exception, as all three Plaintiff air carriers replace their trimotor airplanes with dual-motor airplanes between 1931 and 1933.

Significantly, other countries embrace the lengthier contractual period, revealing the standard industry practice. Recognizing the value of lengthier contracts, European countries typically award air carriers with contracts for a minimum of ten and up to 25 years to ensure effective long-term planning.

4.) Payment Schedule

Also pursuant to the McNary-Watres legislation, Congress adopts Brown’s suggestion by restructuring the payment schedule. Brown believes the previous rate per pound is costly.

349 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 690-91 (Ct. Cl. 1942).
unjust and invites questionable billing methods.\textsuperscript{350} Instead of compensating carriers based on the amount of the mail weight, Brown proposes a payment system based on the amount of the available transport space, which can accommodate passengers and the mail.\textsuperscript{351} Subsequently, the Black Committee heavily criticizes Brown’s payment system and the subsidies received by the airmail carriers.\textsuperscript{352}

In 1934, the collective cost to operate the domestic air transportation system is approximately $25 million.\textsuperscript{353} Passenger revenues generate approximately $10 million and Congress allocates approximately $14 million in airmail subsidies, leaving the air carriers to absorb a $1 million deficit.\textsuperscript{354} In this same year however, the government generates an additional $9 million in revenue from selling airmail stamps to the public, resulting in a reduced $5 million subsidy.\textsuperscript{355} Although receiving intense public attention in the Black Commission proceedings, this $5 million subsidy is significantly less than the hundreds of millions of dollars in subsidies awarded to other industries in 1934, according to William Berchtold, the Associated Press aviation editor.\textsuperscript{356}

\textsuperscript{350} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 683 (Ct. Cl. 1942).
\textsuperscript{351} Id. at 690-91, 769.
\textsuperscript{352} William Berchtold, \textit{The Air Mail Affair: A critical appraisal of the Administration's recent blunder, with suggestions for the formulation of a sound and permanent air policy}, 237 THE N. AM. REV. 5, 438 (1934).
\textsuperscript{353} Id.
\textsuperscript{355} Id.
\textsuperscript{356} Id.
Both the Black Commission and the Roosevelt administration fail to understand congressional intentions involving the payment schedule, according to Berchtold. This legislation does not strive to create a cheaper airmail service, this legislation is “deliberately designed to build up an air transportation system of financially sound and experienced companies which would... become self-supporting.”\textsuperscript{357} Although criticized, the revised “weight-space” payment system allows the Postmaster General the flexibility to “cut down” the rate of payments when necessary.\textsuperscript{358} More than justifying Congress’ decision to implement a weight-space payment, Brown utilizes this function over his tenure and the cost of airmail declines from $1.09 per mile in 1929 to just 0.38 cents per mile in 1933.\textsuperscript{359}

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\textsuperscript{357} William Berchtold, \textit{The Air Mail Affair: A critical appraisal of the Administration’s recent blunder, with suggestions for the formulation of a sound and permanent air policy}, 237 THE N. AM. REV. 5, 438 (1934).
\textsuperscript{358} Id.
\textsuperscript{359} Id.
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CHAPTER VI: THE SEPARATION OF POWERS ARGUMENT.

The U.S. Court of Claims decides Pacific Air Transport v. U.S. on December 7, 1942, several years after the Air Mail Affair concludes. The court holds that former Postmaster James Farley is justified when annulling the plaintiffs’ five route certificates and that his action does not amount to a breach of contract violation, however the Plaintiff airlines are entitled to payment for the airmail services provided during January and February 1934. Finally, the court holds that defendant is not entitled to recover on its counterclaim.

Originally, Plaintiff airlines represent three separate corporations but later merge into one air transportation entity, the United group. The three different air carriers collectively possess five different route certificates when the Roosevelt administration terminates commercial mail delivery. More specifically, Pacific Air Transport has an airmail certificate to fly the mail on route eight between Seattle and San Diego. Boeing Air Transport has a certificate for mail delivery for both route 18 between Chicago and San Francisco and route five between Salt Lake City and Seattle. Likewise, National Air Transport, Inc., has two certificates: route 17 includes

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360 Pacific Air Transport v. United States, 98 Ct. Cl. 649 (Ct. Cl. 1942).
361 Id. at 793.
362 Id. at 793.
364 Id. at 765-6.
365 Id. at 765-6.
mail delivery between New York and Chicago and route three includes the area between Chicago and Dallas.\textsuperscript{366}

Although this argument is not addressed by the court, President Roosevelt arguably violates the Separation of Powers doctrine when he invalidates the route certificates.\textsuperscript{367} Congressional authority over the postal service is constitutionally enshrined.\textsuperscript{368} Specifically, the Constitution empowers Congress “(T)o establish post offices and post roads”\textsuperscript{369} and the courts conclude “…handling the mail is a function of sovereignty conferred directly by the Constitution.”\textsuperscript{370} Further, the Supreme Court holds that this specific, enumerated congressional power includes designating mail routes, identifying the physical locations of post offices as well as “…all measures necessary to secure (the mail’s) safe and speedy transit and the prompt delivery of its contents.”\textsuperscript{371}

Of course, Congress delegates much of this responsibility to the Postmaster General.\textsuperscript{372} Beginning with the Act of 1825, Congress authorizes the Postmaster General “to establish post-offices and appoint postmasters at all such places as shall appear expedient…”\textsuperscript{373} Through legislation, Congress confers to the Postmaster General the power to terminate a subordinate
postmaster by eliminating a specific post office, the court holds.\textsuperscript{374} Even after deferring some duties to the Postmaster General, Congress continues to exert its authority over the postal service by enacting legislation, defining what may be delivered, attributing weight specifications and even setting the price.\textsuperscript{375} Significantly, courts consistently recognize “(t)he power possessed by Congress embraces the regulation of the entire postal system of the country.”\textsuperscript{376}

At the time the Air Mail Affair is unfolding, the Supreme Court consistently rejects Roosevelt’s attempts to usurp congressional powers. Following Roosevelt’s decision terminating the commercial air contracts and well before the U.S. Court of Claims upholds this executive action, the Supreme Court invalidates different pieces of legislation that impermissibly transfer legislative powers to different executive agencies.\textsuperscript{377} In a 1935 decision, \textit{Panama Refining Co. v. Ryan},\textsuperscript{378} the Court invalidates a portion of the National Industrial Recovery Act because it incorrectly delegates a legislative function to the executive branch.\textsuperscript{379} When entering his executive order regulating the oil industry, Roosevelt cites Section 9(c) of the legislation which authorizes the president to prohibit the transportation of petroleum products produced in excess of any state law or regulation.\textsuperscript{380} His executive order directs the Secretary of the Interior to create agencies, establish boards and appoint agents to oversee the oil industry based on

