

San Diego Law Review

Volume 57 | Issue 1

Article 3

4-29-2020

"The Spirit of" Due Process as Advocated by Charles Lindbergh: Revisiting *Pacific Air Transport v. United States*, 98 Ct. Cl. 649 (1942)

Thomas C. Clark, II

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**“The Spirit of” Due Process as Advocated
by Charles Lindbergh: Revisiting *Pacific
Air Transport v. United States*,
98 Ct. Cl. 649 (1942)**

THOMAS C. CLARK, II*

* © 2020 Thomas C. Clark, II. Judge, 22nd Circuit Court, St. Louis, Missouri. This author acknowledges the several individuals who offered invaluable assistance and provided unconditional support with this endeavor. With gratitude, the author acknowledges the guidance of his master’s thesis committee members and skilled scholars, Chair Shawn Marsh, Ph.D., Richard Bjur, Ph.D., and Matthew Leone, Ph.D. The author appreciates his great friend, an academic intellect and a devoted cleric, Rev. Richard Quirk, Ph.D., for providing both the needed historical context and the prevailing political considerations of this time period; recognizes lawyer and friend Michael Silbey for sharing his unparalleled skill and thoughtful counsel when assisting with this undertaking; acknowledges great friends of prodigious legal talent, Catherine A. Schroeder, Yvonne Yarnell, John Wilbers, Jill Hunt, and Hon. Elizabeth Hogan for their encouragement, friendship, and uncompromising loyalty; thanks influential legal mentors Shirley Rodgers and the Hon. John Riley for shaping both legal and judicial careers; thanks the most thoughtful jurists presiding throughout the country—especially the talented judge from Arkansas—who attended classes at the University of Nevada-Reno with the author, and inspired his efforts to both pursue the judicial studies degree and draft this writing; appreciates his revered sister and illustrious brother-in-law, Catherine and D.J. Lutz, for their support and refreshing humor as well as thanks the loving and highly charismatic Carl and Jane Bolte.

Most importantly, the author thanks his parents, his chief editor and mother, Margaret G. Clark, for sharing her highly valued editing skills as well as providing her constant love and support throughout life’s journey and his judicial role model and father, the Hon. Thomas C. Clark, whose exacting, high standards remain the gold standard of the judiciary and who now represents the first of two generations of Judicial Studies graduates in the same family.

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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 became an instant celebrity, the recipient of intense media focus, the subject of overwhelming public attention, and even an American icon.¹ The harrowing flight, the plane named after the jewel of the Louisiana Purchase but constructed on the wharfs of San Diego,² and—most especially—the pilot captured the world’s attention and inspired the country. American and European newspapers reported extensively on Lindbergh

Further, the author appreciates the assistance, efforts and generosity of Editors Jessica Howard, Melanie Ryan, Kelly Reis, their fellow Editors and the staff members of the distinguished *San Diego Law Review*. The author also acknowledges the personally complex and most inspiring Charles Lindbergh who still remains a fascinating story, even ninety-two years after his historic, transatlantic flight. Thank you.

Finally, this work is dedicated to the memory of my grandfathers, Felix C. Cathcart, who worked diligently as a U.S. naval contractor focusing on the safety of airplane construction, and Charles G. Clark, who faithfully delivered the U.S. mail by rail to all corners of the country, when these historical events culminating in the Air Mail Affair simultaneously unfolded from the halls of Congress to the skies above. *Ad astra per aspera*.

1. *The Flight*, CHARLES LINDBERGH, <http://www.charleslindebergh.com/history/paris.asp> [https://perma.cc/7B6X-3M64].

2. *The Spirit of St. Louis*, CHARLES LINDBERGH, <http://www.charleslindebergh.com/plane/index.asp> [https://perma.cc/2QAH-FDGX].

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 defied a U.S. President.³

On February 9, 1934, President Franklin D. Roosevelt signed Executive Order 6591, directing the U.S. Army Air Corps (Air Corps) to assume responsibility for transporting the airmail effective February 19, 1934.⁴ On the same day Roosevelt entered his order, Postmaster General James A. Farley canceled all airmail contracts with the private airlines.⁵ The result was disastrous.⁶ Among other challenges, the Air Corps suffered from under-equipped aircrafts, and pilots who were unfamiliar with flying at night and unaccustomed to flying in inclement weather.⁷ While transporting the mail in just the first few short months, the Air Corps suffered twelve pilot fatalities and sixty-six crashes.⁸

Seven years after his historic flight, Lindbergh remained involved in the airline industry, working at then Transcontinental & Western Air, Inc.⁹ He was, perhaps, the most vocal, high-profile, and persuasive critic of Roosevelt’s executive action to remove the commercial airlines from mail delivery.¹⁰ Among other criticisms, Lindbergh argued Roosevelt unjustly denied “due process” to the air carriers by unilaterally canceling the contracts,¹¹ and he further warned that the ill-advised action gravely threatened the viability of the nascent airline industry.¹²

Roosevelt contended his action was 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

3. A. SCOTT BERG, LINDBERGH 292 (1998).

4. Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93 (Feb. 9, 1934).

5. 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 Permanent Air Policy*, 237 N. AM. REV. 438, 438 (1934).

6. See generally Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535, 571.

7. JOHN L. FRISBEE, MAKERS OF THE UNITED STATES AIR FORCE 50 (1987).

8. *Id.*; Rubin, *supra* note 6, at 571.

9. BERG, *supra* note 3, at 292.

10. Kenneth P. Werrell, “Fiasco” Revisited: *The Air Corps & the 1934 Air Mail Episode*, AIR POWER HIST., Spring 2010, at 12, 17.

11. CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 321 (1st ed. 2003).

12. See BERG, *supra* note 3, at 292.

May and June 1930.¹³ Critics later labeled these Brown meetings with the airline representatives as the “spoils conferences.”¹⁴ Following the change in political power to a Democratic controlled legislature in 1932, Senator Hugo Black (D-Ala.) and Congress launched an investigation into how Brown awarded the contracts to the various airlines,¹⁵ which became known as the “Air Mail Scandal.”¹⁶

This issue dominated 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.¹⁷ By March 10, 1934, Roosevelt backed down, ended the Air Corps operation, and allowed the commercial airlines to resume airmail service under new contracts.¹⁸ Subsequently, Roosevelt also pushed the new Congress to enact different legislation,¹⁹ which heavily regulated the airline industry and changed the fee structure.²⁰ President Roosevelt signed the Air Mail Act of 1934, or the Black-McKellar Act, into law on June 12, 1934.²¹

Although Roosevelt and his Postmaster General, James Farley, reinstated commercial airmail service within a few short months, several of the airlines affected by the Executive order filed suit.²² The outcome unfolded several years later on December 7, 1942, when the United States Court of Claims held in *Pacific Air Transport v. United States* that Postmaster General Farley justifiably annulled the airmail contracts negotiated by former

13. Justin T. Barkowski, Comment, *Managing Air Traffic Congestion Through the Next Generation Air Transportation System: Satellite-Based Technology, Trajectories, and—Privatization?*, 37 PEPP. L. REV. 247, 255 (2010); Grant Cates, *Airmail and the Evolution of the U.S. Aviation Industry in the 1920s and 1930s: A Potential Model for the Space Industry in the Next Millennium*, Paper Session at the 37th Space Means Business in the 21st Century Conference, in SPACE CONGRESS PROC. (May 2, 2000), <https://commons.erau.edu/cgi/viewcontent.cgi?article=1207&context=space-congress-proceedings> [<https://perma.cc/YC3Y-EQD5>].

14. Barkowski, *supra* note 13, at 255.

15. Paul M. Godehn & Frank E. Quindry, *Air Mail Contract Cancellations of 1934 and Resulting Litigation*, 21 J. AIR L. & COM. 253, 254 (1954); *Black, Hugo Lafayette, (1886–1971)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000499> [<https://perma.cc/LN5W-M5BQ>].

16. Barkowski, *supra* note 13, at 255.

17. Werrell, *supra* note 10, at 14.

18. Justin H. Libby, *Comments on the Air Mail Episode of 1934*, AIR POWER HIST., Summer 2010, at 44, 46.

19. Berchtold, *supra* note 5, at 438; Rubin, *supra* note 6, at 571–72.

20. See Timothy M. Ravich, *National Airline Policy*, 23 U. MIAMI BUS. L. REV. 1, 7 (2014).

21. BLACK, *supra* note 11, at 322; *The Air Mail Act of 1934*, AVSTOP.COM, <http://avstop.com/history/needregulations/act1934.htm> [<https://perma.cc/MBV6-SNYB>].

22. *Government Maps Defense as TWA Sues on Air Mail*, N.Y. TIMES, Feb. 14, 1934, at A1, <https://timesmachine.nytimes.com/timesmachine/1934/02/14/issue.html> [<https://perma.cc/928G-6EXF>].

Postmaster General Brown, but the commercial airlines were entitled to payment withheld by Roosevelt and Farley for the airmail services provided in January and February 1934.²³

After consulting available case law from this time period, this Article analyzes the *Pacific Air* decision and specifically considers whether the President violated the separation of powers and offended due process as guaranteed by the U.S. Constitution when he abruptly canceled 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 during 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’s decision, this Article then investigates alternative arguments available to the commercial airlines that could have shaped the judicial opinion but the court failed to address. Specifically, this analysis considers whether President Roosevelt undermined the constitutionally guaranteed separation of powers when he invalidated the airmail contracts on February 9, 1934. The U.S. Constitution delegates mail delivery as a congressional responsibility.²⁴ Additionally, Congress did not authorize the Secretary of War and the Air Corps to provide assistance with mail transportation when Roosevelt entered his Executive order. Later, Congress enacted legislation authorizing this action but not until March 27, 1934.²⁵

Next, this analysis considers whether Roosevelt and the government violated due process of law, specifically “condemn[ed] the largest portion of our commercial aviation without just trial. . . [and without] the opportunity of a hearing” by canceling the contracts, as Charles Lindbergh contended.²⁶ When canceling an airmail contract or a route certificate, the government was required to provide the airlines with written notice and a forty-five-day period to respond.²⁷ However, Roosevelt and Farley failed to comply with the notice and hearing provisions²⁸ and abruptly transferred the

23. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 649, 789–90 (1942).

24. U.S. CONST. art. I, § 8, cl. 7.

25. *See generally* Act of Mar. 27, 1934, ch. 100, § 1, 48 Stat. 508, 508.

26. Libby, *supra* note 18, at 45.

27. *Pac. Air Transp.*, 98 Ct. Cl. at 660.

28. *See id.* at 655–60.

airmail responsibility to the Air Corps instead.²⁹ When justifying this, Roosevelt and Farley contended that the airlines participating in Brown's spoils conferences successfully conspired to prevent other airlines from bidding on airmail route contracts, which violated § 3950 of the Revised Statutes of the United States, or R.S. 3950.³⁰ Under this statute, any violation permitted the Postmaster General to "annul" the airmail contract without notice and hearing, and the carrier was banned from participating in any future governmental contract for a period of five years following the first offense.³¹

The *Pacific Air* court decision did not consider these issues.³² Significantly, another court addressed the airline's due process argument in another case³³ preceding the 1942 *Pacific Air* decision. In *Boeing Air Transport, Inc. v. Farley*, another aggrieved airline from the Air Mail Affair filed suit, similarly complaining about the President and the Postmaster General canceling its airmail contract without notice and hearing.³⁴ The U.S. Court of Appeals granted defendant Farley's motion to dismiss after finding that proper jurisdiction rested with the U.S. Court of Claims, but not before opining the airline deserved notice and a hearing prior to the defendant canceling the contracts.³⁵

Also gleaned from this time period, additional case law illustrates the potential for Executive orders to undermine constitutionally guaranteed separation of powers.³⁶ Although decided a decade earlier, *United States v. Pan-American Petroleum Co.* shares very similar factual circumstances with the Air Mail Affair.³⁷ In *Pan-American Petroleum*, a federal district court invalidated 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 congressional powers by wrongfully transferring managerial authority over the naval petroleum reserves.³⁸

After applying the relevant case law, consulting journal and law review articles, and identifying the relevant statutes, this Article's objective

29. Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934).

30. *Pac. Air Transp.*, 98 Ct. Cl. at 767 (citing Rev. Stat. § 3950 (1872) (codified as amended at 39 U.S.C. § 6421 (repealed 1970))).

31. *Id.* at 745 (citing Rev. Stat. § 3950).

32. *See id.* 654.

33. *Boeing Air Transp., Inc. v. Farley*, 75 F.2d 765, 765–67 (D.C. Cir. 1935).

34. *Id.* at 767.

35. *Id.* at 768.

36. *See, e.g., United States v. Pan-Am. Petrol. Co.*, 6 F.2d 43, 87–88 (S.D. Cal. 1925), *aff'd in part and rev'd in part*, 9 F.2d 761 (9th Cir. 1926), *aff'd*, 273 U.S. 456 (1927).

37. *See id.* at 53.

38. *Id.* at 87.

analysis concludes that President Roosevelt’s Executive Order 6591 wrongfully extended into the responsibility of another branch of government and violated separation of powers. The U.S. Constitution assigns the postal duty as a congressional responsibility under Article One, Section Eight.³⁹ Over time, Congress delegated some postal functions to the Postmaster General.⁴⁰ Although the President appoints the Postmaster General, Roosevelt wrongfully substituted his authority for the Postmaster General’s authority when he entered the Executive order, assigning mail delivery to the Air Corps and effectively canceling the airmail contracts. In doing so, he essentially interfered in the postal responsibility that Congress delegated to the Postmaster General.

Coming close to addressing the due process argument, but without doing so, the *Pacific Air* court implied that the contractual language requiring written notice and a forty-five-day hearing opportunity is inapplicable because the court found a violation of federal statute § 3950, which prohibits interference in the bidding process.⁴¹ Significantly, the written notice and forty-five-day hearing requirements are both specified in the airline contracts, or route certificates, as well as in the congressionally enacted McNary-Watres Act.⁴² The court’s reasoning conflicts with the *Boeing Air* decision, where that court held that a notice and hearing requirement is implied in the applicable federal statute, § 3950.⁴³ Unrelated to the McNary-Watres legislation requiring written notice and a forty-five-day hearing opportunity, § 3950 prohibits bid interference and addresses the penalties but lacks specific notice and hearing language.⁴⁴ Despite this, the *Boeing Air* court held that a due process right is “read” into § 3950.⁴⁵ Finally, additional case law from this time period reinforces the *Boeing*

39. U.S. CONST. art. I, § 8, cl. 7.

40. See *Ware v. United States*, 71 U.S. (4 Wall.) 617, 632 (1867) (citing Act of Mar. 3, 1825, ch. 64, 4 Stat. 102).

41. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 789–90 (1942).

42. *Id.* at 656 (citing McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930)).

43. Rev. Stat. § 3950 (1872) (codified as amended at 39 U.S.C. § 6421 (repealed 1970)); *Boeing Air Transp., Inc. v. Farley*, 75 F.2d 765, 767 (D.C. Cir. 1935).

44. Rev. Stat. § 3950.

45. *Boeing Air Transp.*, 75 F.2d at 767.

Air court reasoning about the unconstitutionality of denying the airlines notice and hearing opportunities.⁴⁶

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 conquered the Atlantic and advanced toward the European horizon on May 21, 1927.

II. LITERATURE REVIEW

A reasonable amount of literature addresses the Air Mail Affair and its aftermath as it unfolded in front of the nation in 1934. In public hearings, a Senate committee investigated former Postmaster General Brown after he awarded various airmail contracts, certificates, and route extensions following a series of meetings with airline executives.⁴⁷ The Senate investigation, Roosevelt's very public dispute with Lindbergh, and the death of Air Corps pilots fueled the public's interest, prompting intense media attention.⁴⁸ The newspapers wrote extensively about the issue as it developed from airfields to the halls of Congress.⁴⁹ In fact, most major newspapers printed "a story on the subject half of the days in February and March" and dedicated 30% of this coverage to the front page.⁵⁰ In addition to the newspaper attention, additional writers also pursued this topic, making it the subject matter of various commercial magazines, textbooks, and even academic journals.

On May 15, 1918, Congress approved funding for the first experimental airmail route between New York and Washington, D.C.⁵¹ Multiple pieces of legislation influenced and shaped the issue over the years, continuing with the Kelly Act of 1925 through the Air Mail Act of 1934.⁵² Much of this legislation is broad and far-reaching, addressing both the Postal Service and the airline industry, which was in its infancy.⁵³ Over the years, various

46. See, e.g., *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589–90 (1935); *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913); *Marchant v. Pa. R.R. Co.*, 153 U.S. 380, 386–87 (1894).

47. See S. Res. 349, 72d Cong. (1933) (enacted).

48. Werrell, *supra* note 10, at 20.

49. *Id.*

50. *Id.*

51. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 677 (1942).

52. Act of Mar. 27, 1934, ch. 100, 48 Stat. 508; Kelly Act, ch. 128, 43 Stat. 805 (1925).

53. See, e.g., Act of Mar. 27, 1934, 48 Stat. 508; Kelly Act, 43 Stat. 805.

authorities evaluated this legislation and considered 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 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*.⁵⁴ Interestingly enough, the holding conflicted with other judicial opinions involving the Air Mail Affair—further clouding the outcome. Initially, a commissioner heard *Pacific Air* and found contrary to the U.S. Court of Claims on some issues.⁵⁵ Commissioner Richard H. Akers agreed that Farley justifiably nullified the airmail contracts; he found that the airlines secured the route certificates through an open bidding procedure, and the evidence failed to corroborate the government’s assertion that the plaintiff airlines received these contracts through fraud or collusion.⁵⁶ Commissioner Akers made his decision and entered his findings on July 14, 1941,⁵⁷ and the U.S. Court of Claims ultimately decided the case on December 7, 1942, several years after the Air Mail Affair concluded.⁵⁸

Significantly, another noteworthy decision preceded *Pacific Air*, where a different court agreed with the airline’s due process claim before granting the government’s motion to dismiss for jurisdictional reasons.⁵⁹ However, the *Pacific Air* decision received anemic attention in the literature, commentary, and legal analysis,⁶⁰ especially when comparing the court

54. 98 Ct. Cl. 649.

55. Godehn & Quindry, *supra* note 15, at 272. Commissioner Richard Akers heard and ruled on the case before the U.S. Court of Claims. *Id.* at 259. The evidence spanned a cumulative sixty-three days between April 26, 1938 and June 11, 1940, when he heard testimony from a significant number of witnesses in three different locations: Washington, D.C., Sanford, North Carolina, and Los Angeles, California. *Id.* Ultimately, he received more than 769 exhibits into evidence. *Id.*

56. *Id.* at 271.

57. *Id.* at 261.

58. *Pac. Air Transp.*, 98 Ct. Cl. at 649.

59. *Boeing Air Transp., Inc. v. Farley*, 75 F.2d 765, 767–68 (D.C. Cir. 1935).