\textsuperscript{374} Ware v. United States, 71 U.S. 617, 633 (1867).
\textsuperscript{375} Ex Parte Jackson, 96 U.S. 727, 732 (1877).
\textsuperscript{376} \textit{Id}.
\textsuperscript{378} Panama Refining Company v. Ryan, 293 U.S. 388 (1935).
\textsuperscript{379} \textit{Id}. at 430.
\textsuperscript{380} \textit{Id}. at 406-407.
Congress delegating this authority to the president.\textsuperscript{381} The Supreme Court finds Section 9(c) unconstitutional because Congress impermissibly transfers its law-making function to the executive branch.\textsuperscript{382} While finding that the U.S. Constitution does not deny Congress the flexibility to address complex issues through legislation, the Supreme Court further holds that “Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.”\textsuperscript{383}

Likewise, in \textit{Schechter Poultry Corporation v. United States},\textsuperscript{384} the Supreme Court again invalidates federal legislation as an impermissible delegation of responsibility from Congress to the president.\textsuperscript{385} Under the National Industrial Recovery Act, Congress authorizes the president to create a code protecting consumers, competitors and employees as well as further the public interest and eliminates “unfair competitive practices.”\textsuperscript{386} However the Court invalidates the legislation, holding that “(s)uch a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.”\textsuperscript{387}

Deciding this case the same year as rendering \textit{Panama Refining Company v. Ryan} and during the height of the Great Depression, the Court further holds that the dire economic conditions neither enhance constitutional powers nor negate the congressional authority to make

\textsuperscript{381} Panama Refining Company v. Ryan, 293 U.S. 388, 405 (1935).
\textsuperscript{382} \textit{Id.} at 430.
\textsuperscript{383} \textit{Id.} at 421.
\textsuperscript{385} \textit{Id.} at 542.
\textsuperscript{386} \textit{Id.} at 534.
all laws which shall be necessary and proper for implementing its power.\textsuperscript{388} “The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”\textsuperscript{389} The very next year in 1936 the Court invalidates the Guffey Coal Act, because it again improperly delegates legislative power to the executive branch in \textit{Carter v. Carter Coal Co.}\textsuperscript{390}

Perhaps the case from this time period most factually similar to the Air Mail Affair is \textit{U.S. v. Pan-American Petroleum Co.}\textsuperscript{391} Decided by the federal district court in California in 1925 this case presents both comparable facts and a similar legal issue.\textsuperscript{392} The court finds that Secretary of the Interior Albert Fall initially solicits then utilizes a presidential executive order to fraudulently award leases and contracts to Defendant Pan-America Petroleum Co., in the U.S. Naval Petroleum Reserve without observing a competitive bidding process.\textsuperscript{393} The court invalidates these leases and contracts because Fall negociates these agreements for personal

\begin{footnotesize}
\begin{enumerate}
\item \textit{Carter v. Carter Coal Co.}, 298 U.S. 238 (1936). \textit{Panama Refining Company v. Ryan, A.L.A. Schechter Poultry Corp. v. United States}, and \textit{Carter v. Carter Coal Co.} trigger one of the most significant events in Supreme Court history. After the Supreme Court invalidates much of his New Deal legislation in these holdings, Roosevelt appeals to the people and introduces his plan to “pack the court” in a March 9, 1937 radio broadcast. Among other judicial reforms, Roosevelt advocates to increase the number of justices from nine to 15. When any federal judge or Supreme Court justice reaches age 70 but chooses to forgo retirement, then another jurist is appointed under the Roosevelt plan. Later that same spring the Senate defeats Roosevelt’s court-packing legislation but only after one of the court’s more centrist justices changes course and begins voting to validate New Deal legislation. Legal analysts refer to this crucial change in vote as the “switch-in-time-that-saved-nine” as well as an event tipping the court in favor of Roosevelt’s policies. Between 1937 and 1943, Roosevelt enjoys the opportunity to appoint eight justices including the outspoken Brown critic Sen. Hugo Black. \textsc{David M. O’Brien, Constitutional Law And Politics: Struggles For Power And Governmental Accountability} 62-67, 128 (2005).
\item \textit{United States v. Pan-American Petroleum Co.}, 6 F.2d 43 (U.S. Dist. 1925).
\item \textit{Id.}
\item \textit{Id.} at 53, 80-1, 88.
\end{enumerate}
\end{footnotesize}
benefit and because Congress does not vest any specific power in the president to develop the naval reserve lands.\textsuperscript{394}

Between April and December 1922, the parties enter a series of agreements where defendant constructs storage facilities at Pearl Harbor and exchanges the crude oil located in the naval reserves in California for oil stored at the Pearl location.\textsuperscript{395} In \textit{Pacific Air} the government alleges the airlines violate a federal statute by conspiring to prevent others from bidding on government contracts.\textsuperscript{396} Similarly, the government accuses the Defendant of engaging in fraudulent conduct in the petroleum case.\textsuperscript{397} Ultimately, the court agrees with the fraud allegation, finding that Secretary Fall negotiates the agreements in bad faith after compelling evidence surfaces that defendant’s executive director Edward Doheny gave Fall a $100,000.00 payment.\textsuperscript{398}

Evidence of fraud is not the only reason the court invalidates the Pan-American contracts and leases.\textsuperscript{399} Unlike \textit{Pacific Air}, the court identifies the separation of powers problem and concludes there is an improper transfer of power.\textsuperscript{400} More specifically, the court holds that the president lacks the legal authority to transfer a power delegated by Congress from one cabinet

\textsuperscript{394} United States v. Pan-American Petroleum Co., 6 F.2d 43 (U.S. Dist. 1925).
\textsuperscript{395} \textit{Id.} at 48.
\textsuperscript{396} Pacific Air Transport v. United States, 98 Ct. Cl. 649,767 (Ct. Cl. 1942).
\textsuperscript{397} United States v. Pan-American Petroleum Co., 6 F.2d 43 (U.S. Dist. 1925).
\textsuperscript{399} \textit{Id.} at 88.
\textsuperscript{400} \textit{Id.} at 87.
member to another. When facilitating his effort to steer the contract or leases to Pan-American Petroleum Co., Fall persuades President Harding to sign an executive order permitting the Secretary of the Interior to administer to the naval reserve instead of the Secretary of the Navy. Fall uses the Harding executive order as authorization to negotiate with parties and to enter into contracts and leases involving the naval petroleum reserves. However, the Harding executive order conflicts with legislation designating the Secretary of the Navy as responsible for administering to the naval reserves.

The same section of the Constitution empowering Congress to exercise authority over the post office also empowers Congress “(t)o provide and maintain a navy.” When Harding signs his executive order designating another cabinet official as occupying administrative responsibility for the naval reserves, he illegally transfers a power delegated to the Secretary of the Navy by Congress. In short, an executive order cannot reverse congressional action rooted in constitutional authority. “(I)t must be held that Congress did not intend that some other branch of the government could transfer this power to some other officer, or divest the officer in whom Congress reposed the authority of the power which Congress has conferred upon such

402 Id. at 50.
403 Id. at 52, 87.
405 U.S. CONST. art, I, § 8.
407 Id. at 87.
officer exclusively. No other branch of the government but Congress can divest or transfer the power so delegated.”

Decided nearly ten years earlier and potentially persuasive to the Pacific Air court, the Pan-American Petroleum holding is a harbinger that the latter court chooses to ignore. The factual circumstances closely resemble the events unfolding in the Air Mail Affair. The Pan-American Petroleum court is confronted about the constitutionality of an executive order that transfers administrative responsibility between executive departments when it conflicts with the congressional delegation of power.

Similarly, Roosevelt enters an executive order directing both the departments of war and commerce to assist the Postmaster General with mail delivery on February 9, 1934. He does so when the Constitution delegates the postal duty to Congress and without congressional legislation authorizing his presidential interference. Admittedly, Congress passes legislation authorizing the president to direct the War Department to assist with mail delivery but this is several weeks later and well after Roosevelt acts. With such a similar factual scenario, Plaintiff airlines enjoy a powerful separation of powers argument after considering the Pan-American Petroleum holding.

409 Id. at 87.
410 Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.
411 Air Mail Act, Pub. L. No. 140, § 1, (1934).
Applying both the Constitution and relevant case law, the Pacific Air court could reasonably find that Roosevelt violates separation of powers when he enters and signs Executive Order 6591. Significantly, he instructs both the Secretary of Commerce and the Secretary of War to assist the Postmaster General with the airmail delivery. Specifically, the President orders the Secretary of War to provide airplanes, landing fields, additional equipment and even pilots as well as additional employees “…required for the transportation of mail, during the present emergency.”

First, Roosevelt is arguably assuming authority over powers delegated to Congress by the Constitution. Just as the Constitution assigns to Congress the postal power, it likewise delegates to Congress the power to “declare war” as well as “make rules for the government and regulation of the land and naval forces.” Admittedly, Congress delegates some authority to a Secretary of War just as it vests certain responsibilities in the Postmaster General and a Secretary of the Navy.


413 Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.

414 Id.

415 Id.


417 Id.


However, canceling the airmail contracts is Roosevelt’s decision, not the Postmaster General’s decision. When doing so, he is usurping the postal power. The timing is critical. On February 9, 1934, Farley signs Post Office Department Order No. 4959 officially terminating the multiple airmail contracts and certificates effective February 19, 1934, further prohibiting the affected airmail carriers from transporting the mail. 420 However, Farley signs his order on the same day that Roosevelt enters his executive order and immediately after he participates in a conference at the White House. 421

Additional evidence points to Roosevelt taking exclusive responsibility for invalidating the airmail contracts. The executive order language is revealing. In the very first sentence of his order, Roosevelt acknowledges that the airmail contracts are invalidated. 422 Later in the same order, he directs other departments to both assist and provide specific, multiple resources to aid Postmaster General Farley with mail delivery. 423 Roosevelt’s actions are even more telling. Significantly, Roosevelt chooses the air carrier’s final day transporting the mail as February 19. 424 He does so after consulting staff and even overruling the Postmaster General who requests postponing this event until early June. 425

422 Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.
423 Id.
Nearly universal opinion openly agrees that Roosevelt cancels the airmail contracts. A plethora of sources identify Roosevelt, not the Postmaster General, as the culprit steering this action, with Roosevelt directing Farley to terminate the relationship with the airlines and further corroborating the reality that the President replaces the Postmaster General’s decision-making with his own.\textsuperscript{426} Even at the time, this is the public perception. The day following the fateful decision, \textit{The Washington Post} headline reads: “Charging fraud and collusion, President Roosevelt yesterday directed the cancellation of all air mail contracts with domestic companies, thus reshaping if not collapsing the nation’s network of private transport concerns.”\textsuperscript{427} Although the agreements are negotiated and entered between the carriers and the Postmaster General, Roosevelt inserts himself and directs the contract termination.

Second, the court could understandably find that Roosevelt violates separation of powers when he transfers responsibility from one executive department to another. The president can transfer responsibilities among various cabinet departments.\textsuperscript{428} However even in “peace time” the president cannot transfer powers among cabinet members contrary to a specific congressional


\textsuperscript{427} Kenneth P. Werrell, “\textit{Fiasco}” Revisited: \textit{The Air Corps & the 1934 Air Mail Episode, AIR P. HIST.} 12, 16 (2010), citing the \textit{Washington Post}.

designation. In other words, Congress delegates the Postmaster General, not the Secretary of War, as responsible for the postal duty.\footnote{United States v. Pan-American Petroleum Co., 6 F.2d 43, 87 (U.S. Dist. 1925).}

In \textit{Pan-American Petroleum}, the court invalidates the contractual agreement because the Harding executive order transfers authority over the petroleum reserves from the Secretary of the Navy to the Secretary of the Interior which directly conflicts with congressional legislation making the Secretary of the Navy responsible for this task.\footnote{\textit{Id}. at 87, 88.} Similarly, Roosevelt transfers or at the minimum assigns some amount of mail responsibility to both the Secretary of War and Secretary of Commerce without congressional authorization.\footnote{Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.} Admittedly, Congress later approves this action involving the Secretary of the War, but much after the fact.\footnote{Air Mail Act, Pub. L. No. 140, § 1, (1934).} Perhaps recognizing Roosevelt exceeds his constitutional mandate, the Democratic Congress moves to protect his overreach. Using language virtually mirroring Roosevelt’s previous executive order, Congress authorizes the Secretary of War to assist “the Postmaster General with such airplanes, landing fields, pilots and other employees and equipment...” when delivering the mail, but not until March 27 or a time well after the President cancels the contracts.\footnote{Air Mail Act, Pub. L. No. 140, § 1, (1934); Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.}

Third, Roosevelt acts contrary to congressional intent. The McNary-Watres legislation directs the Postmaster General to act when and if a carrier violates the contractual relationship,
excluding any need for presidential involvement.\textsuperscript{434} The statute clarifies the termination procedure, if the Postmaster General chooses to act.\textsuperscript{435} The statutory language is telling and specific.\textsuperscript{436} The statute outlines the cancellation procedures but, more importantly, emphasizes that the Postmaster General must act to nullify the contract. Instead, Roosevelt makes the decision, acting contrary to the Constitution and congressional intent.