60. Research identified few articles addressing *Pacific Air* or the litigation involving the Air Mail Affair. Paul Godehn and Frank Quindry reported the U.S. Court of Claims finding that the plaintiff airlines violated the federal statute, which contradicts the findings of the commissioner who initially heard the case. Godehn & Quindry, *supra* note 15, at 261, 271–72. Likewise, Kenneth Werrell agreed the court concluded that the airlines colluded to avoid an open bidding process. Werrell, *supra* note 10, at 22. Finally, Benjamin Lipsner solely reported on Commissioner Akers’ findings that the airlines did not obstruct the bidding process; however, he does not report that the U.S. Court of Claims

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 failed to evaluate the separation of powers or the due process arguments in this lengthy 148-page decision.⁶¹ While it acknowledged the government did not comply with the notice provisions when annulling the airmail contracts, the court remained silent about a Fifth Amendment due process violation.⁶² Likewise, the decision failed to address the executive action and whether this branch exceeded its authority.⁶³ This analysis evaluates these twin arguments and how they apply to the holding affecting such a historic issue.

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's decision, this Article next investigates alternative arguments available to the plaintiffs that the *Pacific Air* court failed 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.⁶⁴ 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.⁶⁵ Although this decision occurred years before *Pacific Air* was finalized, the due process argument for whatever reason does not filter into the later court's evaluation.⁶⁶ Although the *Boeing Air* court dismissed the airline's petition solely for

reversed the commissioner's decision. BENJAMIN B. LIPSNER, *THE AIRMAIL JENNIES TO JETS* 253 (Jeannette Elder & Linton J. Keith eds., 1951).

61. *See generally Pac. Air Transp.*, 98 Ct. Cl. 649.

62. *See id.* at 746.

63. *See generally Pac. Air Transp.*, 98 Ct. Cl. 649.

64. 75 F.2d at 765–67.

65. *See id.* at 767–68.

66. *See generally Boeing Air Transp.*, 75 F.2d 649.

jurisdictional reasons, it identified the due process concerns initially raised by Lindbergh and serves as a valuable resource for this evaluation.⁶⁷

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 decided this matter a decade before the Air Mail Affair unfolded.⁶⁸ 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.⁶⁹ Based on this collective evaluation, this analysis found President Roosevelt violated separation of powers by intruding into the legislative domain as well as violated the airlines’ due process rights by denying them notice and an opportunity to be heard when canceling their contracts. Further findings justify the government acting within the constitutional framework, granting citizens and businesses 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,⁷⁰ the government that interferes least governs best.

IV. HISTORICAL BACKGROUND OF THE AIR MAIL AFFAIR

A dynamic history affected the unfolding events of 1934. For several years following the First World War, mail delivery was the primary source of income for commercial aviation.⁷¹ During these early years of aviation, passenger travel was less lucrative, so the airlines relied heavily on the federal airmail subsidies for their fiscal livelihood.⁷² It was not until 1936 that passenger travel income exceeded the income from airmail subsidies.⁷³

67. *Id.* at 767–68.

68. *United States v. Pan-Am. Petrol. Co.*, 6 F.2d 43 (S.D. Cal. 1925), *aff’d in part and rev’d in part*, 9 F.2d 761 (9th Cir. 1926), *aff’d*, 273 U.S. 456 (1927).

69. *See id.* at 87.

70. Many authorities recognize the economic importance of a country’s standing, including those identified in Thomas C. Clark, *Impact of Nineteenth Century Missouri Courts upon Emerging Industry: Chambers of Commerce or Chambers of Justice?*, authored by a different Hon. Thomas C. Clark. Thomas C. Clark, *Impact of Nineteenth Century Missouri Courts upon Emerging Industry: Chambers of Commerce or Chambers of Justice?*, 63 MO. L. REV. 51, 51–52 (1998).

71. Rubin, *supra* note 6, at 568.

72. *See* Werrell, *supra* note 10, at 15.

73. Ravich, *supra* note 20, at 7–8.

During the years preceding the Air Mail Affair, Congress passed multiple pieces of legislation and different Presidential administrations attempted to influence airline development. In 1925, Congress enacted the Contract Air Mail Act, or the Kelly Act,⁷⁴ authorizing the Postmaster General⁷⁵ to privatize the airmail service, create the different airmail routes, and award those contracts to the lowest bidder.⁷⁶ After the carrier demonstrated dependability, the Postmaster General could exchange the carrier's airmail contract for a route certificate for a longer period but not to exceed ten years.⁷⁷

Recognizing the value of the aviation industry and its economic potential, Congress next enacted the Air Commerce Act in 1926.⁷⁸ This subsequent legislation authorized the Secretary of Commerce to further develop the economic potential of the nascent airline industry.⁷⁹ Then, during the Hoover administration, Congress passed the Air Mail Act of 1930.⁸⁰ Also known as the McNary-Watres Act, this legislation empowered 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.⁸¹ This new compensation method provided the airlines with a stimulus to transport passengers as well as the mail.⁸² Congress intended 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.⁸³

74. Kelly Act, ch. 128, 43 Stat. 805 (1925); Cates, *supra* note 13, at 1. As the namesake of the legislation, Representative Clyde Kelly (R-Pa.) is recognized as the father of the airmail system. Berchtold, *supra* note 5, at 442.

75. The Postmaster General selection process evolved through history. Originally, the President nominated an individual who was subject to Senate approval for this cabinet-level appointment. *Ware v. United States*, 71 U.S. (4 Wall.) 617, 633 (1867). In 1971, Congress removed the Postmaster General as a cabinet-level position and reformed the selection process. *U.S. Postmasters General*, SMITHSONIAN NAT'L POSTAL MUSEUM, <https://postalmuseum.si.edu/research/topical-reference-pages/postmasters-general.html> [<https://perma.cc/BC7A-CNCS>]. Instead of Presidential appointment, the Postmaster General is elected by the Board of Governors of the United States Postal Service. *Id.*

76. Barkowski, *supra* note 13, at 253.

77. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 656 (1942) (citing McNary-Watres Act, ch. 223, § 6, 46 Stat. 259, 259–60 (1930)).

78. Barkowski, *supra* note 13, at 254 (citing Air Commerce Act of 1926, ch. 344, 44 Stat. 568)).

79. *See id.* at 254–55.

80. Ravich, *supra* note 20, at 7 (citing McNary-Watres Act § 4, 46 Stat. 259).

81. H.R. Res. 107, 85th Cong. (1957) (enacted). With this payment change, airlines were no longer subsidized based on the collective weight of the mail transported. *Id.*; Ravich, *supra* note 20, at 7.

82. H.R. Res. 107.

83. *See* Berchtold, *supra* note 5, at 441, 445.

The McNary-Watres Act empowered Brown. He used his influence to improve the efficiency of the airmail service as the overall cost to transport the mail decreased from \$1.09 per mile in 1929 to \$0.38 per mile in 1933.⁸⁴ Under this legislation, he extended several airmail routes, hoping to inspire the airlines to expand passenger service while consolidating the airline industry into a more manageable entity.⁸⁵ Prior to McNary-Watres, the existing airmail routes reflected a haphazard system—a patchwork of “illogical lines” stemming from only one transcontinental route.⁸⁶ Pursuant to his authority under McNary-Watres, Brown bolstered 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.⁸⁷

On May 19, 1930, Brown met 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 and competing” transcontinental routes that the Postmaster General especially favored.⁸⁸ The post office disclosed this event to the public and distributed a press release, announcing the meeting and specifically identifying, by name, the participating passenger and airmail carriers.⁸⁹

At the meeting, Brown encouraged the airline executives to meet, discuss, and decide among themselves which airlines could effectively service the newly proposed airmail routes.⁹⁰ When entering its decision years after these events, the Court of Claims found that Brown told the airlines that he was 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 most careful consideration to their suggestions and recommendations.”⁹¹

Later, critics labeled the airline executive meetings, both with and without Brown, as the spoils conferences.⁹² Under Brown’s approach, he hoped to extend the carrier routes under the existing contracts but without advertising

84. *Id.* at 445.

85. Rubin, *supra* note 6, at 569–71.

86. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 700 (1942).

87. *Id.*

88. Godehn & Quindry, *supra* note 15, at 262–63; *see Pac. Air Transp.*, 98 Ct. Cl. at 700.

89. *Pac. Air Transp.*, 98 Ct. Cl. at 698–99.

90. *See id.* at 701.

91. *Id.* at 702.

92. Barkowski, *supra* note 13, at 255; Rubin, *supra* note 6, at 571.

for competing bids.⁹³ Brown recognized that some operators were more experienced, safe, and fiscally sound than others,⁹⁴ and he undoubtedly feared advertising would prompt bids from incapable providers or “irresponsible bidders.”⁹⁵ In his estimation, a successful restructuring necessitated some of the multiple, smaller companies to consolidate or merge into a fewer number of larger, more manageable airlines equally qualified to expand passenger travel.⁹⁶

On June 4, 1930, the airlines reported to Brown in writing that they agreed on air carriers for seven of the twelve routes Brown proposed but did not agree on a carrier for the remaining, more highly contested airmail lines, including the two additional transcontinental routes.⁹⁷ Brown was disappointed that the airlines were unable to agree on service providers for the “longer and more controversial” routes and could only agree on the shorter, less significant routes, which prompted Brown to act.⁹⁸

Consequently, Brown created and allocated the two transcontinental airmail routes supplementing the sole transcontinental route operated by United at the time.⁹⁹ Pursuant to his plan to establish three independently operated transcontinental routes, Brown awarded Aviation Corporation with the southern route between Atlanta and Los Angeles, and he awarded Transcontinental & Western Air, following their merger, with the central route between New York and Los Angeles and through St. Louis.¹⁰⁰

Under Brown’s direction, the restructured aviation industry thrived and the amount of passenger travel tripled in the next few years.¹⁰¹ Although later congressional hearings revealed that Brown was sometimes autocratic and arbitrary, his vision and leadership elevated the U.S. air transportation system to the best in the world, all while the country was experiencing the economic turmoil of the Great Depression.¹⁰²

As 1932 unfolded, much of the country was experiencing deep economic hardship as the Great Depression continued, but the fall election marked a sea change in political power as the Democrats replaced the Republicans in the White House and both houses of Congress.¹⁰³ Roosevelt convincingly defeated Hoover, and the Democratic-controlled Congress catapulted to a

93. *Pac. Air Transp.*, 98 Ct. Cl. at 701–02.

94. *See Godehn & Quindry*, *supra* note 15, at 265, 269.

95. *Pac. Air Transp.*, 98 Ct. Cl. at 689, 717.

96. Rubin, *supra* note 6, at 570–71.

97. Godehn & Quindry, *supra* note 15, at 264.

98. *Id.*

99. *See Pac. Air Transp.*, 98 Ct. Cl. at 708.

100. *Id.* at 708, 716–21.

101. Rubin, *supra* note 6, at 571.

102. *See BERG*, *supra* note 3, at 291; Werrell, *supra* note 10, at 15.

103. BLACK, *supra* note 11, at 249–50; *see Werrell*, *supra* note 10, at 15.

nearly two-to-one advantage in the Senate and an even more commanding three-to-one lead in the House.¹⁰⁴ With a change in administrations, James A. Farley replaced Brown as the new Postmaster General.¹⁰⁵

Looking to build on their electoral success in 1932, Democrats began researching issues—“real or fabricated”—involving former President Hoover that they could manipulate into a campaign issue for the upcoming 1934 midterm elections.¹⁰⁶ Brown’s spoils conferences presented this opportunity.¹⁰⁷ Beginning in September 1933, Senator Hugo Black (D-Ala.) and his Senate investigative committee collected documents, held hearings, and questioned witnesses about the circumstances surrounding the spoils conferences, the decision-making to retain the private airlines for mail delivery, and if this conduct violated federal statutes requiring competitive bidding.¹⁰⁸ The committee subpoenaed the financial records of many aviation industry leaders, including Lindbergh, even demanding records of stock transactions since 1924.¹⁰⁹ Ultimately, the Senate committee uncovered some suspicious, questionable activity surrounding the allocation of airmail contracts, and Black argued that these practices resembled a “conspiracy to defraud the government.”¹¹⁰

Black’s committee introduced evidence of Brown’s “high-handed treatment” of some¹¹¹ but prevented Brown from testifying despite the former Postmaster General’s repeated requests to appear and defend his policies.¹¹² Understandably, some accused Black¹¹³ and his committee of conducting a less than impartial investigation, and, although effective in generating

104. See BLACK, *supra* note 11, at 249–50.

105. *U.S. Postmasters General*, *supra* note 75. James A. Farley actively participated in Roosevelt’s initial 1932 Presidential campaign. See BLACK, *supra* note 11, at 249. When Roosevelt addressed his supporters on election night, Farley stood next to the President-elect who described his future Postmaster General as one of the two people most responsible for his victory. *Id.*

106. DAN HAMPTON, *THE FLIGHT: CHARLES LINDBERGH’S DARING AND IMMORTAL 1927 TRANSATLANTIC CROSSING* 263 (2017).

107. See *id.*; T.A. HEPPENHEIMER, *TURBULENT SKIES: THE HISTORY OF COMMERCIAL AVIATION* 35 (1995).

108. See HEPPENHEIMER, *supra* note 107, at 35; Godehn & Quindry, *supra* note 15, at 254; Werrell, *supra* note 10, at 15.

109. BERG, *supra* note 3, at 291.

110. Werrell, *supra* note 10, at 15; see Rubin, *supra* note 6, at 571.

111. Rubin, *supra* note 6, at 571.

112. See Berchtold, *supra* note 5, at 443–44.

113. Black’s professional career prospered under Roosevelt, who appointed him to the U.S. Supreme Court in 1937. 1 DAVID M. O’BRIEN, *CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY* 1041 (6th ed. 2005).

front page headlines, none of the investigation positively influenced public policy.¹¹⁴

A longtime critic of the airmail system operating under the Republican Hoover administration,¹¹⁵ Senator Black led the hearings into May 1934, vociferously arguing that Brown fraudulently allocated the airmail contracts.¹¹⁶ Among other revelations surfacing in the Black proceedings occurring at the height of the Great Depression, the executive of United Air witnessed his initial \$253 airline investment grow to a value of \$35 million.¹¹⁷

While the news of exorbitant salaries of some airline executives shocked the public, some airlines and their executives understandably profited after investing in the speculative stock of the airline industry during the bull market years of 1927 to 1929.¹¹⁸ Some aviation stocks rose dramatically in the initial market boom preceding the Great Depression, but this rise in value was not isolated to the aviation industry because other stocks also benefited as a consequence of the speculation market.¹¹⁹ Just days before Roosevelt entered his fateful order, Post Office Solicitor Karl Crowley reviewed the Black committee evidence and issued a brief concluding that Brown fraudulently awarded the airmail contracts after conspiring with the carriers to prohibit competitors from bidding on the routes.¹²⁰

On February 9, 1934, and without warning, President Roosevelt signed Executive Order 6591, directing the Air Corps to transport the airmail beginning February 19 and effectively canceling the airmail contracts with more than thirty different airlines.¹²¹ The President argued executive action was necessary, contending that the Brown airmail contracts were negotiated through collusion and fraud.¹²² Officially, Postmaster General James Farley canceled the airmail contracts on the same day, but only after participating in a conference at the White House,¹²³ further corroborating

114. See Berchtold, *supra* note 5, at 443–44.

115. *Id.* at 442.

116. See BLACK, *supra* note 11, at 321.

117. BERG, *supra* note 3, at 291–92.

118. Berchtold, *supra* note 5, at 444.

119. *Id.*

120. See Libby, *supra* note 18, at 44. Karl Crowley was personally familiar with the events leading up to the Air Mail Affair. Prior to his appointment as Post Office Solicitor, he worked as a lobbyist for a client seeking an airmail contract, but he was unsuccessful in obtaining it. Berchtold, *supra* note 5, at 443–44.

121. Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934); BERG, *supra* note 3, at 291.

122. John F. Shiner, *Benjamin Foulois and the Fight for an Independent Air Force*, in AVIATION'S GOLDEN AGE: PORTRAITS FROM THE 1920s AND 1930s, at 74, 83 (William M. Leary ed., 1st ed. 1989).

123. Berchtold, *supra* note 5, at 443.

that Roosevelt directed the action.¹²⁴ The following day, *The Washington Post* read: “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.”¹²⁵ In fact, Roosevelt was so anxious to cancel the contracts and remove the private airlines, he disregarded Farley’s request to delay the Air Corps start day until June 1 to accommodate a transition period,¹²⁶ a decision the President undoubtedly regretted.

Later responding to the airline lawsuits, Roosevelt and Farley contended that the airlines participating in Brown’s spoils conferences conspired to prevent other airlines from bidding on airmail contracts or route extensions, which violated federal statute § 3950.¹²⁷ Violating § 3950 empowered the Postmaster General to “annul” the airmail contract without notice and hearing and ban the carrier from participating in any future contract for a period of five years following the first offense.¹²⁸ Additionally, the contractual language allowed 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.”¹²⁹ When doing so, the Postmaster General was required to provide both written notice and provide the airline with forty-five days to respond.¹³⁰ In this instance, the Postmaster General did neither.¹³¹

Before acting, Roosevelt consulted some within his administration. In the days before February 9, he asked the post office to contact the chief of the Air Corps, Benjamin Foulois,¹³² about the Army air arm’s ability to

124. See Ravich, *supra* note 20, at 7; Rubin, *supra* note 6, at 571; Shiner, *supra* note 122, at 83; Werrell, *supra* note 10, at 15; Mark C. Mathieson, Comment, *Bankruptcy of Airlines: Causes, Complaints, and Changes*, 61 J. AIR L. & COM. 1017, 1020 n.18 (1996).

125. Leon Dure, Jr., *Roosevelt Cancels Air Mail Contracts; Army Plans to Fill Breach*, WASH. POST, Feb. 10, 1934, at A1; see also Werrell, *supra* note 10, at 16.

126. See BLACK, *supra* note 11, at 321; Werrell, *supra* note 10, at 15.

127. See *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 745, 767 (1942) (citing Rev. Stat. § 3950 (1872) (codified as amended at 39 U.S.C. § 6421 (repealed 1970))).

128. *Id.* at 745 (citing Rev. Stat. § 3950).

129. *Id.* at 660.

130. *Id.*

131. *Id.* at 746.