Fourth, the Pacific Air court can also find that Roosevelt usurps congressional authority because he seizes a constitutionally delegated power. According to the case law, courts are even more deferential to powers specifically enumerated in the Constitution and the branch entrusted with this specific duty.\textsuperscript{437} Arguably, the court elevates the importance of a power specified in the Constitution and emphasizes the significance. Specifically, “(w)hen the power to establish post offices and post roads is surrendered to Congress it (is) a complete power and the grant carrie(s) with it the right to exercise all powers…”\textsuperscript{438}

Undoubtedly, Roosevelt justifies his aggressive action as a necessary response to the dire economic conditions. At this point in history, the country is mired in the Great Depression with many banks and businesses languishing in bankruptcy and astronomical unemployment stretching from the urban core to the family farm. Even at the risk of exceeding constitutional guidelines, Roosevelt likely views his strong executive leadership as the cure to rectifying the

\begin{footnotes}
\item[436] \textit{Id}.
\item[437] In Re Rapier, 143 U.S. 110, 134 (1892).
\item[438] \textit{Id}.
\end{footnotes}
infectious greed of the private sector and righting the ills of the country. Not so, says the court in a 1935 decision. Dire economic conditions do not expand constitutional powers.\textsuperscript{439}

\textit{A.L.A. Schechter Poultry Corp. v. United States} is one of the critical cases striking down executive action from this time period,\textsuperscript{440} providing compelling arguments about the dangers of executive overreach. The court is unpersuaded by the government’s position that “the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted” or the argument that the poor economic conditions invite increasing levels of presidential power.\textsuperscript{441} The court rejects this reasoning, holding:

But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.\textsuperscript{442}

In short, the Constitution is uncompromising regardless of the economic conditions and governmental authority remains constrained by constitutional guidelines. Additional legal authority from this time period consistently rejects executive overreach as well as exposes examples of this branch encroaching on the terrain of the legislature.\textsuperscript{443} In fact, \textit{Schechter

\begin{footnotes}
\item[440] \textit{Id.} at 551.
\item[441] \textit{Id.} at 528.
\end{footnotes}
reasserts the uncompromising principle of separation of powers, or the sanctity of a well-defined
government, operating within the framework of the Constitution and under three separate
branches of government as first defined in Marbury v. Madison. While universally praised in
legal circles and credited for developing the concept of judicial review by constitutional law
scholars, Marbury v. Madison is the seminal case that establishes the role of the judiciary as an
equal branch of government.

Authored by Chief Justice John Marshall, Marbury v. Madison defines the roles of the
courts and asserts the judicial obligation to review governmental action. More specifically, he
writes:

The powers of the legislature are defined and limited; and that those limits may not
be mistaken, or forgotten, the Constitution is written. To what purpose are powers
limited and to what purpose is that limitation committed to writing, if these limits
may, at any time, be passed by those intended to be restrained?

446 Besides writing this landmark opinion, Chief Justice John Marshall is uniquely involved in the factual
circumstances surrounding this case. As President John Adams’ Secretary of State, John Marshall signs and seals the
judicial commission belonging to William Marbury, the lead plaintiff in Marbury v. Madison. On February 27,
1801, or less than a week before then President John Adams concludes his presidency and President Thomas
Jefferson begins his term, Congress passes legislation authorizing the president to appoint justices of the peace in the
District of Columbia. Accordingly, Adams appoints Marbury on March 2 with his nomination subsequently
approved by the Senate the following day. However, the judicial commission is not delivered to Marbury before
newly elected President Thomas Jefferson and his new secretary of state, James Madison, assume office on March 4.
Considering their affiliation with the rival political party, Jefferson and Madison refuse to honor the Marbury
appointment along with others. Interestingly enough, Marshall’s brother, James Marshall, is responsible for
delivering the commissions but unsuccessfully dispatches all of them due to the volume of late appointments in the
448 Id. at 176-7.
CHAPTER VII: THE DUE PROCESS ARGUMENT.

Arguably the Roosevelt administration is premature, short-sighted and inequitable when moving to annul the contracts under Section 3950 instead of acting under the contractual language requiring notice and hearing. While a more pedantic legal analysis of the Roosevelt decision recognizes the conflict existing under separation of powers, Lindbergh’s criticism is more compelling, straightforward, and direct: the President and the government violate due process of law, specifically “…condemn… commercial aviation without just trial… and (without) the opportunity of a hearing.”

On that same day President Roosevelt enters his executive order directing the Army to fly the mail, Postmaster General Farley enters Post Office Department Order No. 4959, terminating multiple airmail contracts effective February 19, 1934. As justification, the administration cites Section 3950, which prevents the federal government from contracting with any entity conspiring to “…prevent the making of any bid for carrying the mail.” Additionally, Farley sends a telegram directly to the affected airlines confirming the cancellation and again citing Section 3950 as reason for terminating the airmail contracts.

Many of the affected air carriers including the plaintiffs respond vigorously. On February 16, Pacific Air Transport, Boeing Air Transport and National Air Transport send a letter to the Postmaster General protesting the cancellation, requesting the suspension of the order as well as

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449 Charles Lindbergh letter dated February 11, 1934 and addressed to President Franklin D. Roosevelt, as cited by Justin Libby, Comments on the Air Mail Episode of 1934, AIR P. HIST. 44, 45 (2010).

450 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 744 (Ct. Cl. 1942).


requesting a hearing on the matter. On that same day, United Air Lines also writes the Postmaster General, alleging that the cancellation order is based on misinformation and requests a hearing. After receiving no reply, United Air Lines again reasserts its right to a hearing on March 7, notifying the Postmaster General that the carriers are losing in excess of $250,000.00 monthly. Not until March 27, the Postmaster General finally responds that the affected carriers may submit a written brief which will be considered by the Post Office. On April 14, the carriers jointly file a brief but the Postmaster General does not respond.

A. Contractual Language Includes a Grievance Procedure

After siding with the Roosevelt administration to find a R.S. 3950 violation that involves a complicated, convoluted factual scenario, the Pacific Air court overlooks a more obvious, fundamental concern. The contracts and subsequent airmail certificates require a notice and response period in direct, specific language. When cancelling the agreement, the Postmaster General provides written notice as well as provides the carrier with a 45-day show cause period

454 Id. at 746.
455 Interestingly or ironically, this is the same day a newly, heavily Democratic Congress enacts new legislation mirroring the language of Roosevelt’s Executive Order 6591 and specifically authorizing the War Department to assist with the airmail. Air Mail Act, Pub. L. No. 140, § 1, (1934).
457 Id.
or an opportunity to respond. Roosevelt and his administration violate this contractual requirement and effectively deny due process guaranties.

Admittedly, Farley sends a telegram to the carriers on February 9 announcing that the airmail agreements will be terminated within ten days, although the contractual language requires written notice. However, his telegram does not outline a grievance procedure and certainly does not offer the air carriers an opportunity to be heard about the annulment. After receiving multiple inquiries and requests to be heard, Farley informs the affected parties on March 27 that they may submit a brief which will be “carefully considered.” However, this is well after the Air Corps assumes responsibility for transporting the mail and the air carriers are displaced from their property interest. The Roosevelt administration ignores any and all requests to reconsider the decision and denies the airlines an opportunity to contest the decision prior to February 19.