132. In addition to serving as the Chief of the Army Air Corps until 1931, Foulois was a leader in military aviation and remained passionate about flying, even piloting the plane that dropped a baseball to Babe Ruth from a height of 250 feet in a publicity stunt receiving media attention. Shiner, *supra* note 122, at 78, 80.

transport the mail.¹³³ Just prior to this time, Foulois was 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 thwarted him.¹³⁴ At this time, the U.S. Air Force did not exist, but the prescient Foulois saw the value of achieving air superiority in combat situations, and he was the leading advocate for a separate air service that functioned independently of the Army.¹³⁵

While he undoubtedly viewed the President's inquiry as more closely resembling an order rather than a request, he also considered transferring the mail as an opportunity to gain support for his plans to convert the Air Corps into an independent military operation.¹³⁶ After discussing the matter with his staff but breaching Army protocol when bypassing the military Chief of Staff General Douglas MacArthur, Foulois confirmed the Air Corps' ability to meet this challenge and responded they could be ready in a week to ten days.¹³⁷

As one of the first to criticize Roosevelt's unilateral action and challenge his executive authority, Charles Lindbergh emerged as the major opponent of the contract cancellation.¹³⁸ Although his historic flight occurred seven years earlier, he was still a national celebrity and active in the aviation industry where he worked for Transcontinental & Western Air, Inc.¹³⁹ Lindbergh did not serve in any official management capacity within the company nor did he negotiate the airmail contracts,¹⁴⁰ but Lindbergh believed his employer heavily contributed to the undervalued aviation industry as well as the economy, and equally important, he believed Roosevelt was treating the airline industry unfairly.¹⁴¹

Lindbergh sent the President a telegram dated February 11, 1934, and simultaneously released a copy to the media.¹⁴² Among other criticisms, Lindbergh reminded the President that certain inalienable, constitutionally guaranteed rights bind us as Americans.¹⁴³ Specifically, he alleged that Roosevelt's decision to cancel the "air mail contracts condemns the largest portion of our commercial aviation without just trial."¹⁴⁴ Further, he

133. *Id.* at 83.

134. *Id.* at 81.

135. *See id.* at 74, 77.

136. *Id.* at 83.

137. *Id.*

138. Werrell, *supra* note 10, at 17.

139. BERG, *supra* note 3, at 292; Werrell, *supra* note 10, at 14.

140. *See* BERG, *supra* note 3, at 292; HAMPTON, *supra* note 106, at 264.

141. *See* BERG, *supra* note 3, at 292.

142. BLACK, *supra* note 11, at 321.

143. *See* Libby, *supra* note 18, at 45.

144. *Id.*

reminded Roosevelt of the fundamental right to a fair trial and alleged the President’s actions “[did] not discriminate between innocence and guilt and place[d] no premium on honest business.”¹⁴⁵

Further, Lindbergh asserted that companies and their officers “[had] not been given the opportunity of a hearing and improper acts by many companies affected [had] not been established.”¹⁴⁶ While reminding the President that America led the world in every aspect of aviation at the time, including the quality of airlines, aircraft, and equipment, Lindbergh also warned that the hasty, misguided decision would “damage all American aviation.”¹⁴⁷ Within days of the contract cancellation, *The New York Times* reported Lindbergh’s fateful comments that “the lives of men inexperienced in mail operations, and flying planes not equipped with radio or the blind flying instruments necessary for the service, may be risked.”¹⁴⁸

As two of the country’s most popular figures squared off on this controversial subject matter that later included military fatalities, the Air Mail Affair unsurprisingly received intense media attention throughout the first half of 1934.¹⁴⁹ Both the President and the partisan Congress challenged Lindbergh to defend the industry and some of the more inflammatory revelations that led to the multiple contract cancellations. For more than two hours on March 16, the media recorded and photographed Lindbergh in a congressional caucus room where he addressed some of the aviation industry’s more questionable practices, but insisted they should not be condemned without an opportunity to be heard.¹⁵⁰

While defending his beloved—yet controversial—aviation industry under the glare of the media spotlight, Lindbergh utilized his vast skill set to articulate well-reasoned, measured, and accurate responses,¹⁵¹ much like how he utilized a string and a globe to measure the distance between New York and Paris

145. *Id.*

146. *Id.*

147. *Id.*

148. *Action on Air Mail Unfair, Lindbergh Tells President*, N.Y. TIMES, Feb. 12, 1934, at A1; *see also* Werrell, *supra* note 10, at 17. Lindbergh’s prolific flying career included extensive experience flying the mail. Prior to his transatlantic crossing, he worked as a pilot at Roberts Airlines, flying the mail between St. Louis and Chicago, where he frequently endured harsh weather conditions that even forced him to jump from his airplane at times. THOMAS KESSNER, *THE FLIGHT OF THE CENTURY: CHARLES LINDBERGH & THE RISE OF AMERICAN AVIATION* 37–39 (2010); *see* CHARLES A. LINDBERGH, *THE SPIRIT OF ST. LOUIS* 6 (1953).

149. Werrell, *supra* note 10, at 14.

150. *See* BERG, *supra* note 3, at 294.

151. *Id.*

when calculating the amount of fuel necessary for his transatlantic journey.¹⁵² When confronted by multiple detractors and skeptics, Lindbergh demonstrated unwavering resiliency, resisted the intense pressure of the public spotlight, deflected the criticism, and communicated¹⁵³ with the precision of higher mathematics. Later that same day, Lindbergh endured 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.¹⁵⁴ In this session, Lindbergh answered questions for more than three hours while addressing industry accusations and deflecting personal attacks.¹⁵⁵

Notwithstanding Lindbergh's concerns about due process denied, the Roosevelt decision invited disaster. Even before beginning the operation, the Air Corps suffered two fatalities on February 16 while conducting practice flights.¹⁵⁶ During the first week of the operation, another three pilots died, another five were critically injured, and the Air Corps accrued a collective \$300,000 in property damage.¹⁵⁷ Beginning with the first Air Corps pilot fatalities in February and extending into March, each day seemed to unveil a different "horror story."¹⁵⁸

Several factors contributed to the operation's demise. Flying combat missions during the day when the enemy is visible was substantially different than flying the mail at night for great distances in varying weather conditions.¹⁵⁹ Also, aviation technology was largely undeveloped in the 1930s.¹⁶⁰ Further, there were not any radar navigation devices or ground control coordination to assist the pilots.¹⁶¹

The Air Corps' planes lacked the blind-flying instruments and radios that the commercial air pilots utilized while conducting their nighttime mail runs.¹⁶² Foulois recognized this deficiency and he upgraded the Army plane instruments, ensuring each plane included a radio receiver, a directional compass, and an artificial horizon in the days immediately

152. LINDBERGH, *supra* note 148, at 84. While overseeing the construction of his single-engine monoplane in San Diego, Lindbergh located a globe in a public library and stretched 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. *Id.* at 83–84.

153. See BERG, *supra* note 3, at 294.

154. *Id.*

155. *Id.* at 295.

156. Werrell, *supra* note 10, at 18.

157. BERG, *supra* note 3, at 293.

158. *Id.* at 293–94.

159. See Shiner, *supra* note 122, at 84.

160. Werrell, *supra* note 10, at 17.

161. *Id.*

162. Shiner, *supra* note 122, at 83–84.

preceding the operation.¹⁶³ While the Army hastily trained the pilots on using the new instruments, many resisted relying on these and instead continued to trust their flying instincts even when encountering challenging weather conditions.¹⁶⁴ Finally, the 1934 winter weather was especially inclement, producing considerable amounts of rain, snow, and fog,¹⁶⁵ further complicating the flying conditions. The harsh weather proved heavily problematic as the Army pilots flew in “open-cockpit machines,” which exposed them to the punishing elements.¹⁶⁶

The decision presented economic consequences as well. Roosevelt’s action threatened both the airline industry’s stability and its long-term viability, which invited economic turmoil and jeopardized America’s standing as the premiere air transport system in the world.¹⁶⁷ A successful, efficient airmail system not only brought “the country closer together” but it fostered a successful business environment.¹⁶⁸ Instead, the Roosevelt decision prompted economic ruin with many airlines reducing flight schedules and laying off employees.¹⁶⁹ Immediately following the Executive order, Transcontinental & Western Air President Richard Robbins asked 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.¹⁷⁰ Instead, the action forced Robbins to furlough employees and restructure a minimal passenger flight schedule effective February 18.¹⁷¹

At the time of the contract cancellation, the United airline executive’s massive investment growth¹⁷² was an exception to the airline industry’s fiscal health. In fact, few airlines were able to break even or realize small profits in 1933, with some even battling massive operating losses prior to this time.¹⁷³ 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

163. *Id.* at 84.

164. *Id.*

165. BERG, *supra* note 3, at 293.

166. Shiner, *supra* note 122, at 84.

167. *See* Werrell, *supra* note 10, at 15, 17–18.

168. *Id.* at 14.

169. *Id.* at 17.

170. BERG, *supra* note 3, at 292.

171. *Id.* at 293; *see* Werrell, *supra* note 10, at 17.

172. BERG, *supra* note 3, at 291–92.

173. Berchtold, *supra* note 5, at 445.

level where many airlines would have been profitable within three to five years without the mail subsidy.¹⁷⁴

Following an extensive public clamor, Roosevelt eventually reversed himself. On March 10, he withdrew Executive Order 6591 and allowed the airlines to resume responsibility for transporting the mail.¹⁷⁵ However, the President insisted that the new airmail contracts restricted the mail delivery term to three years, not the previous ten years as allowed under the McNary-Watres legislation.¹⁷⁶ Further, he demanded that any airlines or former participants in the Brown spoils conferences were ineligible for the newly solicited airmail routes.¹⁷⁷

While this new action prevented thirty-one individuals and former airline executives from participating in future aviation contracts and essentially banished them from the industry, some of the affected airlines maneuvered around Roosevelt's restriction by changing their names.¹⁷⁸ For example, American Airways changed to American Airlines, Eastern Air Transport changed into Eastern Airlines, United Aircraft became United Airlines, and Transcontinental & Western Air changed its name to Trans World Airlines.¹⁷⁹

On March 27, Congress formally authorized Roosevelt's action, directing the departments of war and commerce to assist with mail delivery.¹⁸⁰ The legislative language duplicated the language in Roosevelt's Executive Order 6591.¹⁸¹ Later that summer, Roosevelt signed the Air Mail Act of 1934, effectively disassembling the previous McNary-Watres legislation.¹⁸² Engineered by the White House,¹⁸³ the Black-McKellar Act mandated that multiple federal agencies regulate the airlines and significantly reduced the postal subsidies.¹⁸⁴

The Air Corps' seventy-eight-day operation was considered a "dismal failure"¹⁸⁵ and by May 8, the commercial airlines were flying the mail again.¹⁸⁶ Before commercial air service resumed, however, the Air Corps suffered twelve fatalities, sixty-six accidents, and completed just over 65%

174. *Id.*

175. Libby, *supra* note 18, at 46.

176. *Id.*; see McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 259 (1930).

177. Libby, *supra* note 18, at 46.

178. Werrell, *supra* note 10, at 22.

179. BERG, *supra* note 3, at 295.

180. Act of Mar. 27, 1934, ch. 100, § 1, 48 Stat. 508, 508.

181. *Id.*; Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934).

182. Air Mail Act of 1934, ch. 466, 48 Stat. 933.

183. Berchtold, *supra* note 5, at 438.

184. Air Mail Act of 1934, 48 Stat. 933; Rubin, *supra* note 6, at 572.

185. FRISBEE, *supra* note 7, at 50.

186. BERG, *supra* note 3, at 296.

of all scheduled flights.¹⁸⁷ If the loss of life was not bad enough, the operating expenses rose to \$0.70 per mile during the Presidential experiment, nearly double the cost of the commercial airlines operating expenses just months earlier.¹⁸⁸

The Air Mail Affair introduced political consequences as well. Many concluded that the issue was “a setback and an embarrassment” for the President.¹⁸⁹ Even the President’s own son, Elliott, who worked as an editor at an aviation publication, criticized his father’s involvement in the issue.¹⁹⁰ Perhaps, the American writer Walter Lippmann summarized the issue best when he opined that the issue “had deep repercussions for [Roosevelt]. For the first time since he had taken office, his authority had been effectively challenged, making him appear both fallible and impenitent.”¹⁹¹ The criticism, the consequences, and the potentially lasting political impact were not missed on Roosevelt, who later remarked to his press secretary that the administration would avenge¹⁹² this regrettable experience with Lindbergh while threatening “[w]e will get that fair-haired boy.”¹⁹³

V. THE *PACIFIC AIR* DECISION

Nearly nine years passed from the time Lindbergh initially raised his due process concern on February 11, 1934,¹⁹⁴ and the *Pacific Air* court ultimately decided the matter on December 7, 1942.¹⁹⁵ Before the U.S.

187. FRISBEE, *supra* note 7, at 50; Shiner, *supra* note 122, at 84.

188. Shiner, *supra* note 122, at 84.

189. BLACK, *supra* note 11, at 322; Berchtold, *supra* note 5, at 438; Werrell, *supra* note 10, at 14.

190. Werrell, *supra* note 10, at 21.

191. BERG, *supra* note 3, at 296.

192. And he does. In the years preceding World War II, Lindbergh made a series of radio broadcasts and public speeches discouraging American entry into the European conflict. BLACK, *supra* note 11, at 537. In response, Roosevelt painted Lindbergh as a Nazi, although repeated efforts to wiretap his conversations failed to reveal any proof. *Id.* After the United States entered the war, Roosevelt worked to keep Lindbergh from serving in the military, despite the former aviator’s determination to fight following the attack on Pearl Harbor. John J. Dwyer, *FDR v. Lindbergh: Setting the Record Straight*, NEW AM. (Jan. 21, 2014), <https://www.thenewamerican.com/culture/history/item/17341-fdr-vs-lindbergh-setting-the-record-straight?tmpl=component&print=1> [perma.cc/76E6-4E89]. Eventually, Lindbergh overcame these obstacles, and he served admirably for his country. *Id.*

193. HAMPTON, *supra* note 106, at 264.

194. Libby, *supra* note 18, at 44–45.

195. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649 (1942).

Court of Claims entered judgment, Commissioner Richard H. Akers reviewed the facts and issues surrounding the Air Mail Affair and initially decided the case.¹⁹⁶

In fact, Commissioner Akers heard evidence on the matter over a collective sixty-three-day period that stretched over more than two years between April 26, 1938 and June 11, 1940.¹⁹⁷ He heard from a substantial number of witnesses in three different venues, Washington, D.C., Sanford, North Carolina, and Los Angeles.¹⁹⁸ He received 769 exhibits into evidence, and the trial transcript totaled 7,164 pages.¹⁹⁹ Ultimately, the commissioner decided that the Roosevelt administration terminated the airmail agreements in good faith²⁰⁰ but equally found the evidence “insufficient to substantiate the claims of the [administration] that these contracts and route certificates were secured through fraud, collusion, or a conspiracy.”²⁰¹ Further, he concluded the plaintiffs were entitled to \$364,423.43 in collective damages for the services performed in January and February 1934.²⁰² Finally, he decided that plaintiffs were not liable under any of the counterclaims pursued by the government.²⁰³

Although the *Pacific Air* decision addressed multiple airmail routes and several different air carriers throughout the opinion, the holding solely applied to the three different plaintiff airlines operating five specific airmail routes.²⁰⁴ They included Pacific Air Transport, Boeing Air Transport, and United Air Lines Transport Corporation.²⁰⁵ Pacific Air Transport was the plaintiff in No. 43029, involving Route 8 between Seattle, Washington, and Los Angeles, California.²⁰⁶ It received the contract and began operating this airmail route beginning September 15, 1926.²⁰⁷ Following two years of satisfactory service and as allowed by statute, Pacific Air Transport exchanged the airmail contract for a route certificate on May 27, 1930, with the Postmaster General’s approval.²⁰⁸ When receiving the route certificate,

196. Godehn & Quindry, *supra* note 15, at 259. This author relies on secondary materials in reviewing the decision of Commissioner Richard H. Akers.

197. *Id.*

198. *Id.*

199. *Id.* at 259–60.

200. *Pac. Air Transp.*, 98 Ct. Cl. at 765.

201. Godehn & Quindry, *supra* note 15, at 271.

202. *Pac. Air Transp.*, 98 Ct. Cl. at 765.

203. *Id.*

204. *Id.*

205. *Id.* at 649.

206. *Id.* at 654. Originally, Vern C. Gorst was the low bidder on this route first advertised on July 15, 1925, but he promptly sublet this route to Pacific Air Transport with the Postmaster General’s written approval on March 19, 1926. *Id.*

207. *Id.* at 655.

208. *Id.*

Pacific Air Transport posted the statutorily required surety or bond.²⁰⁹ On July 1, 1930, and also pursuant to statute, the Postmaster General extended Pacific Air Transport Route 8 to include the additional distance between Los Angeles and San Diego.²¹⁰ Pacific Air Transport operated Route 8 through February 19, 1934.²¹¹

Boeing Air Transport was the plaintiff in No. 43030 and began operating airmail Route C.A.M. 18 between Chicago and San Francisco on July 1, 1927.²¹² Following two years of satisfactory service and as allowed by statute, Boeing Air Transport exchanged the airmail contract for a route certificate on October 21, 1930.²¹³ When receiving the route certificate, Boeing Air Transport provided the required surety.²¹⁴ Although Boeing Air Transport did not request an extension on the Chicago, Illinois, and San Francisco, California, airmail route, Postmaster Brown later directed Boeing Air Transport to expand Route 18 to include an extended route between Omaha, Nebraska, and Watertown, South Dakota, beginning January 16, 1932.²¹⁵

As the plaintiff in No. 43031, Boeing Air Transport also operated Route A.M. 5 between Salt Lake City, Utah, and Seattle, Washington, which it acquired from Varney Air Lines, Inc. beginning October 1, 1933.²¹⁶ Originally two separate routes, known as Route A.M. 5 and Route C.A.M. 32, these routes eventually merged into a single airmail route on May 27, 1930.²¹⁷ Initially, Varney Air Lines, Inc. was the low bidder on the previous Route 5 between Elko, Nevada, and Pasco, Washington, first advertised on July 15, 1925.²¹⁸ Additionally, Varney Air Lines, Inc. was the low bidder on another Pacific Northwest airmail route, Route 32, and entered into a contract with the government to transport the mail beginning September 23, 1929.²¹⁹ Later, Postmaster General Brown found that the

209. *Id.* at 656.

210. *Id.* at 663.

211. *Id.* at 655.

212. *Id.* at 663–64. Similarly, Edward Hubbard and Boeing Airplane Company were the low bidder on this route first advertised on November 15, 1926, but Hubbard later sublet this route to Boeing Air Transport with the Postmaster General’s written approval on April 29, 1927. *Id.* at 664.

213. *Id.* at 664–65.

214. *Id.* at 665.

215. *Id.* at 666.

216. *Id.* at 666, 670–71.

217. *Id.* at 669.

218. *See id.* at 666–68.

219. *Id.* at 668.

public interest was better served by consolidating these routes, pursuant to the McNary-Watres Act.²²⁰ Varney Air Lines, Inc. continued to operate this consolidated airmail Route 5 until October 1, 1933, when Boeing Air Transport sublet the route with Postmaster General approval and acquired Varney Air Lines, Inc.'s assets, including "physical properties."²²¹

United Air Lines Transport Corporation was the plaintiff in No. 43032 after merging with National Air Transport, Inc.²²² As the low bidder, National Air Transport, Inc. was awarded Route C.A.M. 17 between New York, New York, and Chicago, Illinois, beginning September 1, 1927.²²³ Following two years of satisfactory service and as allowed by statute, National Air Transport exchanged the airmail contract for a route certificate on October 22, 1930, with the Postmaster General's approval.²²⁴ When receiving the route certificate, National Air Transport posted the necessary bond.²²⁵ On December 28, 1934, and well after the contract cancellation, National Air Transport, Inc. merged with three other airlines into United Air Lines Transport Corporation, which assumed the ownership interest in National Air Transport, Inc.'s cause of action against the Postmaster General.²²⁶

Similarly, United Air Lines Transport Corporation was the plaintiff in No. 43033 following the National Air Transport, Inc. merger.²²⁷ Initially, National Air Transport, Inc. was the low bidder on airmail C.A.M. 3 between Chicago, Illinois, and Dallas, Texas, which it operated from May 12, 1926, until February 19, 1934.²²⁸ After two years of satisfactory service and as allowed by statute, National Air Transport exchanged the airmail contract for a route certificate on May 3, 1930.²²⁹ When receiving the route certificate, National Air Transport provided the necessary surety.²³⁰ Following the merger in late 1934, United Air Lines Transport Corporation assumed the ownership interest in National Air Transport, Inc.'s cause of action against the Postmaster General.²³¹

After Roosevelt reversed himself and restored commercial airmail delivery, the government prevented any of the more than thirty airlines, including

220. *Id.* at 668–69.

221. *Id.* at 671.

222. *Id.* at 672.

223. *See id.* at 672–73.

224. *Id.* at 673.

225. *Id.*

226. *Id.* at 672.

227. *Id.* at 672, 674.

228. *Id.* at 674–75.

229. *See id.*

230. *Id.* at 675–76.

231. *Id.* at 672.

the plaintiffs, whose certificates were canceled on February 9, from resuming an airmail schedule.²³² Eventually, all three plaintiff air carriers merged into the United group.²³³ Also within the United group was a management corporation, United Air Lines, Inc.²³⁴ Subsequently, United Air Lines, Inc. successfully bid on the routes previously awarded to the three former, separate air carriers: Pacific Air Transport, Boeing Air Transport, and National Air Transport.²³⁵ United Air Lines, Inc. was not prohibited from bidding on these routes in spring 1934 because it did not possess a certificate canceled on February 19.²³⁶

Ultimately, the *Pacific Air* court sided with Roosevelt. The court held that the plaintiff airlines violated § 3950, justifying the Roosevelt administration’s decision to annul the mail contracts.²³⁷ Disagreeing with Commissioner Akers, the court found that the plaintiffs and other carriers “made a combination to avoid competitive bidding” through their collective agreement.²³⁸ Further, the court concluded that the plaintiffs entered these agreements and combinations to prevent competitive bidding for the airmail contracts at the expense of others seeking these contracts; the same air carriers sought to preserve the system using the high rates of payment, and the air carriers wished to remain in favor with the Postmaster General who enjoyed considerable discretionary power over the industry.²³⁹

The majority opinion specifically faulted plaintiffs, the United group, as well as Aviation Group, the former Transcontinental Air Transport, and the former Western Air Express for conspiring with the Postmaster General that they would not bid on contracts during the competitive bidding process unless the Postmaster General selected that carrier for that specific route.²⁴⁰ The court further held that these same carriers agreed to use their influence to dissuade others from bidding on contracts.²⁴¹

In a concurring opinion, Judge Benjamin Horsley Littleton agreed with the outcome but disagreed with the court that plaintiffs participated in a combination or agreement “to prevent the making of any bid for carrying

232. *Id.* at 766–67.

233. *Id.* at 765.

234. *Id.* at 766.

235. *Id.*

236. *Id.*

237. *Id.* at 789.

238. *Id.* at 776.

239. *Id.* at 764–65.

240. *Id.* at 764.

241. *Id.*

the mail,²⁴² as prohibited in § 3950. Judge Littleton emphasized that the plaintiffs' five route certificates were all awarded following an open competitive bidding process and well before the May 1930 conference.²⁴³ He disagreed that the plaintiffs schemed to protect their rates considering United Air possessed the only transcontinental airmail route and the Postmaster General insisted on two additional transcontinental lines operated by competitors, which was against the airline's financial interests.²⁴⁴

Although finding the airmail contracts are properly annulled, the court held that the plaintiffs were entitled to payment for delivering the mail from January through February 1934.²⁴⁵ Specifically, the court awarded Pacific Air Transport an amount of \$59,519.32 for unpaid services along Route 8; 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 5; and United Air Lines Transport Corp., as the successor to National Air Transport, Inc., an amount of \$66,748.80 for mail delivery along Route 17 and an additional \$51,782.01 for unpaid services along Route 3, totaling \$364,423.43 in damages.²⁴⁶ Likewise, the court rejected the Roosevelt administration's counterclaim request.²⁴⁷

Representative Clyde Kelly (R-Pa.) was unimpressed. Like Lindbergh, he criticized 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 . . ."²⁴⁸ Further dispelling any fraud allegations, thirty-one of the thirty-four canceled airmail contracts were awarded between 1925 and 1927 following a competitive bidding process that included three to nine interested parties per contract.²⁴⁹ The remaining three canceled contracts or certificates were awarded by "Postmaster General Brown to the lowest responsible bidder."²⁵⁰ Significantly, all five contracts at issue in the *Pacific Air* lawsuit were awarded following a competitive bidding process.²⁵¹

Considerable publicity preceded the Roosevelt decision to unilaterally annul all the airmail contracts. The highly public Senate hearings and investigations revealed shocking economic gains by some carriers and their

242. *Id.* at 794 (Littleton, J., concurring) (citing Rev. Stat. § 3950 (1872) (codified as amended at 39 U.S.C. § 6421 (repealed 1970))).

243. *Id.*

244. *Id.* at 795.

245. *See id.* at 790 (majority opinion).

246. *Id.* at 757, 790.

247. *Id.* at 793.

248. Berchtold, *supra* note 5, at 442.

249. *Id.* at 441.

250. *Id.*

251. *Pac. Air Transp.*, 98 Ct. Cl. at 768.

owners.²⁵² Among other disclosures surfacing in the Black proceedings, the executive of United benefited from an initial \$253 airline investment that increased to a value of \$35 million.²⁵³

With convenient timing and occurring just days before Roosevelt acted, Post Office Solicitor Karl Crowley issued a written opinion concluding that the government could cancel the contracts through any number of methods, including: (1) a Presidential Executive order,²⁵⁴ (2) a breach of contract action under McNary-Watres,²⁵⁵ (3) an order from the Postmaster General based on the federal statute preventing bid-conspiring,²⁵⁶ (4) an order from the Postmaster General upon a finding that the contracts are fraudulently awarded²⁵⁷ or, finally, (5) a postal regulation permitting the Postmaster General to cancel contracts when in the public interest.²⁵⁸ Although the Post Office Solicitor cited the Presidential Executive order as an acceptable method, he advised against pursuing this cause of action.²⁵⁹ Instead, he recommended nullification pursuant to the third, fourth, and fifth methods previously described.²⁶⁰

Ironically, the Post Office Solicitor cited the breach of contract alternative as a viable option but recommended against engaging the McNary-Watres statute as the preferred method to discontinue the contracts.²⁶¹ Specifically, the statute allowed the government to terminate any agreement if the carrier failed to observe any “rules, regulations, or orders.”²⁶² Conspiring to circumvent the bidding process and steer specific route certificates to specific air carriers arguably violated the Postal Service rules and regulations. Interestingly, Crowley confirmed this was a viable cause of action, but he still recommended against Roosevelt acting under this option.²⁶³

252. Berchtold, *supra* note 5, at 444.

253. BERG, *supra* note 3, at 291–92.

254. *Pac. Air Transp.*, 98 Ct. Cl. at 748 (citing Act of June 16, 1933, ch. 101, § 5, 48 Stat. 283, 305).

255. *Id.* (citing McNary-Watres Act, ch. 223, 46 Stat. 259 (1930)).

256. *Id.* (quoting 39 U.S.C. § 6421 (repealed 1970)).

257. *Id.*

258. *Id.* (citing U.S. POSTAL SERV., POSTAL LAWS AND REGULATIONS § 1846, at 679 (1932)).

259. *Id.*

260. *Id.*

261. *See id.*

262. *Id.* at 656 (quoting McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930)).

263. *See id.* at 748.

A. *President Roosevelt Moved to Annul Airmail Agreements Under § 3950, Alleging Competitive Bidding Violations*

In clear language, the McNary-Watres legislation authorized the Postmaster General to terminate an airmail agreement and outlined the grievance procedure.²⁶⁴ More specifically:

Such certificate may be canceled at any time for willful neglect on the part of the holder to carry out any rules, regulations, or orders made for his guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be canceled.²⁶⁵

Roosevelt and his administration ignored this cause of action available under McNary-Watres. Instead, Roosevelt moved to act under a statute conducive to his narrative of the Air Mail Affair. Section 3950 of the Revised Statutes of the United States 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 for five years, and for the second offense shall be forever disqualified.²⁶⁶

First, Roosevelt pointed to many deficiencies in Brown's methods. His administration alleged that the plaintiff air carriers violated the statute through corrupt, unlawful conduct by avoiding the competitive bidding process and steering Brown's newly created twelve airmail routes to certain airlines and effectively dividing the spoils among themselves.²⁶⁷ Specifically, Roosevelt contended that Brown circumvented the competitive bidding process when he awarded the transcontinental routes, assigning these lucrative routes to his preferred candidates.²⁶⁸ As an example, the administration was highly critical that Brown awarded the middle or central transcontinental route to the newly formed Transcontinental & Western Air, Inc. after

264. McNary-Watres Act, sec. 2, § 6, 46 Stat. at 260. Through much of the airmail legislation's history, Congress consistently included a grievance procedure following a contract termination. Prior to the McNary-Watres legislation requiring a forty-five day written notice requirement and opportunity to be heard, the Kelly Amendment specified a sixty-day written notice requirement and opportunity to be heard on any cancellation. Kelly Amendment, ch. 603, sec. 2, § 6, 45 Stat. 594, 594 (1928).

265. McNary-Watres Act, sec. 2, § 6, 46 Stat. at 260.

266. *Pac. Air Transp.*, 98 Ct. Cl. at 767 (citing Rev. Stat. § 3950 (1872) (codified as amended at 39 U.S.C. § 6421 (repealed 1970))).

267. *See id.*

268. *Id.* at 786.

Brown suggested this merger.²⁶⁹ Even more important to his critics, Brown disregarded a competitor’s lower bid.²⁷⁰

Second, Roosevelt asserted that Brown abused 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.²⁷¹ For example, Brown awarded a carrier with an extension route understanding that the same air carrier would later sublet the route to a different carrier meeting Brown’s approval.²⁷² In effect, this was awarding a route to the latter air carrier without competitive bidding.²⁷³

Third, the Roosevelt administration faulted 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 allowed this.²⁷⁴ Intent on changing this discretionary power, Roosevelt persuaded the heavily Democratic Congress in 1934 to eliminate the certificate conversion option and effectively terminate the ten-year contractual term.²⁷⁵

Finally, the Roosevelt administration also criticized the payment methods funding the operators and, likewise, it persuaded a subsequent Congress to eliminate Brown’s space-weight system and lower the fees to “[not] exceed 33¹/₃ cents per airplane-mile for transporting a mail load not [to exceed] three hundred pounds.”²⁷⁶

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

Between 1925 and 1927 and before Walter Brown’s arrival, the previous Postmaster General both advertised and competitively bid each proposed

269. *See id.* at 720. Transcontinental & Western Air, Inc. received the middle route, which was defined as New York to Los Angeles through St. Louis. *Id.* at 711, 716, 720.

270. *See id.* at 782–84.

271. *See id.* at 775–76.

272. *Id.* at 776–77.

273. *Id.* at 776.

274. *Id.* at 691 (quoting McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930)); Berchtold, *supra* note 5, at 439, 446.

275. Air Mail Act of 1934, ch. 466, § 3, 48 Stat. 933, 933–34; *see* Werrell, *supra* note 10, at 15.

276. Air Mail Act of 1934 § 3(a)–(c), 48 Stat. at 933–94; *Special Committee to Investigate Air Mail and Ocean Mail Contracts*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/MailContracts.htm> [<https://perma.cc/C5LB-QDJC>].

airmail route before ultimately awarding each of the five contracts involved in the lawsuit.²⁷⁷ Following his appointment as Postmaster General on March 5, 1929, Brown aimed to support commercial aviation²⁷⁸ by making the industry self-sufficient and less reliant on public subsidies.²⁷⁹ At this time, the passenger industry was struggling financially with many passenger routes mirroring the airmail routes.²⁸⁰ Similarly, he recognized the expense and inefficiency of the airmail system that developed over time into an “illogical” system of multiple routes with some routes created through political pressure.²⁸¹

In February 1930, Brown forwarded his recommendations to improve the system to Congress.²⁸² The new McNary-Watres legislation reflected some, but not all, of the Brown recommendations proposed in his bill H.R. 9500.²⁸³ Specifically, Brown recommended that the legislation maintain a competitive bidding clause but the Postmaster General should retain the flexibility to award certain airmail routes through negotiation when in the “public interest.”²⁸⁴ While he recognized competitive bidding was cost-effective, efficient, and preferable in almost all other governmental spending decisions, Brown believed that competitive bidding was a “myth” in the airmail business because only a “limited number of prospective responsible bidders” existed in the industry.²⁸⁵

To Brown, his proposal to award contracts through negotiation was critical to shielding the Postal Service from irresponsible bidders who were less experienced, possibly unsafe, and fiscally unsound.²⁸⁶ His attempt to balance the industry with a healthy representation of responsible and self-sufficient providers was also reflected in his frequently repeated decision first announced at the May 1930 conference to add two additional transcontinental routes “independently and competitively owned.”²⁸⁷ Under Brown’s approach, the additional east to west transcontinental routes made the transportation system more efficient by reaching more of the country. Then, he could consolidate or even eliminate some of the multiple, illogical shorter lines.²⁸⁸

277. *Pac. Air Transp.*, 98 Ct. Cl. at 768.

278. *Id.* at 684; *U.S. Postmasters General*, *supra* note 75.

279. *See* Berchtold, *supra* note 5, at 445–46; Werrell, *supra* note 10, at 15.

280. *Pac. Air Transp.*, 98 Ct. Cl. at 684, 772.

281. *Id.* at 684.

282. *Id.* at 685 (citing H.R. 9500, 71st Cong. (1930) (enacted)).

283. *See id.* at 695.

284. *See* H.R. 9500, § 4.

285. *Pac. Air Transp.*, 98 Ct. Cl. at 688.

286. *See* Godehn & Quindry, *supra* note 15, at 265, 269.

287. *Pac. Air Transp.*, 98 Ct. Cl. at 700, 708, 718.

288. *Id.* at 700.

Additionally, Brown’s proposed H.R. 9500 recommended that the Postmaster General make any route extensions or consolidations when in the public interest to do so.²⁸⁹ To promote passenger travel, he further recommended 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.²⁹⁰ By revising the payment system, the passenger airlines utilizing larger planes could transport the mail as well.²⁹¹

Ultimately, Congress passed the McNary-Watres legislation, which was later signed by President Hoover on April 29, 1930.²⁹² The new legislation denied Brown’s proposal to award contracts by negotiation and without advertising, in favor of the traditional approach embracing a competitive bidding process.²⁹³ However, the new legislation allowed the Postmaster General to make both route extensions and consolidations when in the public interest.²⁹⁴

1. Competitive Bidding

Brown intended to solve “some of the important airmail problems” by merging this service with the passenger travel industry to create “a national network of [airmail] and passenger service.”²⁹⁵ Brown attempted 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.²⁹⁶ He realized that some airmail routes were not only unprofitable and expensive, but others were created following congressional political pressure.²⁹⁷

Further, Brown recognized the value of the competitive bidding concept, but he also believed it restricted his ability to overcome some of the industry problems.²⁹⁸ For this reason, Brown advocated for the flexibility to negotiate with qualified air carriers without advertising and without

289. *Id.* at 686–87 (quoting H.R. 9500, § 6).

290. *See id.* at 690 (citing H.R. 9500, § 4).

291. *See* H.R. Res. 107, 85th Cong. (1957) (enacted).

292. McNary-Watres Act, ch. 223, 46 Stat. 259 (1930); *Pac. Air Transp.*, 98 Ct. Cl. at 690.

293. *See* McNary-Watres Act § 4, 46 Stat. at 259.

294. *Id.* at 259–60.

295. *Pac. Air Transp.*, 98 Ct. Cl. at 683, 700.

296. *See id.* at 684, 688, 770.

297. *See id.* at 683, 769–70.

298. *See id.* at 770.

competitive bidding because of the “limited number of prospective responsible bidders.”²⁹⁹

Despite Brown’s preference, competitive bidding remained statutorily required when Congress passed McNary-Watres in Spring 1930.³⁰⁰ However, this new legislation expanded the Postmaster General’s discretion over passenger travel, which was struggling financially.³⁰¹ Recognizing that many passenger routes mirrored the airmail routes, Brown aimed to expand passenger travel, improve efficiency, and reduce rates by combining services, specifically allowing mail carriers to transport passengers as well as the mail.³⁰²

By creating a comprehensive national passenger and airmail service, Brown attempted to grow the industry, expand competition, and enhance the quality of service.³⁰³ Much of Brown’s conduct involving the transcontinental routes revealed his motives, captured his concerns, and illuminated his intentions. Recognizing there were a “limited number” of capable carriers, Brown believed Aviation Corporation (Aviation) was the most responsible air carrier to operate the southern route between Atlanta, Georgia, and Los Angeles, California.³⁰⁴ The carrier fit Brown’s criteria as a strong, dependable operator, one of only a few qualified to manage this demanding route.³⁰⁵ Further, it was “separately owned” and competitively managed from the other candidates that operated or sought to operate another transcontinental passage.³⁰⁶ Additionally, Brown expected Aviation to distribute portions of the route to other qualified air carriers³⁰⁷ after considering “the pioneering rights,” a term reflecting an air carrier’s commitment and length of service to a region.³⁰⁸ Aviation did this. When it merged with Delta airlines in July 1930, Aviation agreed to subcontract an extension from either Atlanta, Georgia, or Birmingham, Alabama, to Dallas, Texas, to Delta, assuming Aviation received the southern transcontinental route.³⁰⁹

299. *Id.* at 688.

300. *Id.* at 771 (citing McNary-Watres Act, ch. 223, 46 Stat. 259 (1930)).

301. *Id.* at 697, 771–72.

302. *See id.* at 683–84, 771; Berchtold, *supra* note 5, at 438; Werrell, *supra* note 10, at 15.