Besides their substantial investment in equipment, real estate and infrastructure, the plaintiffs also possess property rights in their airmail contracts. A well-established legal principle firmly entrenched in precedent, a valid contract is considered as property. When abolishing the contracts without notice and hearing, the Roosevelt administration is confiscating this property

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458 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656 (Ct. Cl. 1942).
459 Id. at 744.
460 Id. at 744.
461 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 746 (Ct. Cl. 1942).
462 Id. at 745-6.
interest. Due process prohibits taking private property without a grievance process, specifically notice of this intention and providing an opportunity to respond.

When denying the air carriers’ due process rights clearly specified within the four corners of the written agreement, the Pacific Air court also rejects the consistent, frequently reaffirmed congressional preference for a grievance procedure. The notice and response period is consistently and persistently required, pursuant to statute. Prior to McNary-Watres, Congress passes the Kelly Act requiring the Postmaster General to provide the air carrier with a 60-day period to respond to any written cancellation notice.\textsuperscript{464} While McNary-Watres changes certain elements of the preexisting legislation such as the length of the response period, the latter legislation equally embraces the grievance procedure, further reinforcing its importance.

Even the Roosevelt administration seems to recognize its error denying due process to the certificate holders while clinging to the alleged Section 3950 violation. After receiving numerous inquiries challenging the annulment decision, the administration relents on March 27 and announces that it will allow the airlines to submit a written brief.\textsuperscript{465} At this point, the Roosevelt administration seems to first realize that their conduct resembles a taking without following a legitimate procedure. They have not complied with the contractual language and for the first time they seem to realize their conduct resembles a due process violation.

If the Roosevelt administration remains intent on extricating the commercial airlines from airmail delivery, the more equitable cause of action is utilizing the escape clause existing in the

\textsuperscript{464} Pacific Air Transport v. United States, 98 Ct. Cl. 649, 680 (Ct. Cl. 1942).

\textsuperscript{465} \textit{Id.} at 746.
contractual language. The Postmaster General can terminate any certificate due to any “willful neglect” by the holder to “carry out any rules, regulations or order made for his guidance...”\footnote{Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656 (Ct. Cl. 1942), McNary Watres Act, §.., 46 Stat. 259 (1930).} In fact, the Post Office Solicitor General identifies the breach of contract course of action, along with others, as a viable option.\footnote{\textit{Id.} at 747-8.} When assailing the air carriers, the Roosevelt administration alleges that plaintiffs go beyond violating Section 3950 and additionally asserts that they are “… guilty of other corrupt and unlawful conduct which justifies defendant cancelling the contracts.”\footnote{\textit{Id.} at 767.} Corrupt and unlawful activity arguably falls within the scope of conduct qualifying as a breach because it contradicts the government’s rules and regulations. As a more equitable alternative, the Roosevelt administration could press for termination by pursuing a breach of contract action which preserves plaintiffs’ due process rights.

**B. Due Process Rights Exist under the Fifth Amendment**

Prior to the Pacific Air decision, the United States Court of Appeals for the District of Columbia holds that Plaintiff airlines enjoy a due process right under the Fifth Amendment in Boeing Air Transport, Inc. v. Farley, 75 F.2d 765 (U.S. App. 1935) (\textit{Boeing Air})\footnote{Boeing Air Transport, Inc. v. Farley, 75 F.2d 765 (U.S. App. 1935).} Decided in 1935 or immediately following the Air Mail Affair, the court opines that Section 3950 would be unconstitutional without a notice and hearing requirement.\footnote{\textit{Id.} at 767.} In its petition, Boeing Air
Transport requests the court prevent the Roosevelt administration from enforcing the February 9 executive order.\textsuperscript{471} Ultimately, the court grants the government’s motion to dismiss because the court finds that jurisdiction on this issue properly rests with the U.S. Court of Claims.\textsuperscript{472}

The Court of Appeals’ analysis is illuminating. The court considers both the question of whether or not the Roosevelt administration may annul contracts without notice and hearing as well as the additional issue of whether the government can impose statutory penalties while preventing the plaintiff airlines from bidding on future contracts.\textsuperscript{473} The Fifth Amendment of the Constitution specifies that “(n)o person shall be … deprived of life, liberty or property without due process of law;..”\textsuperscript{474} Before concluding proper jurisdiction rests elsewhere, the court considers Roosevelt’s argument that Section 3950 “does not expressly provide for notice and hearing” when annulling government contracts.\textsuperscript{475} The court disagrees, concluding that a notice and hearing provision is implied in the Section 3950 statute, which is unconstitutional without providing a grievance process.\textsuperscript{476}

Further, the court reasons that denying plaintiffs their right to notice and hearing equates to a taking of property thus violating the Fifth Amendment.\textsuperscript{477} Contracts are property according to the court and the government cannot disregard its obligation to comply with the Fifth

\textsuperscript{471} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 766 (U.S. App. 1935).

\textsuperscript{472} \textit{Id.} at 768.

\textsuperscript{473} \textit{Id.} at 766.

\textsuperscript{474} U.S. \textsc{const.} amend. V.

\textsuperscript{475} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 767 (U.S. App. 1935).

\textsuperscript{476} \textit{Id.}

\textsuperscript{477} \textit{Id.}
Amendment, even as a party to a case. Signaling the significance of due process and its revered standing within the Constitution, the court further references the language in Ochoa v. Hernandez Morales:

Without the guaranty of “due process” the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Carta, was embodied in that Charter … and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term “due process of law,” all authorities agree that it inhibits the taking of one man’s property and giving it to another, contrary to settled usages and modes of procedure and without notice or an opportunity for hearing.

When the court concludes that Section 3950 implies a grievance provision, Roosevelt cannot deny the air carriers notice and an opportunity to respond regardless of the statutory language, according to the court. Admittedly, it does not address the question whether Roosevelt acts properly when breaching the contracts but clarifies that he cannot terminate these contracts without providing the air carriers with a grievance process. By doing so, he offends due process and denies the air carriers their rights under the Fifth Amendment.