303. *Pac. Air Transp.*, 98 Ct. Cl. at 770, 773; Werrell, *supra* note 10, at 15.

304. *See Pac. Air Transp.*, 98 Ct. Cl. at 688–89, 716–17.

305. *Id.* at 717.

306. *Id.* at 708, 717, 779.

307. *See id.* at 717.

308. *Id.* at 688. When expanding the passenger travel and airmail delivery system, Brown believed in pioneering rights or the equities developed by the carriers in their various regions. *Id.* at 688–89. Under this philosophy he deferred to the proven, qualified carriers who invested time and effort in a region, “created a good will” in commercial aviation, and helped “persuade[] people to fly.” *Id.* at 687–89, 772.

309. *Id.* at 717–18.

Demonstrating its commitment to this region, Delta was a longtime operator of airmail routes between Dallas, Texas, and Atlanta, Georgia.³¹⁰

When awarding the central or middle transcontinental route, Brown likewise sought a responsible provider, and he remained true to his philosophy, favoring pioneering rights.³¹¹ Following the spoils conference, Western Air Express and Transcontinental Air Transport were the two primary contenders expressing interest in the middle transcontinental route.³¹² Both provided a reliable, proven service to portions of this route between New York, New York, and Los Angeles, California.³¹³ However, Brown preferred that these two operators combine their resources to effectively operate the new route.³¹⁴ Later, these two carriers merged with Pittsburgh Aviation to form Transcontinental & Western Air, Inc. before the post office advertised for bids.³¹⁵

As critics pointed out, Brown awarded the contract to Transcontinental & Western Air over the lower bid tendered by W.A. Letson's United Avigation.³¹⁶ Letson formed United Avigation immediately prior to the advertisement for bids and even expressed his intention to dissolve the airline depending on the contract's outcome.³¹⁷ When learning about the competing bid, William McCracken of Transcontinental Air Transport suggested that the advertisement require that the bidder maintain at least six months of night flying experience delivering airmail.³¹⁸ Subsequently, the post office included this requirement in the advertisement soliciting bids for the middle transcontinental route.³¹⁹ Obviously, this requirement precluded United Avigation as a bidder because it was a newly formed carrier without any record of air service, but the newly merged Transcontinental

310. *Id.* at 709, 778.

311. *Id.* at 687–88.

312. *Id.* at 720.

313. *Id.* at 687, 709.

314. *Id.* at 720.

315. *Id.*

316. *Id.* at 784–85. United Avigation was a separate and distinct entity from both the United group, which already operated a transcontinental route, and Aviation Corporation, which was awarded Brown's southern transcontinental route. *Id.* at 717–18.

317. *Id.* at 780–81.

318. *Id.* at 781.

319. *Id.* at 781–82. Sometime later, the Acting Postmaster General Coleman asked the then-acting Attorney General John Lord O'Brian about the legality of the night flying requirement. *Id.* at 783. Subsequently, O'Brian advised Coleman that, in his opinion, this particular requirement was illegal. *Id.*

& Western Air was not excluded because Western Air had extensive experience flying the mail at night.³²⁰

Transcontinental & Western Air was “separately owned” and independently operated from the other two airlines operating the southern and northern transcontinental route, an important consideration to Brown.³²¹ Additionally, in Brown’s opinion the new corporation was “strong financially” and stable economically.³²² And prior to the merger, the two carriers provided a reliable service along the route between New York and Los Angeles,³²³ further satisfying Brown’s concern for pioneering rights.³²⁴

When insisting on two additional transcontinental routes that were separately owned and independently operated,³²⁵ Brown was expanding the market and generating economic opportunity while fostering a competitive environment. Arguably, he further improved the efficiency of the airmail system by adding two additional transcontinental routes and eliminating some of the multiple shorter lines. Brown’s decision was unpopular with some, including the *Pacific Air* plaintiffs. At this time, the United group operated the only existing transcontinental airmail route between New York and San Francisco³²⁶ and opposed Brown’s plan. Contrary to the allegation that he colluded with the plaintiffs, Brown’s action clearly opposed the United group’s interests.³²⁷

2. Route Extensions

Additionally, the new McNary-Watres legislation authorized the Postmaster General to make extensions or consolidations of routes when in “the public interest.”³²⁸ When awarding extensions and making route consolidations,

320. *Id.* at 780–84.

321. *Id.* at 700, 708, 779.

322. *Id.* at 779.

323. Prior to their merger, Transcontinental Air Transport operated an air passenger service over this same route between New York and Los Angeles. *Id.* Similarly, Western Air operated a passenger service between Kansas City and Los Angeles. *Id.*

324. *Id.* at 687.

325. *Id.* at 707–08; see Werrell, *supra* note 10, at 15.

326. *Pac. Air Transp.*, 98 Ct. Cl. at 707. At this time, the United group, the United system, or United Aircraft and Transport Corporation was the strongest aviation entity in the country. *Id.* National Air Transport operated the eastern half of the transcontinental route between New York and Chicago, and Boeing Air Transport system operated the western half of the route between Chicago and San Francisco. *Id.* The United system also included Pacific Air Transport, and later, in August 1930, it acquired Varney Lines, Inc. as well. *Id.*

327. See *id.* at 707–08. While recognizing the additional transcontinental routes would impact their business, the United group further realized that Brown was intent on expanding routes to create a national network. *Id.*

328. McNary-Watres Act, ch. 223, sec. 3, § 7, 46 Stat. 259, 260 (1930).

Brown could correct the illogical growth of the airmail map.³²⁹ He believed that this legislative language, which he interpreted broadly, allowed him to designate a carrier for a specific route without competitive bidding.³³⁰

When Brown convened what critics later called the spoils conference,³³¹ he assembled the air operators, asked them to recommend specific carriers for specific proposed routes, and they provided him their recommendations.³³² Although Brown believed the legislation allowed the Postmaster General to extend routes from existing lines without competitive bidding and when in the public interest, he did not act prematurely. Instead, he sought advice from the Comptroller General, who ultimately approved one proposed route extension and disapproved another.³³³ When responding to Brown’s proposal to expand air service, the Comptroller General did not discourage this practice, offering even tacit approval.³³⁴ More specifically, or vaguely, he opined:

No hard and fast rule may be laid down in advance for the determination of the question whether a proposed extension of an air-mail 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 so extended, and such subordinate relationship to the existing route as to be merely an extension thereof rather than a major addition thereto.³³⁵

The *Pacific Air* court noted that Brown awarded only two route extensions affecting the plaintiffs.³³⁶ Initially, the court did not fault his decision to extend Pacific Air Transport’s route by 120 miles, or the distance between Los Angeles, California, and San Diego, California, considering the air carrier already operated the 1141-mile route between Seattle, Washington, and Los Angeles, California, known as Route 8.³³⁷ According to the court, the second route extension was problematic, reflected decision-making

329. See *Pac. Air Transp.*, 98 Ct. Cl. at 684.

330. *Id.* at 699, 775.

331. See, e.g., Barkowski, *supra* note 13, at 255.

332. *Pac. Air Transp.*, 98 Ct. Cl. at 701–03.

333. *Id.* at 777.

334. See *id.* at 714.

335. *Id.*

336. *Id.* at 730.

337. *Id.*

contrary to the statute, and undermined competitive bidding.³³⁸ Specifically, Brown asked Boeing Air Transport to operate a 259-mile extension between Omaha, Nebraska, and Watertown, South Dakota, that extended from Route 18.³³⁹ Ironically, Boeing Air Transport did not request this extension because it viewed this specific route as unprofitable.³⁴⁰ Ultimately, plaintiff acceded to the Postmaster General's request with the understanding that Brown would later designate another operator to sublet this specific route extension.³⁴¹ Brown never designated another air carrier to operate or sublease the Omaha and Watertown extension and, as Boeing Air Transport feared, it operated this route extension at a financial loss until the entire route was canceled in February 1934.³⁴²

Although Boeing Air Transport accepted this extension when it was "detrimental to [its] interests,"³⁴³ the court criticized Brown for failing to advertise and open this route to competitive bidding as well as cited this specific example as reason for annulling the contracts.³⁴⁴ Again, the court failed to appreciate Brown's collective considerations. There were a limited number of responsible, competitive operators pursuing any given route, including this extension between Omaha and Watertown.³⁴⁵ Specifically, Brown expressed concerns about the "lack of experience or doubtful financial responsibility" of the other two or three carriers interested in this route.³⁴⁶

3. *Airmail Contract Converted into Route Certificate*

Similar to previous legislation, the McNary-Watres Act allowed the Postmaster General to convert an airmail contract into a long-term route certificate when finding it was in the "public interest."³⁴⁷ Pursuant to the statute, the Postmaster General could issue a route certificate to a carrier in exchange for the airmail contract, assuming the carrier provided a satisfactory service for a minimum of two years.³⁴⁸ Like a contract extension, the route certificate could not exceed ten years from the date of the original

338. *Id.* at 789.

339. *Id.* at 730, 789. Omaha was an intermediary stop along Route 18, or the 1931-mile distance between Chicago and San Francisco. *Id.* at 730.

340. *Id.* at 730, 789.

341. *Id.* at 789.

342. *Id.* at 731, 789, 795.

343. *Id.* at 795. In his concurring opinion, Judge Littleton cited Boeing's objection to the extension for financial reasons as evidence of disproving that the carrier engaged in any fraud, conspiracy, or illegal acts. *Id.* at 794-95 (Littleton, J., concurring).

344. *Id.* at 789 (majority opinion).

345. *Id.* at 688, 730.

346. *Id.* at 730.

347. McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930).

348. *Id.* at 259-260.

airmail contract.³⁴⁹ In consideration for a route certificate, the holder delivered a performance bond to the Postal Service as a form of security.³⁵⁰

As Lindbergh advocated, the lengthier certificates complemented the airlines’ ability to make sound fiscal decisions, affecting both equipment upgrades and aircraft safety.³⁵¹ Congress first recognized the necessity of awarding air certificates for lengthier time periods when it passed the Kelly Amendment in 1928.³⁵² The House committee report explained 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.”³⁵³ Before exchanging a carrier’s airmail contract for a route certificate, the carrier needed to prove it could provide a dependable service for a given time period.³⁵⁴

Similarly, the McNary-Watres Congress also embraced this philosophy and recognized this unique industry required time to implement the substantial investment decisions affecting the capital, property, and equipment necessary for undertaking mail and passenger travel.³⁵⁵ Following the recently approved legislation, Brown exercised this option with all the plaintiff airlines at various times between May and October 1930, upgrading all five contracts to route certificates due to expire well after February 19, 1934.³⁵⁶ Complying with the statutory language, the plaintiffs provided the Postmaster General with proper surety.³⁵⁷ The 1930 Congress recognized and, as Brown understood, the airlines invested considerably in everything from airplanes to ground facilities, and these same carriers made significant, long-term expenditures and therefore relied on lengthier route certificates to maintain economic viability.³⁵⁸

As the technology evolved during this time period, airlines were constantly replacing equipment while faced with twin economic and safety concerns.³⁵⁹

349. *Id.*

350. *See id.*

351. *See Pac. Air Transp.*, 98 Ct. Cl. at 743.

352. *Id.* at 679–80 (citing Kelly Amendment, ch. 603, sec. 2, § 6, 45 Stat. 594, 594 (1928)).

353. Kelly Amendment, 45 Stat. at 2.

354. *Id.*

355. McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 259–260 (1930).

356. *Pac. Air Transp.*, 98 Ct. Cl. at 655, 664, 670, 673, 675.

357. *Id.* at 656, 665, 670–71, 673, 676.

358. *See id.* at 743.

359. *See id.* at 742.

For example, Pacific Air Transport utilized single-engine airplanes when transporting the mail along the west coast in 1926, but it upgraded its inventory and purchased three Fokker and six Ford trimotor airplanes in 1931.³⁶⁰ The trimotor airplanes were rapidly outdated and promptly replaced.³⁶¹ By 1933, Pacific Air Transport purchased dual-motor Boeing airplanes functioning with greater speed and efficiency.³⁶² Faced with similar economic considerations, technological advances, and safety concerns, the remaining two plaintiffs made similar decisions over the same time period.³⁶³ As the parties facing these costly expenditures argued, sooner or later equipment became obsolete making “long-term contracts imperative.”³⁶⁴

Extending the airmail contracts into certificates following two years of proven service³⁶⁵ was beneficial and advantageous for both sides. The Postal Service and its customers benefited from a lengthier contractual term because it ensured dependable service following two years of proven performance. Similarly, the carriers could rely on a steady income source over a lengthy time period, which was necessary for long term planning. To perform efficiently, effectively, and safely, operators must adjust to the evolving technology, and this time in history was not an exception, as all three plaintiff air carriers replaced their trimotor airplanes with dual-motor airplanes between 1931 and 1933.³⁶⁶

Significantly, other countries embraced the lengthier contractual period, revealing the standard industry practice.³⁶⁷ Recognizing the value of lengthier contracts, European countries typically awarded air carriers with contracts for a minimum of ten and up to twenty-five years to ensure effective long-term planning.³⁶⁸

4. *Payment Schedule*

Also pursuant to the McNary-Watres legislation, Congress adopted Brown’s suggestion by restructuring the payment schedule.³⁶⁹ Brown believed the previous rate per pound was costly, unjust, and invited questionable billing methods.³⁷⁰ Instead of compensating carriers based on the amount of the

360. *Id.*

361. *Id.*

362. *Id.*

363. *See id.*

364. Berchtold, *supra* note 5, at 439.

365. *See* McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930).

366. *Pac. Air Transp.*, 98 Ct. Cl. at 742.

367. *See generally* Berchtold, *supra* note 5, at 439.

368. *Id.*

369. *Pac. Air Transp.*, 98 Ct. Cl. at 690–91 (quoting McNary-Watres Act § 4, 46 Stat. at 259).

370. *See id.* at 683.

mail weight, Brown proposed a payment system based on the amount of the available transport space, which provided carriers the versatility to transport both passengers and the mail.³⁷¹ Subsequently, the Black committee heavily criticized Brown’s payment system and the subsidies received by the airmail carriers.³⁷²

In 1934, the collective cost to operate the domestic air transportation system was approximately \$25 million.³⁷³ Passenger revenues generated approximately \$10 million and Congress allocated approximately \$14 million in airmail subsidies, leaving the air carriers to absorb a \$1 million deficit.³⁷⁴ In this same year, however, the government generated an additional \$9 million in revenue from selling airmail stamps to the public, resulting in a reduced \$5 million subsidy.³⁷⁵ Although receiving intense public attention in the Black commission proceedings, this \$5 million subsidy was significantly less than the hundreds of millions of dollars in subsidies awarded to other commercial industries in 1934, according to William Berchtold, the Associated Press aviation editor at the time.³⁷⁶

Both the Black commission and the Roosevelt administration failed to recognize congressional intentions involving the payment schedule, according to Berchtold.³⁷⁷ This legislation did not strive to create a cheaper airmail service—although this was the outcome—this legislation was “deliberately designed to build up an air transport system of financially sound and experienced companies which would . . . become self-supporting.”³⁷⁸ Although criticized, the revised “weight-space” payment system allowed the Postmaster General the flexibility to “cut down” the rate of payments when necessary.³⁷⁹ More than justifying Congress’s decision to implement a weight-space payment, Brown utilized this function over his tenure, and the cost of airmail declined from \$1.09 per mile in 1929 to just \$0.38 per mile in 1933.³⁸⁰

371. *Id.* at 769.

372. Berchtold, *supra* note 5, at 441.

373. *Id.* at 442.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.* at 441 (“Representative James M. Mead and Representative Clyde Kelly of the House Committee on Post Offices and Post Roads made elaborate studies on this subject long before the Black committee heard its first witness, but apparently economics have been overthrown for political expediency.”).

378. *Id.* at 445.

379. *Id.* at 441, 445.

380. *Id.* at 445.

VI. THE SEPARATION OF POWERS ARGUMENT

The U.S. Court of Claims decided *Pacific Air* on December 7, 1942, several years after the Air Mail Affair concluded.³⁸¹ The court held that former Postmaster James Farley was justified when annulling the plaintiffs' five route certificates and that his action did not amount to a breach of contract violation; however, the plaintiff airlines were entitled to payment for the airmail services provided during January and February 1934.³⁸² Finally, the court held that the defendant was not entitled to recover on its counterclaim.³⁸³

Originally, plaintiff airlines represented three separate corporations but later merged into one air transportation entity, the United group.³⁸⁴ The three different air carriers collectively possessed five different route certificates when the Roosevelt administration terminated commercial mail delivery.³⁸⁵ More specifically, Pacific Air Transport had an airmail certificate to fly the mail on Route 8 between Seattle, Washington, and San Diego, California.³⁸⁶ Boeing Air Transport had a certificate for mail delivery for both Route 18 between Chicago, Illinois, and San Francisco, California, and Route 5 between Salt Lake City, Utah, and Seattle, Washington.³⁸⁷ Likewise, National Air Transport, Inc., had two certificates: Route 17 between New York, New York, and Chicago, Illinois, and Route 3 between Chicago, Illinois, and Dallas, Texas.³⁸⁸

Although this argument is not addressed by the court, President Roosevelt undoubtedly violated the separation of powers doctrine when he invalidated the route certificates.³⁸⁹ Congressional authority over the Postal Service is constitutionally enshrined.³⁹⁰ Specifically, the Constitution empowers Congress "To establish Post Offices and post Roads,"³⁹¹ and the courts concluded, ". . . handling of the mails is a function of sovereignty conferred directly by the Constitution."³⁹² Further, the Supreme Court held that this specific, enumerated congressional power included designating mail routes, identifying the physical locations of post offices as well as "all measures

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

382. *Id.* at 793.

383. *Id.*

384. *Id.* at 765.

385. *Id.*

386. *Id.* at 765–66.

387. *Id.* at 766.

388. *Id.*

389. *See generally* U.S. CONST. art. I, § 8, cl. 7.