Admittedly Section 3950 calls for the Postmaster General to annul the contracts following evidence undermining the integrity of the bidding process without any notice or hearing, but the Boeing Air court concludes that this grievance process cannot be ignored. Without providing a notice and hearing opportunity, the statute is unconstitutional according to


481 Id. at 767.
the court.\textsuperscript{482} In sum, the Roosevelt actions deprive the air carriers of a recognizable property interest when ending the contracts. Interestingly, the court describes the administration’s action as resembling a “breach,” not an “annulment” of the airmail contracts under Section 3950.\textsuperscript{483} Conceding jurisdiction on this issue lies elsewhere, the Boeing Air court acknowledges another court must decide if the breach – or the Roosevelt decision to cancel the airmail certificates – is proper or improper.\textsuperscript{484}

Precedent from this time supports the Boeing Air court reasoning. In their opinions, the Supreme Court remains vigilant, frequently upholding due process as necessary to preserve individual rights, regulate government conduct and guard against government abuse. In another opinion from this time period, Blackmer v. United States, the Court defines due process as “requir(ing) appropriate notice of the judicial action and an opportunity to be heard.”\textsuperscript{485} In this case, a lower court finds the petitioner in contempt of court, fines him and orders the judgment satisfied following the seizure of his property.\textsuperscript{486} When upholding the lower court’s judgment, the Supreme Court further opines “(t)he requirement of due process is… satisfied by suitable notice and adequate opportunity to appear and to be heard.”\textsuperscript{487}

Likewise, in Ballard v. Hunter the Supreme Court upholds an Arkansas statute allowing notice by publication prior to selling a nonresident’s property due to unpaid taxes but cites

\textsuperscript{482} Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 767 (U.S. App. 1935).
\textsuperscript{483} Id. at 768.
\textsuperscript{484} Id. at 768.
\textsuperscript{485} Blackmer v. United States, 284 U.S. 421, 438 (1932).
\textsuperscript{486} Id. at 433.
\textsuperscript{487} Blackmer v. United States, 284 U.S. 421, 440 (1932).
additional case law requiring “respect... (as) to the cause and object of the taking” when deciding
due process issues. In a due process case from 1907, plaintiffs assert that the Arkansas statute
discriminates against them as non-residents of the state because it allows different forms of
notice for resident versus non-resident landowners prior to selling a property for nonpayment of
taxes.

When upholding the statute, the Supreme Court holds that a state is restricted by
boundaries, cannot always manage to personally serve an out of state resident so constructive
service, or service by publication, is appropriate. Decided before Pacific Air as relevant
precedent, the Court finds that the essential requirement for due process is an opportunity for a
hearing and defense, but no fixed procedure is demanded. The process or procedure may be
adopted to the nature of the case. Further, the Court recognizes that government is entrusted
with certain taxing powers or even the power to take property through eminent domain but
fairness requires a process for the individual to be heard in response to these actions. When
applied fairly, proportionately and appropriately, this is due process but, conversely, if this
process becomes ‘arbitrary, oppressive and unjust,’ it is not due process of law.

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489 Id. at 254, 264.
490 Id.
491 Id. at 255.
The Supreme Court repeatedly emphasizes the importance of offering notice and hearing opportunities prior to taking property.\(^{495}\) The Boeing Air court decision absorbs the Supreme Court’s rationale and applies this concept when considering the due process issues in the Air Mail Affair, unlike the Pacific Air court which appears to disregard this precedent when making a decision. While recognizing its jurisdictional limitations, the Boeing Air court concludes that Roosevelt violates due process.\(^{496}\) Besides investing in expensive equipment, property and even infrastructure, the plaintiffs possess a recognizable property interest in the airmail contracts or route certificates according to the courts.\(^{497}\) Any taking of property requires due process of law and Roosevelt violates this requirement when he annuls the certificates without notice or hearing. He acts under the authority of Section 3950 but at least one court finds this statute unconstitutional without a grievance process.\(^{498}\)

Additionally, the contract length elevates the value of the plaintiffs’ property and enhances their damages. After two years of proven, capable service, each plaintiff or their predecessor in interest receive an airmail certificate for an extended number of years. Arguably, this lengthy contractual term multiplies the revenue and increases the plaintiff’s property interest. Under these circumstances, a taking of property without some form of notice and hearing seems completely contrary to court precedent.\(^{499}\) Considering plaintiffs enjoy a property interest in a


\(^{496}\) Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 767 (U.S. App. 1935).


\(^{498}\) Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 767 (U.S. App. 1935).

written agreement extending over as much as ten years, there is much to lose. This taking
without hearing amounts to a property loss compounded over multiple years in multiple amounts.
To sanction the Roosevelt action without allowing some form of a grievance process seems
contrary to prevalent court precedent and fundamentally unfair.

The factual circumstances offer an equally compelling narrative. The Roosevelt
administration abruptly cancels 34 total airmail contracts with more than 30 different companies
on February 9. Of that number, 31 are awarded between 1925 and 1927 under competitive
bidding procedures where there are three to nine competitors for each contract. The remaining
three are awarded in 1930 to the lowest responsible bidder. Summarily, the Pacific Air
decision involves only three carriers and their respective five collective airmail routes. All five
airmail contracts are initially awarded following an open, competitive bidding process pursuant
to statute. Significantly, all five airmail contracts are initially awarded between 1926 and
1927, well before the May 1930 conferences and even prior to Walter Brown’s appointment as
Postmaster General on March 4, 1929. Considering the five contracts are awarded following
an open, competitive bidding process and increased in value to multiple year agreements,

500 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 744 (Ct. Cl. 1942); William E. Berchtold, The Air Mail
Affair: A critical appraisal of the Administration’s recent blunder, with suggestions for the formulation of a sound and
501 William Berchtold, The Air Mail Affair: A critical appraisal of the Administration’s recent blunder, with
suggestions for the formulation of a sound and permanent air policy, 237 THE N. AM. REV. 5, 438 (1934).
502 Id.
504 Following two years of proven service by the airlines, Postmaster General Brown exchanges the airmail contracts
for airmail certificates pursuant to the McNary-Watres statutory language. Pacific Air Transport v. United States, 98
Ct. Cl. 649, 654-676 (Ct. Cl. 1942).
505 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 654-676, 682 (Ct. Cl. 1942).
Roosevelt’s move to terminate the succeeding air certificates within ten days and without a grievance procedure resembles an ‘arbitrary, oppressive and unjust’ process as described by earlier courts.\textsuperscript{506}

CHAPTER VIII: JUDICIAL PERSPECTIVES.

President Roosevelt violates both separation of powers and due process when taking the air carrier’s five route certificates. Roosevelt is bolstered by several factors. Specifically, the Black Committee concludes that the airmail contracts are fraudulently obtained,\(^{507}\) the Postal Solicitor recommends cancellation\(^{508}\) and public opinion is inflamed. Regardless, he exceeds his presidential authority.

The Constitution empowers Congress to “establish post offices and post roads”\(^{509}\) and oversee mail handling.\(^{510}\) Here, Congress fulfills its role as entrusted by the Constitution. Pursuant to McNary-Watres legislation signed April 29, 1930, the Postmaster General can exchange a mail carrier’s contract for an air certificate for up to ten years from the date of the original contract and following two years of satisfactory service.\(^{511}\) Under this legislation, Congress further restructures the payment schedule when endorsing Brown’s space-weight method over the previous method.\(^{512}\) Instead of compensating carriers for the weight amount of mail transported, the carriers are compensated for the amount of transportation space available,


\(^{508}\) Pacific Air Transport v. United States, 98 Ct. Cl. 649, 748 (Ct. Cl. 1942).