390. *Id.*

391. *Id.*

392. *E.g.*, *Boeing Air Transp., Inc. v. Farley*, 75 F.2d 765, 768 (D.C. Cir. 1935); *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 381 (1819).

necessary to secure [the mail’s] safe and speedy transit, and the prompt delivery of its contents.”³⁹³

Of course, Congress delegated much of this responsibility to the Postmaster General.³⁹⁴ Beginning with the Act of 1825, Congress authorized the Postmaster General to “establish post-offices, and appoint postmasters, at all such places, as shall appear to him expedient.”³⁹⁵ The court held that through legislation, Congress conferred to the Postmaster General the power to terminate a subordinate postmaster by eliminating a specific post office.³⁹⁶ Even after deferring some duties to the Postmaster General, Congress continued to exert its authority over the Postal Service by enacting legislation, defining what may be delivered, attributing weight specifications, and even setting the price.³⁹⁷ Significantly, courts consistently recognized that “[t]he power possessed by Congress embraces the regulation of the entire postal system of the country.”³⁹⁸

At the time the Air Mail Affair was unfolding, the Supreme Court consistently rejected Roosevelt’s attempts to usurp congressional powers. Following Roosevelt’s decision to terminate the commercial air contracts and well before the U.S. Court of Claims upheld this executive action, the Supreme Court invalidated different pieces of legislation that impermissibly transferred legislative powers to different executive agencies.³⁹⁹ In a 1935 decision, *Panama Refining Co. v. Ryan*, the Court invalidated a portion of the National Industrial Recovery Act because it incorrectly delegated a legislative function to the executive branch.⁴⁰⁰ When entering his Executive order that regulated the oil industry, Roosevelt cited § 9(c) of the legislation, which authorized the President to prohibit the transportation of petroleum products produced in excess of any state law or regulation.⁴⁰¹ His Executive order directed the Secretary of the Interior to create agencies, establish boards, and appoint agents to oversee the oil industry based on

393. *Ex parte Jackson*, 96 U.S. 727, 732 (1877).

394. *See generally* *Ware v. United States*, 71 U.S. (4 Wall.) 617, 631–32 (1867).

395. Act of Mar. 3, 1825, ch. 64, § 1, 4 Stat. 102, 102.

396. *Ware*, 71 U.S. (4 Wall.) at 633–34.

397. *Ex parte Jackson*, 96 U.S. at 732.

398. *Id.*

399. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

400. *Pan. Ref. Co.*, 293 U.S. at 430–32.

401. *Id.* at 406–07 (quoting National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195, 200 (1933) (repealed 1966)).

Congress delegating this authority to the President.⁴⁰² The Supreme Court found § 9(c) unconstitutional because Congress impermissibly transferred its law-making function to the executive branch.⁴⁰³ While finding that the U.S. Constitution did not deny Congress the flexibility to address complex issues through legislation, the Supreme Court further held that “Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”⁴⁰⁴

Likewise, in *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court again invalidated federal legislation as an impermissible delegation of responsibility from Congress to the President.⁴⁰⁵ Under the National Industrial Recovery Act, Congress authorized the President to create a code protecting consumers, competitors, and employees as well as further the public interest while eliminating “unfair competitive practices.”⁴⁰⁶ However, the Court partly invalidated 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.”⁴⁰⁷

Deciding *Schechter* the same year as rendering *Panama Refining Co. v. Ryan* and during the height of the Great Depression, the Court further held that the dire economic conditions neither enhanced constitutional powers nor negated the congressional authority to make all laws, which shall be necessary and proper for implementing its power.⁴⁰⁸ “The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”⁴⁰⁹ The very next year in 1936 the Court invalidated the Guffey Coal Act because it again improperly delegated legislative power to the executive branch in *Carter v. Carter Coal Co.*⁴¹⁰

402. *Id.* (quoting Exec. Order No. 6204: Power Given to the Secretary of the Interior to Enforce the Preceding Order, 2 PUB. PAPERS 282 (July 14, 1933)).

403. *Id.* at 430.

404. *Id.* at 421.

405. 295 U.S. 495, 541–42 (1935).

406. *Id.* at 534 (citing National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196 (1933) (repealed 1966)).

407. *Id.* at 537.

408. *Id.* at 528–29; see U.S. CONST. art. I, § 8, cl.18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution . . .”).

409. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 529.

410. 298 U.S. 238, 238, 311 (1936). *Panama Refining Co. v. Ryan*, *A.L.A. Schechter Poultry Corp. v. United States*, and *Carter v. Carter Coal Co.* triggered one of the most significant events in Supreme Court history. After the Supreme Court invalidated much of his New Deal legislation in these holdings, Roosevelt appealed to the people and introduced his plan to pack the Court in a March 9, 1937, radio broadcast. O’BRIEN, *supra* note 113, at 62. Among other judicial reforms, Roosevelt advocated to increase the number of justices from nine to fifteen. *Id.* When any federal judge or Supreme Court Justice reached age seventy but chose to forgo retirement, then another jurist would be appointed under the

Perhaps the case from this time period most factually similar to the Air Mail Affair is *United States v. Pan-American Petroleum Co.*⁴¹¹ Decided by a federal district court in California in 1925, this case presented both comparable facts and a similar legal issue.⁴¹² The court found that Secretary of the Interior Albert Fall initially solicited, and then utilized, a Presidential Executive order to fraudulently award leases and contracts to defendant Pan-America Petroleum Company in the U.S. Naval Petroleum Reserve without observing a competitive bidding process.⁴¹³ The court invalidated these leases and contracts because Fall negotiated these agreements for personal benefit and because Congress did not vest any specific power in the President to develop the naval reserve lands.⁴¹⁴

Between April and December 1922, the parties entered a series of agreements where defendant constructed storage facilities at Pearl Harbor and exchanged the crude oil located in the naval reserves in California for oil stored at the Pearl Harbor location.⁴¹⁵ In *Pacific Air*, the government alleged the airlines violated a federal statute by conspiring to prevent others from bidding on government contracts.⁴¹⁶ Similarly, in *Pan-American Petroleum Co.*, the government accused the defendant of engaging in fraudulent conduct.⁴¹⁷ Ultimately, the court agreed with the fraud allegation, finding that Secretary Fall negotiated the agreements in bad faith after compelling evidence surfaced that defendant’s executive director Edward Doheny gave Fall a \$100,000 payment.⁴¹⁸

Roosevelt plan. *Id.* at 65. Later that same spring, the Senate defeated Roosevelt’s court-packing legislation but only after one of the court’s more centrist Justices changed course and began voting to validate New Deal legislation. *See id.* at 128. Legal analysts referred 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. *Id.* at 62. Between 1937 and 1943, Roosevelt enjoyed the opportunity to appoint eight justices, including the outspoken Brown critic, Senator Hugo Black. *Id.* at 1041.

411. 6 F.2d 43 (S.D. Cal. 1925), *aff’d in part and rev’d in part*, 9 F.2d 761 (9th Cir. 1926), *aff’d*, 273 U.S. 456 (1927).

412. *See id.* at 43, 53, 80.

413. *Id.* at 53, 80–81, 88.

414. *Id.* at 56, 80–81.

415. *Id.* at 48.

416. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 767 (1942) (quoting Rev. Stat. § 3950 (1872) (codified as amended at 39 U.S.C. § 6421 (repealed 1970))).

417. *Pan-Am. Petrol.*, 6 F.2d at 50.

418. *Id.* at 65, 80–81.

Evidence of fraud is not the only reason the court invalidated the Pan-American contracts and leases.⁴¹⁹ Unlike *Pacific Air*, the court identified the separation of powers problem and concluded there was an improper transfer of power.⁴²⁰ More specifically, the court held that the President lacked the legal authority to transfer a power delegated by Congress from one cabinet member to another.⁴²¹ When facilitating his effort to steer the contract or leases to Pan-American Petroleum Co., Fall persuaded President Harding to sign an Executive order designating the Secretary of the Interior as administrator to the naval reserve instead of the Secretary of the Navy.⁴²² Fall used the Harding Executive order as authorization to negotiate with parties and to enter into contracts and leases involving the naval petroleum reserves.⁴²³ However, the Harding Executive order conflicted with legislation designating the Secretary of the Navy as administrator to the naval reserves.⁴²⁴

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.”⁴²⁵ When Harding signed his Executive order designating another cabinet official as occupying administrative responsibility for the naval reserves, he illegally transferred a power delegated to the Secretary of the Navy by Congress.⁴²⁶ In short, an Executive order cannot reverse congressional action rooted in constitutional authority.⁴²⁷

[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 officer exclusively. No branch of the government but Congress can divest or transfer the power so delegated.⁴²⁸

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 chose to ignore.⁴²⁹ The factual circumstances closely resemble the events unfolding in the Air Mail Affair. The *Pan-American Petroleum* court was confronted with the constitutionality of an Executive order that

419. *See id.* at 88.

420. *Id.* at 87.

421. *Id.*

422. *Id.* at 50.

423. *See id.* at 52.

424. *Id.* at 87.

425. U.S. CONST. art. I, § 8, cl. 13.

426. *Pan-Am. Petrol.*, 6 F.2d at 87–88.

427. *Id.* at 87.

428. *Id.*

429. *See generally* *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649 (1942).

transferred administrative responsibility between executive departments when it conflicted with the congressional delegation of power.⁴³⁰

Similarly, Roosevelt entered an Executive order directing both the departments of war and commerce to assist the Postmaster General with mail delivery on February 9, 1934.⁴³¹ Roosevelt did so when the Constitution delegated the postal duty to Congress and without congressional legislation authorizing his Presidential interference.⁴³² Admittedly, Congress passed legislation authorizing the President to direct the U.S. Department of War to assist with mail delivery, but this was several weeks later and well after Roosevelt acted.⁴³³ With such a similar factual scenario, plaintiff airlines enjoyed a powerful separation of powers argument after considering the *Pan-American Petroleum* holding.⁴³⁴

Applying both the Constitution and relevant case law,⁴³⁵ the *Pacific Air* court could have reasonably found that Roosevelt violated separation of powers when he entered and signed Executive Order 6591.⁴³⁶ Significantly, he instructed both the Secretary of Commerce and the Secretary of War to assist the Postmaster General with the airmail delivery.⁴³⁷ Specifically, the President ordered 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.”⁴³⁸

First, Roosevelt was arguably assuming authority over powers delegated to Congress by the Constitution.⁴³⁹ Just as the Constitution assigned to Congress the postal power, it likewise delegated to Congress the power to “declare War” as well as to “make Rules for the Government and Regulation of the land and naval Forces.”⁴⁴⁰ Admittedly, Congress delegated some

430. *Pan-Am. Petrol.*, 6 F.2d at 87.

431. Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934).

432. U.S. CONST. art. I, § 8, cl. 7.

433. *See generally* Act of Mar. 27, 1934, ch. 100, § 1, 48 Stat. 508, 508.

434. *See Pan-Am. Petrol.*, 6 F.2d at 88.

435. *See generally, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537, 550 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *Pan-Am. Petrol.*, 6 F.2d at 87.

436. *See* Exec. Order No. 6591, 3 PUB. PAPERS at 93.

437. *Id.*

438. *Id.*

439. *See* U.S. CONST. art. I, § 8, cls. 7, 13.

440. *Id.* at cls. 11, 14.

authority to a Secretary of War,⁴⁴¹ just as it vested certain responsibilities in the Postmaster General and a Secretary of the Navy.⁴⁴²

However, canceling the airmail contracts was Roosevelt's decision, not the Postmaster General's decision.⁴⁴³ By doing so, he was usurping the postal power. The timing is critical. On February 9, 1934, Farley signed Post Office Department Order No. 4959, officially terminating the multiple airmail contracts and certificates effective February 19, 1934, further prohibiting the affected carriers from transporting the mail.⁴⁴⁴ However, Farley signed his order on the same day that Roosevelt entered his Executive order and immediately after he participated in a conference at the White House.⁴⁴⁵

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 acknowledged that the airmail contracts are invalidated.⁴⁴⁶ Later in the same order, he directed other departments to both assist and provide specific, multiple resources to aid Postmaster General Farley with mail delivery.⁴⁴⁷ Roosevelt's actions were even more telling. Significantly, Roosevelt selected February 19 as the air carrier's final day for transporting the mail.⁴⁴⁸ He did so after consulting staff and even overruling the Postmaster General, who requested postponing this event until early June.⁴⁴⁹

It is almost universally recognized that Roosevelt canceled the airmail contracts. A plethora of sources identify Roosevelt, not the Postmaster General, as steering this action, with Roosevelt directing Farley to terminate the relationship with the airlines and further corroborating the reality that the President replaced the Postmaster General's decision-making with his own.⁴⁵⁰ Even at the time, this was the public perception. The day following the fateful decision, *The Washington Post* read: "Charging fraud and collusion, President Roosevelt yesterday directed the cancellation of all air mail

441. Act of Sept. 19, 1890, ch. 907, § 12, 26 Stat. 426, 455; *Phila. Co. v. Stimson*, 223 U.S. 605, 615 (1912).

442. See *United States v. Pan-Am. Petrol. Co.*, 6 F.2d 43, 88 (S.D. Cal. 1925), *aff'd in part and rev'd in part*, 9 F.2d 761 (9th Cir. 1926), *aff'd*, 273 U.S. 456 (1927).

443. Exec. Order No. 6591: *The Army Temporarily Flies the Mail*, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934).

444. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 743-45 (1942).

445. Berchtold, *supra* note 5, at 443.

446. Exec. Order No. 6591, 3 PUB. PAPERS at 93.

447. *Id.*

448. See Werrell, *supra* note 10, at 16.

449. BLACK, *supra* note 11, at 321; Werrell, *supra* note 10, at 15.

450. See, e.g., BLACK, *supra* note 11, at 321; Ravich, *supra* note 20, at 7; Rubin, *supra* note 6, at 571; Shiner, *supra* note 122, at 83; Werrell, *supra* note 10, at 14; Mathieson, *supra* note 124, at 1020 n.18.

contracts with domestic companies—thus reshaping, if not collapsing, the Nation’s network of private transport concerns.”⁴⁵¹ Although the agreements were negotiated and entered between the carriers and the Postmaster General, Roosevelt inserted himself and directed the contract termination.

Second, the court could understandably find that Roosevelt violated separation of powers when he transferred responsibility from one executive department to another.⁴⁵² The President can transfer responsibilities among various cabinet departments.⁴⁵³ However, even in “peace time” the President cannot transfer powers among cabinet members contrary to a specific congressional designation.⁴⁵⁴ In other words, Congress delegated the Postmaster General, not the Secretary of War, as responsible for the postal duty.⁴⁵⁵

In *Pan-American Petroleum*, the court invalidated the contractual agreement because the Harding Executive order transferred authority over the petroleum reserves from the Secretary of the Navy to the Secretary of the Interior, which directly conflicted with congressional legislation making the Secretary of the Navy responsible for this task.⁴⁵⁶ Similarly, Roosevelt transferred, or at the minimum assigned, some amount of mail responsibility to both the Secretary of War and Secretary of Commerce without congressional authorization.⁴⁵⁷ Admittedly, Congress later approved this action involving the Secretary of the War, but much after the fact.⁴⁵⁸ Perhaps recognizing Roosevelt exceeded his constitutional mandate, the Democratic Congress moved to protect his overreach.⁴⁵⁹ Using language virtually mirroring Roosevelt’s previous Executive order, Congress authorized 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 canceled the contracts.⁴⁶⁰ Also, applying the reasoning of *Pan-American Petroleum*,

451. Dure, *supra* note 125, at A1.

452. See *United States v. Pan-Am. Petrol. Co.*, 6 F.2d 43, 87 (S.D. Cal. 1925), *aff’d in part and rev’d in part*, 9 F.2d 761 (9th Cir. 1926), *aff’d*, 273 U.S. 456 (1927).

453. *Id.*

454. *Id.*

455. See *id.*

456. *Id.* at 87–88.

457. See Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934).

458. See Act of Mar. 27, 1934, ch. 100, § 1, 48 Stat. 508, 508.

459. See *id.*

460. *Id.*; Exec. Order No. 6591, 3 PUB. PAPERS at 93.

Roosevelt's decision to transfer the constitutionally enshrined mail power to other departments—even with the benefit of congressional approval—was unconstitutional.⁴⁶¹

Third, Roosevelt acted contrary to congressional intent when considering the existing legislation. The McNary-Watres Act directed the Postmaster General to act when and if a carrier violated the contractual relationship, excluding any need for Presidential involvement.⁴⁶² The statute clarified the termination procedure, if the Postmaster General chose to act.⁴⁶³ The statutory language is telling and specific.⁴⁶⁴ The statute outlined the cancellation procedures but, more importantly, emphasized that the Postmaster General must act to nullify the contract.⁴⁶⁵ Instead, Roosevelt made the decision, acting contrary to the Constitution and congressional intent.⁴⁶⁶

Fourth, the *Pacific Air* court could also find that Roosevelt usurped congressional authority because he seized 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 these specific duties.⁴⁶⁷ Arguably, the Court elevated the importance of a power specified in the Constitution and emphasized the significance. Specifically, “[w]hen the power to establish post-offices and post-roads [is] surrendered to the Congress it [is] as a complete power, and the grant carrie(s) with it the right to exercise all powers.”⁴⁶⁸

Undoubtedly, Roosevelt justified his aggressive action as a necessary response to the dire economic conditions. At this point in history, the country was 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 considered his strong executive leadership as the cure to rectifying what he viewed as the infectious greed of the private sector that was undoubtedly contributing to the ills of the country. Not so, said the Court in a 1935 decision.⁴⁶⁹ Dire economic conditions do not expand constitutional powers.⁴⁷⁰

461. See *Pan-Am. Petrol.*, 6 F.2d at 88.

462. McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 259–60 (1930).

463. See *id.* at 260.

464. See *id.* at 259–60.

465. *Id.* at 260.

466. See Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934).

467. See, e.g., *In re Rapier*, 143 U.S. 110, 134 (1892).

468. *Id.*

469. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

470. See *id.* at 528.

A.L.A. Schechter Poultry Corp. v. United States was one of the critical cases striking down executive action from this time period,⁴⁷¹ providing compelling arguments about the dangers of executive overreach. The Court was 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 invited increasing levels of Presidential power.⁴⁷² The Court rejected 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.⁴⁷³

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 rejected executive overreach, as well as exposed examples of the executive branch encroaching on the terrain of the legislature.⁴⁷⁴ In fact, *A.L.A. Schechter Poultry Corp.* reasserted 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*.⁴⁷⁵ 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 establishing the role of the judiciary as an equal branch of government.⁴⁷⁶

471. *See id.* at 551.

472. *Id.* at 528.

473. *Id.* at 528–29 (footnote omitted).

474. *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (Hughes, J., concurring); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

475. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 528–29; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803).

476. *Marbury*, 5 U.S. (1 Cranch) at 173, 176–77, 179.

Authored by Chief Justice John Marshall,⁴⁷⁷ *Marbury v. Madison* defined the roles of the courts and asserted the judicial obligation to review governmental action.⁴⁷⁸ More specifically, Chief Justice Marshall wrote:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution 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?⁴⁷⁹

VII. THE DUE PROCESS ARGUMENT

Arguably the Roosevelt administration was premature, shortsighted, and inequitable when moving to annul the contracts under § 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 was more compelling, straightforward, and direct: the President and the government violated due process of law, specifically “condemn[ed] . . . commercial aviation without just trial . . . [and without] the opportunity of a hearing.”⁴⁸⁰

On that same day President Roosevelt entered his Executive order directing the Army to fly the mail, Postmaster General Farley entered Post Office Department Order No. 4959, terminating multiple airmail contracts effective February 19, 1934.⁴⁸¹ As justification, the administration cited § 3950, which prevented the federal government from contracting with any entity conspiring to “prevent the making of any bid for carrying the mail,” thus

477. Besides writing this landmark opinion, Chief Justice John Marshall was uniquely involved in the factual circumstances surrounding this case. See GERALD GUNTHER, CONSTITUTIONAL LAW 10 (David L. Shapiro et al. eds., 12th ed. 1991). As President John Adams’s Secretary of State, John Marshall signed and sealed the judicial commission belonging to William Marbury, the lead plaintiff in *Marbury v. Madison*. *Id.* On February 27, 1801, or less than a week before then-President John Adams concluded his presidency and President Thomas Jefferson began his term, Congress passed legislation authorizing the President to appoint justices of the peace in the District of Columbia. *Id.* Accordingly, Adams appointed Marbury on March 2 with his nomination subsequently approved by the Senate the following day. *Id.* However, the judicial commission was not delivered to Marbury before newly elected President Thomas Jefferson and his new secretary of state, James Madison, assumed office on March 4. *Id.* Considering their affiliation with the rival political party, Jefferson and Madison refused to honor the Marbury appointment along with others. *Id.* Interestingly enough, Marshall’s brother, James Marshall, was responsible for delivering the commissions, but unsuccessfully dispatched all of them due to the volume of late appointments in the final hours of the Adams administration. *Id.* at 10–11.

478. *Marbury*, 5 U.S. (1 Cranch) at 177–78.

479. *Id.* at 176.

480. Libby, *supra* note 18, at 45.

481. *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 744 (1942).

negating the necessity of notice and hearing.⁴⁸² Although previous legislation and even the airmail contracts required notice and an opportunity to respond, the Roosevelt administration hoped to dodge due process guarantees when acting under § 3950.⁴⁸³ Additionally, Farley sent a telegram directly to the affected airlines confirming the cancellation and again cited § 3950 as reason for terminating the airmail contracts.⁴⁸⁴

Many of the affected air carriers, including the plaintiffs in *Pacific Air*, responded vigorously. On February 16, Pacific Air Transport, Boeing Air Transport, and National Air Transport sent a letter to the Postmaster General protesting the cancellation, requesting the suspension of the order as well as requesting a hearing on the matter.⁴⁸⁵ On that same day, United Air Lines also wrote the Postmaster General, alleging that the cancellation order was based on misinformation and requested a hearing.⁴⁸⁶ After receiving no reply, United Air Lines again reasserted its right to a hearing on March 7, notifying the Postmaster General that the carriers were losing in excess of \$250,000 monthly.⁴⁸⁷ Not until March 27,⁴⁸⁸ the Postmaster General finally responded that the affected carriers could submit a written brief, which would be considered by the post office.⁴⁸⁹ On April 14, the carriers jointly filed a brief, but the Postmaster General did not respond.⁴⁹⁰

A. Contractual Language Included a Grievance Procedure

After siding with the Roosevelt administration to find a Revised Statutes § 3950 violation that involved a complicated, convoluted factual scenario, the *Pacific Air* court overlooked a more obvious, fundamental concern. The contracts and subsequent airmail certificates required a notice and

482. *Id.* at 752 (quoting Rev. Stat. § 3950 (1872) (codified as amended at 39 U.S.C. § 6421 (repealed 1970))).

483. *Id.* at 656 (quoting McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930)).

484. *See id.* at 744–45.

485. *Id.* at 745.

486. *Id.* at 746.

487. *Id.*

488. Interestingly, or ironically, this is the same day a new, heavily Democratic Congress enacted legislation mirroring the language of Roosevelt’s Executive Order 6591 and specifically authorizing the U.S. Department of War to assist with the airmail. *See* Act of Mar. 27, 1934, ch. 100, § 1, 48 Stat. 508, 508.

489. *Pac. Air Transp.*, 98 Ct. Cl. at 746.

490. *Id.*

response period in direct, specific language.⁴⁹¹ When canceling the agreement, the Postmaster General should have provided written notice as well as provided the carrier with a forty-five-day period to show cause or an opportunity to respond.⁴⁹² Roosevelt and his administration violated this contractual requirement and effectively denied due process guarantees.

Admittedly, Farley sent a telegram to the carriers on February 9 announcing that the airmail agreements would be terminated within ten days, although the contractual language required written notice.⁴⁹³ However, his telegram did not outline a grievance procedure and certainly did not offer the air carriers an opportunity to be heard about the annulment.⁴⁹⁴ After receiving multiple inquiries and requests to be heard, Farley informed the affected parties on March 27 that they could submit a brief, which would be “carefully considered.”⁴⁹⁵ However, this was well after the Air Corps assumed responsibility for transporting the mail and the air carriers were displaced from their property interest.⁴⁹⁶ The Roosevelt administration ignored any and all requests to reconsider the decision and denied the airlines an opportunity to contest the decision prior to February 19.⁴⁹⁷

Besides their substantial investment in equipment, real estate, and infrastructure, the plaintiffs also possessed property rights in their airmail contracts. A well-established legal principle, firmly entrenched in precedent, is that a valid contract is considered property.⁴⁹⁸ When abolishing the contracts without notice and hearing, the Roosevelt administration was confiscating this property interest. Due process prohibits taking private property without a grievance process, specifically notice of this intention and an opportunity to respond.⁴⁹⁹

By denying the air carriers’ due process rights clearly specified within the four corners of the written agreement, the *Pacific Air* court also rejected the consistent, frequently reaffirmed congressional preference for a grievance procedure.⁵⁰⁰ The notice and response period is consistently and persistently required, pursuant to statute.⁵⁰¹ Prior to McNary-Watres, Congress passed the Kelly Amendment, requiring the Postmaster General to provide the air

491. *Id.* at 656 (quoting McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930)).

492. *Id.* (quoting McNary-Watres Act, sec. 2, § 6, 46 Stat. at 259–60).

493. *Id.* at 743–44.

494. *See id.*

495. *Id.* at 746.

496. *See id.* at 743–46.

497. *Id.* at 745–46.

498. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

499. *See id.*

500. *See Pac. Air Transp.*, 98 Ct. Cl. at 789; *Lynch*, 292 U.S. at 579.

501. *See, e.g., Lynch*, 292 U.S. at 579.

carrier with a sixty-day period to respond to any written cancellation notice.⁵⁰² While McNary-Watres changed certain elements of the preexisting legislation, such as the length of the response period, the latter legislation equally embraced the grievance procedure, further reinforcing its importance.⁵⁰³

Even the Roosevelt administration seemed to recognize its error in denying due process to the certificate holders while clinging to the alleged § 3950 violation. After receiving numerous inquiries challenging the annulment decision, the administration relented on March 27 and announced that it would allow the airlines to submit a written brief.⁵⁰⁴ At this point, the Roosevelt administration seemed to realize that their conduct resembled a taking without following a legitimate procedure. They had not complied with the contractual language, and for the first time, they seemed to realize their conduct resembled a due process violation.

If the Roosevelt administration remained intent on extricating the commercial airlines from airmail delivery, the more equitable cause of action would have been to utilize the escape clause existing in the contractual language. The Postmaster General could terminate any certificate due to any “willful neglect” by the holder to “carry out any rules, regulations, or orders made for his guidance.”⁵⁰⁵ In fact, the Post Office Solicitor General identified the breach of contract course of action, along with others, as a viable option.⁵⁰⁶ When assailing the air carriers, the Roosevelt administration alleged that plaintiffs went beyond violating § 3950 and additionally asserted that they were “guilty of other corrupt and unlawful conduct which justified defendant canceling the route certificates.”⁵⁰⁷ 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 have pressed for termination by pursuing a breach of contract action, thus preserving plaintiffs’ due process rights.

502. Kelly Amendment, ch. 603, sec. 2, § 6, 45 Stat. 594, 594 (1928).

503. See McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930); Kelly Amendment, 45 Stat. at 594.

504. *Pac. Air Transp.*, 98 Ct. Cl. at 746.

505. McNary-Watres Act, sec. 2, § 6, 46 Stat. at 260; *Pac. Air Transp.*, 98 Ct. Cl. at 656.

506. *Pac. Air Transp.*, 98 Ct. Cl. at 747–48.

507. *Id.* at 767.

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 held that the plaintiff airlines enjoyed a due process right under the Fifth Amendment in *Boeing Air Transport, Inc. v. Farley*.⁵⁰⁸ Decided in 1935, immediately following the Air Mail Affair, the court opined that § 3950 would be unconstitutional without a notice and hearing requirement.⁵⁰⁹ In its petition, Boeing Air Transport requested the court prevent the Roosevelt administration from enforcing the February 9 Executive order.⁵¹⁰ Ultimately, the court granted the government's motion to dismiss only because the court found that jurisdiction on this issue properly rested with the U.S. Court of Claims.⁵¹¹

The Court of Appeals's analysis is illuminating. The court considered both the question of whether or not the Roosevelt administration could annul contracts without notice and hearing as well as the additional issue of whether the government could impose statutory penalties while preventing the plaintiff airlines from bidding on future contracts.⁵¹² The Fifth Amendment of the Constitution specifies that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁵¹³ Before concluding proper jurisdiction rests elsewhere, the court considered Roosevelt's argument that § 3950 "does not expressly provide for notice and hearing" when annulling government contracts.⁵¹⁴ The court disagreed, concluding that a notice and hearing provision was implied in the § 3950 statute, making the statute unconstitutional without providing a grievance process.⁵¹⁵

Further, the court reasoned that denying plaintiffs their right to notice and hearing equated to a taking of property, thus violating the Fifth Amendment.⁵¹⁶ Contracts are property according to the court, and the government could not disregard its obligation to comply with the Fifth Amendment, even as a party to a case.⁵¹⁷ Signaling the significance of due process and its revered standing within the Constitution, the court further referenced the language in *Ochoa v. Hernandez Morales*:

508. *Boeing Air Transp., Inc. v. Farley*, 75 F.2d 765, 767 (D.C. Cir. 1935).

509. *Id.*

510. *Id.* at 766.

511. *Id.* at 768.

512. *Id.* at 766.

513. U.S. CONST. amend. V.

514. *Boeing Air Transp.*, 75 F.2d at 767.

515. *Id.*

516. *Id.*

517. *Id.* (citing *Lynch v. United States*, 292 U.S. 571, 579–80 (1934)).

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 Charta, 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 a hearing.⁵¹⁸

When the court concluded that § 3950 implied a grievance provision, Roosevelt could not deny the air carriers notice and an opportunity to respond regardless of the statutory language, according to the court.⁵¹⁹ Admittedly, it did not address the question whether Roosevelt acted properly when breaching the contracts, but clarified that he could not terminate these contracts without providing the air carriers with a grievance process.⁵²⁰ By doing so, he offended due process and denied the air carriers their rights under the Fifth Amendment.

Admittedly § 3950 called 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 concluded that this grievance process cannot be ignored.⁵²¹ Without providing a notice and hearing opportunity, the statute was unconstitutional according to the court.⁵²² In sum, Roosevelt’s actions deprived the air carriers of a recognizable property interest by ending the contracts. Interestingly, the court described the administration’s action as resembling a “breach,” not an “annulment” of the airmail contracts under § 3950.⁵²³ Conceding jurisdiction on this issue existed elsewhere, the *Boeing Air* court acknowledged another court must decide if the breach—or the Roosevelt decision to cancel the airmail certificates—was proper or improper.⁵²⁴

Precedent from this time supports the *Boeing Air* court’s reasoning. In its opinions, the Supreme Court remained vigilant, frequently upholding due process as necessary to preserve individual rights, regulate government conduct, and guard against government abuse. In another opinion from

518. *Id.* (citations omitted) (quoting *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913)).

519. *See id.* at 767–68.

520. *See id.* at 768.

521. *Id.* at 767.

522. *Id.*

523. *Id.* at 768.

524. *Id.*

this time period, *Blackmer v. United States*, the Court defined due process as “requir[ing] appropriate notice of the judicial action and an opportunity to be heard.”⁵²⁵ In this case, a lower court found the petitioner in contempt of court, fined him, and ordered the judgment satisfied following the seizure of his property.⁵²⁶ When upholding the lower court’s judgment, the Supreme Court further opined “[t]he requirement of due process . . . is satisfied by suitable notice and adequate opportunity to appear and to be heard.”⁵²⁷

Likewise, in *Ballard v. Hunter* the Supreme Court upheld an Arkansas statute allowing notice by publication prior to selling a nonresident’s property due to unpaid taxes but cited additional case law requiring “respect . . . [as] to the cause and object of the taking” when deciding due process issues.⁵²⁸ In the due process case from 1907, plaintiffs asserted that the Arkansas statute discriminated against them as nonresidents of the state because it allowed different forms of notice for resident versus nonresident landowners prior to selling a property for nonpayment of taxes.⁵²⁹

When upholding the statute, the Supreme Court held that a state is restricted by boundaries and cannot always manage to personally serve an out-of-state resident, so constructive service, or service by publication, is appropriate.⁵³⁰ Decided before *Pacific Air* as relevant precedent, the Court found that the essential requirement for due process is an “opportunity for a hearing and defense, but no fixed procedure is demanded.”⁵³¹ “The process or proceedings may be adapted to the nature of the case.”⁵³² Further, the Court recognized that the 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.⁵³³ 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.⁵³⁴

525. *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

526. *Id.* at 433.

527. *Id.* at 440.

528. *Ballard v. Hunter*, 204 U.S. 241, 242–43, 255–56 (1907) (quoting *Davidson v. New Orleans*, 96 U.S. 97, 107 (1878) (Bradley, J., concurring)).

529. *Id.* at 254, 264.

530. *Id.* at 254.

531. *Id.* at 255.

532. *Id.*

533. *Id.* at 255–56 (citing *Davidson*, 96 U.S. at 104–05, 107).

534. *Id.* at 256 (citing *Davidson*, 96 U.S. at 107 (Bradley, J., concurring)).

The Supreme Court repeatedly emphasized the importance of offering notice and hearing opportunities prior to taking property.⁵³⁵ The *Boeing Air* court’s decision absorbed the Supreme Court’s rationale and applied this concept when considering the due process issues in the Air Mail Affair,⁵³⁶ unlike the *Pacific Air* court, which appeared to disregard this precedent when making a decision.⁵³⁷ While recognizing its jurisdictional limitations, the *Boeing Air* court concluded that Roosevelt violated due process.⁵³⁸ Besides investing in expensive equipment, property, and even infrastructure, the plaintiffs possessed a recognizable property interest in the airmail contracts or route certificates according to the courts.⁵³⁹ Any taking of property required due process of law and Roosevelt violated this requirement when he annulled the certificates without notice or hearing.⁵⁴⁰ He acted under the authority of § 3950 but at least one court found this statute unconstitutional without a grievance process.⁵⁴¹

Additionally, the contract length elevated the value of the plaintiffs’ property and enhanced their damages. After two years of proven, capable service, each plaintiff or their predecessor in interest received an airmail certificate for an extended number of years.⁵⁴² Arguably, this lengthy contractual term multiplied the revenue and increased 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.⁵⁴³ Considering the plaintiffs enjoyed a property interest in a written agreement extending over as many as ten years, there was much to lose. This taking without a 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.

535. *E.g.*, *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913); *Ballard*, 204 U.S. at 255–56 (citing *Davidson*, 96 U.S. at 104–05).

536. *Boeing Air Transp., Inc. v. Farley*, 75 F.2d 765, 767 (D.C. Cir. 1935).

537. *See Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 789 (1942).

538. *Boeing Air Transp.*, 75 F.2d at 767–68.

539. *Id.* at 767 (citing *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

540. *See supra* Section VII.A.

541. *Boeing Air Transp.*, 75 F.2d at 767.

542. McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 259–60 (1930); *see Pac. Air Transp.*, 98 Ct. Cl. at 654.

543. *See Boeing Air Transp.*, 75 F.2d at 767 (citing *Lynch*, 292 U.S. at 579).

The factual circumstances offer an equally compelling narrative. The Roosevelt administration abruptly canceled thirty-four total airmail contracts with more than thirty different companies on February 9.⁵⁴⁴ Of that number, thirty-one were awarded between 1925 and 1927 under competitive bidding procedures where there were three to nine competitors for each contract.⁵⁴⁵ The remaining three were awarded in 1930 to the lowest responsible bidder.⁵⁴⁶ Summarily, the *Pacific Air* decision involved only three carriers and their respective five collective airmail routes. All five airmail contracts were initially awarded following an open, competitive bidding process pursuant to statute.⁵⁴⁷ Significantly, all five airmail contracts were initially awarded between 1926 and 1927,⁵⁴⁸ well before the May 1930 spoils conferences and even prior to Walter Brown's appointment as Postmaster General on March 4, 1929.⁵⁴⁹ Considering the five contracts were awarded following an open, competitive bidding process and increased in value to multiple year agreements, Roosevelt's move to terminate the succeeding air certificates within ten days and without a grievance procedure resembled an "arbitrary, oppressive, and unjust" process as described by earlier courts.⁵⁵⁰

VIII. MORE RECENT USE OF THE EXECUTIVE ORDER

Among other recent Presidents who have been criticized for executive overreach, former President Barack Obama embraced the unilateral power of the Executive order to reshape the nation through sweeping regulations.⁵⁵¹ The Executive order replaced the legislative process and substituted law made by representatives of the people with law made by bureaucrats. Arguably, this contradicted the democratic process.

Complaining about a Congress controlled by a different political party that resisted his agenda during a portion of his two terms, President Obama entered 560 total Executive orders, involving significant financial and social regulations during the first seven years of his presidency, which is

544. *Pac. Air Transp.*, 98 Ct. Cl. at 744; BERG, *supra* note 3, at 291; Berchtold, *supra* note 5, at 438, 441.

545. Berchtold, *supra* note 5, at 441.

546. *Id.*

547. *See Pac. Air Transp.*, 98 Ct. Cl. at 764.

548. Following two years of proven service by the airlines, Postmaster General Brown exchanged the airmail contracts for airmail certificates pursuant to the McNary-Watres statutory language. *See generally id.* at 654–76.

549. *See id.* at 682.

550. *Ballard v. Hunter*, 204 U.S. 241, 256 (1907) (quoting *Davidson v. New Orleans*, 96 U.S. 97, 107 (1878) (Bradley, J., concurring)).

551. Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), <https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html> [<https://perma.cc/QJT4-FHDH>].