\(^{509}\) U.S. Const. art, I, § 8.

\(^{510}\) Boeing Air Transport, Inc. v. Farley, 75 F.2d 765, 768 (U.S. App. 1935).


allowing them to carry passengers.  

Further, this legislation authorizes the Postmaster General to award extension or consolidation routes when in the public interest.

While Congress confers some responsibility for mail service to the Postmaster General, it never transfers this constitutionally prescribed function to the executive branch. But arguing executive action is necessary, President Roosevelt directs the contract annulment anyway, asserting authority over the responsibilities prescribed to a separate branch of government.

After participating in a conference at the White House Postmaster General Farley technically announces the annulment under Order No. 4959 issued February 9, 1934, however this is undeniably President Roosevelt’s decision. On the same day, the President issues Executive Order 6591, directing the Air Corps to transport the mail as well as instructing both the commerce and war departments to assist with this effort by providing equipment, land and even employees. Further, Roosevelt chooses the air carrier’s final day transporting the mail as February 19 after overruling the Postmaster General who requests postponing this event until early June. Even the media describes this as Roosevelt’s decision with The Washington Post

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514 Id. at 771, 770, 691.
516 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 744 (Ct. Cl. 1942).
517 Executive Order 6591, “Directing the Army to Fly the Mail,” February 9, 1934.
reporting that “...President Roosevelt yesterday directed the cancellation of all air mail contracts...”

Arguments concerning one branch of government intruding on the duties of another branch of government are closely scrutinized by the Supreme Court. At this time in history, the Supreme Court repeatedly strikes down both legislative and executive attempts to transfer legislative powers to the executive branch, finding these attempts unconstitutional.

The postal duty is a responsibility delegated to Congress by the Constitution and when Roosevelt acts he lacks congressional authorization. Likewise, when proceeding against the air carriers under Section 3950 Roosevelt denies the Pacific Air Plaintiffs an opportunity to be heard, which at least one court describes as unconstitutional. For these reasons, the Pacific Air court is justified in deciding differently.

Based on a case law review, applicable statutes and even the commentary following the Air Mail Affair, both President Roosevelt and Postmaster Farley should have reacted differently even if intent on responding to the concerns voiced in the Black Commission proceedings. First, Roosevelt should resist inserting himself into the Air Mail Affair, thus preventing any criticisms about intruding, tainting the outcome and assuming a responsibility delegated to Congress. The


air certificates are agreements between the carriers and the Postmaster General, not the President. When overreaching, he exceeds his authority and affects the outcome. His conduct prompts drastic consequences. He replaces commercial aviation with the public sector which is unprepared for this responsibility.

Second, Postmaster Farley should demonstrate a proper, measured and proportionate response to the issue. Following an objective review of the credible evidence, he should move to identify the carriers actually deserving of contract cancellation, sanction or less drastic action instead of revoking all the contracts affecting more than 30 carriers and condemning the entire industry, as Lindbergh asserts. When moving against all the carriers, not just those implicated of wrongdoing, the Postmaster General threatens the viability of the emerging aviation industry. Failing to recognize that his action prompts consequences, the Postmaster General must appreciate his decision invites ripple effects within the industry, quite possibly even extending into the broader economy.

Third, the Postmaster General should proceed under an appropriate legal cause of action, not Section 3950 which denies Fifth Amendment due process rights. Instead, he should act under a breach of contract claim, thus providing the affected carriers with the written notice and opportunity to be heard pursuant to their agreement. This is a more fair and equitable course of action than proceeding against the implicated air carriers under a statute that does not afford them an opportunity to respond to a unilateral decision affecting a significant property interest.

524 Pacific Air Transport v. United States, 98 Ct. Cl. 649, 656 (Ct. Cl. 1942).
CHAPTER IX: CONCLUSION.

The airmail certificates are agreements between the Postmaster General and the separate air carriers yet Roosevelt inserts himself in the process. He abolishes the agreements, thrusts airmail delivery on an ill-equipped and unprepared Air Corps and then reverses himself following tragic consequences. Among other criticisms, the Black Commission and the Roosevelt administration philosophically dislike the fee structure and the subsidies enacted in McNary-Watres. However, this legislation is “deliberately designed to build up an air transportation system of financially sound and experienced companies which would... become self-supporting.”\(^{525}\) Emboldened by the new 1930 legislation, Brown embraces the challenge to improve the air transportation system and grow the economy, aiming to both eliminate irresponsible carriers while consolidating the numerous smaller air carriers into larger, more efficient, financially secure carriers capable of providing a quality product.\(^{526}\)

Unsurprisingly, Brown’s detractors criticize his decision-making when he encourages different carriers to merge but this is exactly the same kind of strategic move that occurs in a different transportation industry. About this time, the Interstate Commerce Commission forces “the consolidation of railroads into a few major systems.”\(^{527}\) Even when deciding against the airlines in his concurring opinion, Judge John Marvin Jones recognizes the challenging

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circumstances facing the individuals involved in the Air Mail Affair. “This was a great new industry in which the country was vitally interested. Its development was fraught with risks and losses and called for daring as well as vision.”

Although Roosevelt, the Black Committee and others impugn Brown and the air carriers, Commissioner Akers at least is very clear when finding the former Postmaster General acts within the law.

Of course any conduct violating the public trust is indefensible. Steering contracts, committing fraud and conspiring against a competitive bidding process are as misguided as government disregarding due process of law. When acting arbitrarily and unjustly, government undermines people’s faith in the judicial system and shakes their confidence in the foundation of government.

Lindbergh’s concerns about a government exceeding its authority and failing to follow our established laws remain relevant today. As we move forward, a government functioning outside the constitutional framework will create future challenges, present potential pitfalls and test our resolve to enforce branches operating within the scope of their respective responsibilities. Among other observations, the courts must remain attentive to these issues surfacing on the horizon. Further, future executives and government agencies need to resist exceeding their constitutional authority influenced by ideological leanings and defer to the

528 Pacific Air Transport v. United States, 98 Ct. Cl. 649,793 (Ct. Cl. 1942).

529 After hearing over 63 days of evidence on this matter, the commissioner does not find that Brown acts improperly. In fact, Commissioner Akers finds that these contracts are awarded following proper competitive bidding procedures and the evidence fails to corroborate the government’s assertion that Plaintiff airlines receive contracts through fraud or collusion. Paul M. Godehn, et al., Air Mail Contract Cancellations of 1934 and Resulting Litigation, 21 J. AIR L. & COM. 253, 259-60, 271 (1954), citing Akers opinion.

experience of the legislature when applicable. Conversely, the legislature needs to resist transferring too much authority and responsibility to executive agencies and disallow ideological opinions to shape this decision-making.