50% higher in number than his immediate predecessor.⁵⁵² For example, an executive agency during the Obama presidency awarded “‘lawful status’ on at least 4.3 million illegal aliens,” a move contrary to the congressional intent.⁵⁵³

As reflected in more recent events, these intragovernmental battles spilled 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. In January 2019, the longest government shutdown in the country’s history ended with President Trump unable to secure significant congressional funding for a border wall necessary for national security reasons.⁵⁵⁴ Undeterred, President Trump declared a national emergency and proposed transferring money from other federal budgetary sources, including the federal asset forfeiture fund, the military construction fund, and the military antidrug account to subsidize this endeavor.⁵⁵⁵ Critics argued the Presidential action was contrary to congressional intent,⁵⁵⁶ potentially triggered a dangerous precedent for future Presidents, and possibly disrupted the balance of power between two branches of government.⁵⁵⁷

Even Congress responded. Citing the constitutional significance of separation of powers, Congress passed a joint resolution⁵⁵⁸ opposing the

552. *Id.*

553. Erin Hawley, *Obama’s Curtain Call: A Look Back on a Legacy of Executive Overreach*, HILL (Dec. 24, 2016, 8:00 AM), <https://thehill.com/blogs/pundits-blog/the-administration/311608-obamas-curtain-call-a-look-back-on-a-legacy-of> [<https://perma.cc/6W45-7VLX>].

554. Associated Press, *Trump Says ‘Wall’ Must Be Part of Lawmakers’ Border Deal*, KPBS (Jan. 30, 2019), <https://www.kpbs.org/news/2019/jan/30/trump-says-wall-must-be-part-lawmakers-border-deal> [<https://perma.cc/JVW4-PTTL>].

555. Charlie Savage & Robert Pear, *16 States Sue to Stop Trump’s Use of Emergency Powers to Build Border Wall*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/us/politics/national-emergency-lawsuits-trump.html> [<https://perma.cc/BUJ6-WXPD>].

556. See, e.g., Alan Fram, *Democrats Prepare Resolution Against Trump’s Declaration*, ASSOCIATED PRESS (Feb. 21, 2019), <https://www.apnews.com/f959b48ccf00424ead5097ee01877456> [<https://perma.cc/2U2Z-7GAV>].

557. See Peter Baker, Emily Cochrane & Maggie Haberman, *As Congress Passes Spending Bill, Trump Plans National Emergency to Build Border Wall*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/us/politics/trump-national-emergency-border.html> [<https://perma.cc/L7CD-QPK3>].

558. Originally, the National Emergencies Act of 1976 empowered Congress to terminate a national emergency following a resolution passed in both houses. See generally National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended in scattered sections of 50 U.S.C. (2012)). Interestingly, subsequent executive administrations

use of a national emergency as a vehicle to shift funding for border security.⁵⁵⁹ On March 15, 2019, President Trump vetoed this legislative initiative for attempting to block his funding maneuver as allowed by statute.⁵⁶⁰ Considering Congress lacked the votes to overcome the Presidential veto, the President could successfully steer funding to border security contrary to the congressional budget allocation.⁵⁶¹ Now, Congress is considering future legislation that limits the use of the national emergency, hoping to curb executive power.⁵⁶²

Similarly, some Presidential critics challenged this recent executive action through the courts, asserting that the Presidential initiative violated separation of powers.⁵⁶³ On May 30, 2019, a federal district court judge in Oakland, California, issued an injunction preventing the Trump administration from transferring the Department of Defense funding dedicated for combatting illegal drugs to building a border wall.⁵⁶⁴ A coalition of groups filed the action, asserting Congress did not authorize this particular \$2.5 billion Pentagon earmark for constructing a border wall and the administration's effort to redirect the funding violated separation of powers.⁵⁶⁵ On July 26, 2019, however, the U.S. Supreme Court nullified the lower court injunction and—at least momentarily—allowed the Trump administration to fund

complained that this legislative power resembled a “legislative veto,” which violated separation of powers. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 273, 273 (1993). The Supreme Court agreed, holding that the legislative veto was unconstitutional in *INS v. Chadha*. 462 U.S. 919, 959 (1983). The Court's holding prompted the law to change, allowing Congress to terminate a national emergency declaration only after passing a joint resolution, which required Presidential signature. See Savage & Pear, *supra* note 555.

559. Fram, *supra* note 556; Carl Hulse, *After Veto, Some Lawmakers See a New Emergency: Fixing the Act Trump Invoked*, N.Y. TIMES (Mar. 16, 2019), <https://www.nytimes.com/2019/03/16/us/politics/trump-veto-emergency-act.html> [<https://perma.cc/BWK7-DBJ8>]; Paul Owen, *Senate Set to Reject Trump's National Emergency Declaration*, GUARDIAN (Mar. 5, 2019, 5:45 AM), <https://www.theguardian.com/us-news/2019/mar/05/senate-to-reject-trump-national-emergency-declaration> [<https://perma.cc/KTS8-9RPX>].

560. Hulse, *supra* note 559.

561. *Id.*

562. *Id.*; see National Emergencies Act, 90 Stat. 1255.

563. Savage & Pear, *supra* note 555.

564. Lawrence Hurley, *U.S. Supreme Court Lets Trump Use Disputed Funds for Border Wall*, REUTERS (July 26, 2019, 3:36 PM), <https://www.reuters.com/article/us-usa-court-wall-idUSKCN1UL2S7> [<https://perma.cc/6TH5-KYE3>].

565. *Sierra Club v. Trump*, 929 F.3d 670, 676 (9th Cir. 2019). The coalition filing the suit is the Southern Border Communities Coalition group, which includes a variety of groups claiming to advocate on behalf of individuals residing near the border and the Sierra Club. *Id.* The longtime environmental organization fears the proposed wall jeopardizes the habitat for a variety of species living in the southern United States and northern Mexico area. Hurley, *supra* note 564.

the wall as proposed after finding that the plaintiffs lacked standing to file the lawsuit.⁵⁶⁶

Additionally, sixteen states, including California, New York, Hawaii, and Oregon, pursued legal action against the President in the same federal district court, claiming he lacked the authority to divert funding when spending is a congressional responsibility.⁵⁶⁷ Despite the chorus of multiple, heated accusations condemning the funding maneuver, existing congressional legislation allowed this executive action.⁵⁶⁸ Equally significant, the statutory language only broadly defined the scope of a national emergency and did not specify any prerequisites prior to an Executive declaration.⁵⁶⁹

Trump’s decision to act pursuant to congressional statute is distinguishable from Roosevelt’s conduct involving the Air Mail Affair. While Roosevelt and his administration purported to act under statutory authority, the New Deal era President flagrantly ignored the written notice and forty-five-day hearing requirements both specified in the airline contracts as well as contained in the congressionally enacted McNary-Watres Act.⁵⁷⁰ While the former President clung to § 3950 as justifying his conduct, at least one federal court concluded that even this statute implied a notice and hearing requirement.⁵⁷¹ Roosevelt provided neither. Future Executives must resist exceeding their authority and resist usurping the authority of another branch of government, all conduct that threatens constitutional democracy.

566. Hurley, *supra* note 564.

567. California v. Trump, 379 F. Supp. 3d 928, 935–36, 941 (N.D. Cal. 2019). On June 19, the court allowed the U.S. House of Representatives leave to file an amicus curiae brief, ostensibly supporting the multiple state initiated legal action. Order Granting Consent Motion for Leave to File Memorandum of the United States House of Representatives as *Amicus Curiae*, Trump, 379 F. Supp. 3d 928 (No. 19-cv-00872-HSG). Also filing lawsuits in opposition to the executive action, the watchdog group Public Citizen as well as the Center for Biological Diversity, Defenders of Wildlife, and the Animal Legal Defense Fund were all pursuing relief in the courts. Savage & Pear, *supra* note 555.

568. National Emergencies Act, Pub. L. No. 94-412, §§ 201, 301, 90 Stat. 1255, 1255, 1257 (1976) (codified as amended at 50 U.S.C. §§ 1621, 1631 (2012)).

569. See Savage & Pear, *supra* note 555; see also National Emergencies Act §§ 201, 301, 90 Stat. at 1255, 1257. The Act simply required the President to specify the legal provision authorizing executive action and notify Congress of the declaration. National Emergencies Act § 301, 90 Stat. at 1257.

570. Pac. Air Transp. v. United States, 98 Ct. Cl. 649, 656 (1942) (quoting McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930)).

571. Boeing Air Transp., Inc. v. Farley, 75 F.2d 765, 767 (D.C. Cir. 1935).

IX. JUDICIAL PERSPECTIVES

President Roosevelt violated both separation of powers and due process when taking the air carrier's five route certificates. Roosevelt was bolstered by several factors. Specifically, the Black committee concluded that the airmail contracts were fraudulently obtained,⁵⁷² the Postal Solicitor recommended cancellation,⁵⁷³ and public opinion was inflamed. Regardless, he exceeded his Presidential authority.

The Constitution empowers Congress to "establish Post Offices and post Roads"⁵⁷⁴ and oversee mail handling.⁵⁷⁵ Here, Congress fulfilled its role as entrusted by the Constitution. Pursuant to McNary-Watres legislation signed April 29, 1930, the Postmaster General could 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.⁵⁷⁶ Under this legislation, Congress further restructured the payment schedule when endorsing Brown's space-weight method over the previous method.⁵⁷⁷ Instead of compensating carriers for the weight amount of mail transported, the carriers were compensated for the amount of transportation space available, allowing them to carry passengers.⁵⁷⁸ Further, this legislation authorized the Postmaster General to award extensions or consolidate routes when in the public interest.⁵⁷⁹

While Congress conferred some responsibility for mail service to the Postmaster General, it never transferred this constitutionally prescribed function to the executive branch.⁵⁸⁰ But arguing executive action was necessary, President Roosevelt directed the contract annulment anyway, asserting authority over the responsibilities prescribed to a separate branch of government.⁵⁸¹

After participating in a conference at the White House⁵⁸² Postmaster General Farley technically announced the annulment under Order No. 4959 issued February 9, 1934;⁵⁸³ however, this was undeniably President Roosevelt's decision. On the same day, the President issued Executive Order

572. BLACK, *supra* note 11, at 321.

573. *Pac. Air Transp.*, 98 Ct. Cl. at 747-48.

574. U.S. CONST. art. I, § 8, cl. 7.

575. *Boeing Air Transp.*, 75 F.2d at 768.

576. McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 259-60 (1930).

577. *Pac. Air Transp.*, 98 Ct. Cl. at 690, 769-71 (quoting McNary-Watres Act, 46 Stat. at 259).

578. *Id.* at 769.

579. McNary-Watres Act, sec. 2, § 6, 46 Stat. at 259-60.

580. *See id.* at 259.

581. *Pac. Air Transp.*, 98 Ct. Cl. at 748.

582. Berchtold, *supra* note 5, at 443.

583. *Pac. Air Transp.*, 98 Ct. Cl. at 744.

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.⁵⁸⁴ Further, Roosevelt chose the air carrier’s final day transporting the mail as February 19 after overruling the Postmaster General who requested postponing this event until early June.⁵⁸⁵ Even the media described this as Roosevelt’s decision with *The Washington Post* reporting that “President Roosevelt yesterday directed the cancellation of all air mail contracts.”⁵⁸⁶

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 struck down both legislative and executive attempts to transfer legislative powers to the executive branch, finding these attempts unconstitutional.⁵⁸⁷

The postal duty is a responsibility delegated to Congress by the Constitution⁵⁸⁸ and when Roosevelt acted, he lacked congressional authorization.⁵⁸⁹ Likewise, when proceeding against the air carriers under § 3950 Roosevelt denied the *Pacific Air* plaintiffs an opportunity to be heard, which at least one court described as unconstitutional.⁵⁹⁰ For these reasons, the *Pacific Air* court was justified in deciding differently.

Applying the relevant case law, and the applicable statutes, and after considering 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 have resisted 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 were agreements between the carriers and the Postmaster General, not the President. By overreaching, he exceeded his authority and affected the outcome. His conduct prompted drastic consequences. He

584. Exec. Order No. 6591: The Army Temporarily Flies the Mail, 3 PUB. PAPERS 93, 93 (Feb. 9, 1934).

585. BLACK, *supra* note 11, at 321; Werrell, *supra* note 10, at 15.

586. Dure, *supra* note 125, at A1.

587. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 296–97 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

588. U.S. CONST. art. I, § 8, cl. 7.

589. See Exec. Order No. 6591, 3 PUB. PAPERS at 93.

590. E.g., *Boeing Air Transp., Inc. v. Farley*, 75 F.2d 765, 767 (D.C. Cir. 1935).

replaced commercial aviation with the public sector, which was unprepared for this responsibility.

Second, Postmaster Farley should have demonstrated a proper, measured, and proportionate response to the issue. Following an objective review of the credible evidence, he should have moved to identify the carriers actually deserving of contract cancellation, sanction, or less drastic action instead of revoking all the contracts affecting more than thirty carriers and condemning the entire industry, as Lindbergh asserted.⁵⁹¹ By moving against all the carriers, not just those implicated of wrongdoing, the Postmaster General threatened the viability of the emerging aviation industry. Failing to recognize that his action prompted consequences, the Postmaster General must appreciate his decision invited ripple effects within the industry, quite possibly even extending into the broader economy.

Third, the Postmaster General should have proceeded under an appropriate legal cause of action, not § 3950, which denied Fifth Amendment due process rights.⁵⁹² Instead, he should have acted under a breach of contract claim, thus providing the affected carriers with the written notice and opportunity to be heard pursuant to their agreement.⁵⁹³ 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.

X. CONCLUSION

The airmail certificates were negotiated between the Postmaster General and the separate air carriers, yet Roosevelt directed the outcome. He abolished the agreements, thrusting airmail delivery on an ill-equipped and unprepared Air Corps., and then reversed himself following tragic consequences. Among other criticisms, the Black commission and the Roosevelt administration philosophically disliked the fee structure and the subsidies enacted in McNary-Watres.⁵⁹⁴ However, this legislation was “deliberately designed to build up an air transport system of financially sound and experienced companies which would . . . become self-supporting.”⁵⁹⁵ Emboldened by the new 1930 legislation, Brown embraced 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

591. Libby, *supra* note 18, at 45.

592. See *Boeing Air Transp.*, 75 F.2d at 767.

593. See *Pac. Air Transp. v. United States*, 98 Ct. Cl. 649, 656 (1942) (quoting McNary-Watres Act, ch. 223, sec. 2, § 6, 46 Stat. 259, 260 (1930)).

594. *Special Committee to Investigate Air Mail and Ocean Mail Contracts*, *supra* note 276.

595. Berchtold, *supra* note 5, at 445.

into larger, more efficient, financially secure carriers capable of providing a quality product.⁵⁹⁶

Unsurprisingly, Brown’s detractors criticized his decision-making when he encouraged different carriers to merge, but this is exactly the same kind of strategic move that occurred in a different transportation industry. About this time, the Interstate Commerce Commission forced “the consolidation of railroads into a few major systems.”⁵⁹⁷ Even when deciding against the airlines in his concurring opinion, Judge John Marvin Jones recognized the challenging 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.”⁵⁹⁸ Although Roosevelt, the Black committee, and others impugned Brown and the air carriers, Commissioner Akers at least was very clear when finding the former Postmaster General acted within the law.⁵⁹⁹

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 the government disregarding due process of law. When acting arbitrarily and unjustly,⁶⁰⁰ the 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 ensure the different branches operate 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 experience of the

596. Rubin, *supra* note 6, at 570–71.

597. Berchtold, *supra* note 5, at 440.

598. *Pac. Air Transp.*, 98 Ct. Cl. at 793 (Jones, J., concurring).

599. After hearing over sixty-three days of evidence on this matter, the Commissioner did not find that Brown acted improperly. Godehn & Quindry, *supra* note 15, at 259–60, 271. In fact, Commissioner Akers found that these contracts were awarded following proper competitive bidding procedures, and the evidence failed to corroborate the government’s assertion that plaintiff airlines received contracts through fraud or collusion. *Id.* at 271.

600. *Ballard v. Hunter*, 204 U.S. 241, 256 (1907) (citing *Davidson v. New Orleans*, 96 U.S. 97, 107 (1878) (Bradley, J., concurring)).

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 lessons, the Air Mail Affair encourages deference to legislative expertise, somewhat similar to the court deferring to legal precedent. When Roosevelt abruptly entered his Executive order, Congress had a lengthy history studying the aviation industry. Roosevelt substituted his 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 information including congressional testimony.⁶⁰¹ Acting on this knowledge, Congress passed multiple pieces of legislation as early as 1916 through McNary-Watres in 1930.⁶⁰²

This challenge will not disappear as future officeholders 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 signaled one of the first disputes over the scope of government during the Roosevelt administration, as those favoring a free market economy battled those advancing the President's New Deal legislation. It also signaled the first confrontation between Lindbergh and Roosevelt with Lindbergh advocating for an economy shaped by independent, free market forces and the President insisting government had an obligation to impose limits on the free market to advance the general welfare of all citizens.⁶⁰³ As a harbinger of things to come, this epic encounter between two iconic figures set 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,⁶⁰⁴ Lindbergh did not stray from his mission. He openly defied Roosevelt because the former aviator was troubled by a government disregarding fundamental elements of the law, exceeding

601. See Berchtold, *supra* note 5, at 446.

602. See *id.* at 438–39, 445–47. The post office initially requested funding for the airmail service in 1912, but Congress did not approve it until 1916. *Pac. Air Transp.*, 98 Ct. Cl. at 677. On May 15, 1918, Congress approved funding for the first experimental airmail route between New York and Washington, D.C. *Id.*

603. See BERG, *supra* note 3, at 291–92, 295–96.

604. *The Flight*, *supra* note 1.

its executive authority, and intruding on industry.⁶⁰⁵ When President Roosevelt canceled the contracts, he unfairly condemned the commercial aviation industry that had developed the best air transportation system in the world.⁶⁰⁶ His misguided action caused economic damage that almost triggered “the demise of the airline industry.”⁶⁰⁷

When speaking out against government overreach, Lindbergh advocated for a government constrained by the Constitution, as well as for a business environment conducive to creativity, development, and innovation. 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: “[I]t is the duty of the general government to guard its subordinate members from the encroachments 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 the law.”⁶⁰⁸

605. JAMES P. DUFFY, *LINDBERGH VS. ROOSEVELT: THE RIVALRY THAT DIVIDED AMERICA* 16–17 (2010).

606. Lindbergh asserted that “the United States . . . is far in the lead in almost every branch of commercial aviation.” Libby, *supra* note 18, at 45. Others corroborated Lindbergh’s claim. Kenneth P. Werrell asserts that the “American air transport[ation] and the air mail system [were] the envy of the world” at this time in history. Werrell, *supra* note 10, at 15. Likewise, a European aviation periodical concluded, “No other country can show as high a standard of speed, regularity and safety’ as the American airmail system.” *Id.* (quoting *Briton Lauds U.S. Air Mail Service*, WASH. POST, Apr. 22, 1934, at AS10).

607. Michael A. Katz, *The American Experience Under the Airline Deregulation Act of 1978—An Airline Perspective*, 6 HOFSTRA LAB. L.J. 87, 87 (1988).

608. THOMAS JEFFERSON, *Opinion on Certain Proceedings of the Executive in the Northwestern Territory*, in 3 THE WRITINGS OF THOMAS JEFFERSON 88, 88 (Albert Ellery Bergh ed., 1907).