Among other recent presidents who have been criticized for executive overreach, former President Barrack Obama embraced the unilateral power of the executive order to reshape the nation through sweeping regulations. The executive order replaces the legislative process and substitutes law made by representatives of the people with law made by bureaucrats. Arguably, this contradicts the democratic process.

Complaining about a Congress controlled by a different political party that resists his agenda during a portion of his two terms, President Obama enters 560 total executive orders involving significant financial and social regulations during the first seven years of his presidency which is 50 percent higher in number than his immediate predecessor. For example, an executive agency during the Obama presidency awards “lawful status to 4.3 million illegal aliens,” a move contrary to the congressional intent.

If recent events are any indication, these intragovernmental battles could spill into the courts. Today there is increasing evidence of the rising tension between different branches of government as they battle over partisan economic priorities, the scope of the social service net and, most notably, the budget. Only recently, the longest government shutdown in the country’s history ends with the president unable to secure significant congressional funding for a border

531 Once Skeptical of Executive Power, Obama Has Come to Embrace It, N.Y. TIMES, August 13, 2016.
532 Id.
wall or even broadly defined border security.\textsuperscript{534} To assist with this endeavor, President Trump declared a national emergency and proposed transferring money from the federal asset forfeiture fund which is contrary to congressional intent.\textsuperscript{535} This potentially triggers a dangerous precedent for future presidents and possibly disrupts the balance of power between two branches of government, according to critics.\textsuperscript{536}

Alleging this act violates separation of powers, both houses of Congress reject this effort when passing resolutions opposing the use of a national emergency as a vehicle to transfer funding for border security.\textsuperscript{537} On March 15, 2019, President Trump vetoes this legislative initiative.\textsuperscript{538} Considering Congress lacks the votes to overcome the presidential veto, the President can successfully steer funding to border security and contrary to the congressional budget allocation.\textsuperscript{539} Now presidential critics are threatening legal action and Congress considers preparing future legislation that limits the use of the national emergency, hoping to curb executive power.\textsuperscript{540}

\textsuperscript{534} Trump Says ‘Wall’ Must be Part of Border Deal, A.P., January 30, 2019.

\textsuperscript{535} Democrats Prepare Resolution Against Trump’s Declaration, ST. LOUIS DAILY RECORD, February 22, 2019, at 1.

\textsuperscript{536} Trump Plans National Emergency to Build Border Wall as Senate Passes Spending Bill, N.Y. TIMES, February 14, 2019.

\textsuperscript{537} Democrats Prepare Resolution Against Trump’s Declaration, ST. LOUIS DAILY RECORD, February 22, 2019, at 1; Senate Set to Reject Trumps National Emergency Declaration, THE GUARDIAN, March 5, 2019; After Veto, Some Lawmakers See a New Emergency: Fixing the Act Trump Invoked, N.Y. TIMES, March 16, 2019.

\textsuperscript{538} After Veto, Some Lawmakers See a New Emergency: Fixing the Act Trump Invoked, N.Y. TIMES, March 16, 2019.

\textsuperscript{539} Id.

\textsuperscript{540} After Veto, Some Lawmakers See a New Emergency: Fixing the Act Trump Invoked, N.Y. TIMES, March 16, 2019; Senate Set to Reject Trumps National Emergency Declaration, THE GUARDIAN, March 5, 2019.
Future executives must resist exceeding their authority. Additionally, the executive branch should consider deferring to congressional experience with specialized issues when appropriate. Among other lessons, the Air Mail Affair encourages deference to legislative expertise, somewhat similar to the court deferring to legal precedent. When Roosevelt abruptly enters his executive order, Congress has a lengthy history studying the aviation industry. Roosevelt substitutes his more limited exposure to the airmail issue with the experience of numerous individuals, serving multiple terms, while studying this evolving industry and benefiting from a broad range of resources including congressional testimony. Acting on this knowledge, Congress passes multiple pieces of legislation as far back as 1916 through McNary-Watres in 1930.

This challenge will not disappear as future office holders interpret their duties more broadly than others, pushing the boundaries of their constitutional roles. The courts must remain vigilant. Undoubtedly judicial interpretation is necessary to decide if future executives and legislative bodies are migrating onto the terrain of another branch of government. The Constitution entrusts the judiciary with performing their duty independently, considering the plain and ordinary meaning of the statutory language and following the law consistently. To do less, is a disservice to constitutional democracy.


The Air Mail Affair signals one of the first disputes over the scope of government during the Roosevelt administration, as those favoring a free market economy battle those advancing the President’s New Deal legislation. It also signals the first confrontation between Lindbergh and Roosevelt with Lindbergh advocating for an economy shaped by free market forces and the President insisting government has an obligation to impose limits on the free market to advance the general welfare of all citizens. As a harbinger of things to come, this epic encounter between two iconic figures sets the stage for an ongoing debate about the evolving New Deal legislation, the reach of an expanding government and the impact on future generations.

Much like his steady, resolute Spirit of St. Louis single-engine airplane traveling the width of the Atlantic, Lindbergh does not stray from his mission. He openly defies Roosevelt because the former aviator is troubled by a government disregarding fundamental elements of the law, exceeding its executive authority and intruding on industry. When President Roosevelt cancels the contracts he unfairly condemns the commercial aviation industry that has developed the best air transportation system in the world. His misguided action causes economic damage that almost triggers “the demise of the airline industry.”

When speaking out against government overreach, Lindbergh advocates for a government constrained by the Constitution as well as for a business environment free to

543 Lindbergh asserts “the United States... is far in the lead in almost every branch of commercial aviation.” Justin Libby, Comments on the Air Mail Episode of 1934, AIR P. HIST. 44, 45 (2010), citing Lindbergh letter to FDR. Others corroborate this. Kenneth P. Werrell asserts that “the American air transport(ation) and the air mail system are the envy of the world” at this time in history. Likewise, a European aviation periodical concludes “No other country can show as high a standard of speed, regularity and safety” as the American airmail system.” Kenneth P. Werrell, “Fiasco” Revisited: The Air Corps & the 1934 Air Mail Episode, AIR P. HIST. 12, 15 (2010).

prosper, develop and innovate. The country’s democracy, system of governance and even the
rule of law depends upon honoring the Constitution. When disregarding the Constitution, the
system fails. Thomas Jefferson recognized the significance of separation of powers and strongly
advocated for a government of limited powers when he wrote: “It is the duty of the (g)eneral
(g)overnment to guard its subordinate members from the encroachment of each other, even when
they are made through error or inadvertence, and to cover its citizens from the exercise of powers
not authorized by law.”

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545 Thomas Jefferson: Official Opinion, 1790. ME 3:88
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