“South Africa is the Mississippi of the world”: Anti-Apartheid Activism through Domestic Civil Rights Law

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In January 1969, South African Airways (SAA) invited readers of newspapers including the Los Angeles Times, the New York Times, the Washington Post, the Chicago Tribune, and the Boston Globe to secure reservations for its new weekly service between New York City and Johannesburg, and to be among the “139 distinguished Americans to be the first to fly the last ocean.”¹ However, not all Americans were equally welcome. The airline—owned by the South African government and subject to its apartheid laws—made no overt reference to the country’s white supremacist policies.


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But the advertisement touted the comforts of the flight in barely coded language: “Our language and welcome are mirrors of your hometown country club.”

American anti-apartheid activists, led by the American Committee on Africa (ACOA) and the Chair of the House Subcommittee on Africa, Representative Charles Diggs Jr. (D-MI), saw the advertisement as an announcement that South African apartheid was soon to land at John F. Kennedy Airport. At the same time, they recognized that the flights presented an unexpected opportunity to challenge South Africa’s white supremacist regime. Activists had long been frustrated by the close relationship between the United States and South Africa, but their continuing efforts to pressure foreign policy officials on this issue had been largely unsuccessful. An SAA plane arriving in New York, however, meant that sovereignty and jurisdiction overlapped and conflicted; matters previously considered foreign policy questions could be re-imagined as subject to domestic law and legal institutions. Using the legal and political strategies of the American civil rights movement, activists pushed domestic institutions to take apartheid seriously. If the airline engaged in racial discrimination on American soil, they argued, South African apartheid became an American civil rights problem that American government institutions could and should address. Although early efforts were directed at revoking SAA’s federal route permit, activists soon broadened their efforts and leveraged civil rights arguments against South Africa’s apartheid rules by emphasizing the harm to black Americans who would be subject to discrimination in their travels. Activists made their arguments to the White House, to Congress, to federal and state administrative agencies, and to federal and state courts, pointing to the affirmative responsibility each institution had to protect American citizens from discrimination.

2. Ibid.
A civil rights strategy turning more on legal arguments than on mass support was well suited to the relatively small size of the American anti-apartheid movement in the late 1960s and early 1970s. Even as the global anti-colonialist and anti-apartheid movements exploded in the 1950s and early 1960s, and newly independent nations in Africa and Asia demanded that the United Nations General Assembly push for sanctions against South Africa, the United States anti-apartheid movement remained small in size and strength. Although American civil rights and anti-colonialist activists had spent decades linking freedom abroad with freedom at home, the Cold War context made it challenging for Americans to successfully challenge European colonialism or United States foreign policy. It was particularly


difficult for American opponents of apartheid to make much headway against the American foreign policy establishment. Cold War pressures may have pushed American leaders to moderate Jim Crow policies in deference to the concerns of citizens of new African and Asian nations, but when it came to South Africa, foreign policy incentives also worked the other way. South Africa was a staunchly anticommunist country that controlled key ports and minerals and offered a significant market for United States goods. Its status as an important Cold War ally meant that most American politicians were loath to push too hard against its fierce commitment to white supremacy, even at the cost of significant national and international criticism. The Kennedy and Johnson administrations devoted

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more attention to Africa than previous ones had, and, as the disjuncture between American civil rights rhetoric and South Africa’s repressive policies widened, and as international criticism of apartheid increased, the White House tried to find a position on apartheid that would satisfy strongly anti-apartheid African and Asian nations, American civil rights groups, and the South African government. But throughout the 1960s, even as ACOA, churches, and civil rights groups organized protests, boycotts, and litigation campaigns targeting both United States government policy and private businesses profiting from South Africa, they found it hard to turn public attention from civil rights at home to civil rights abroad, and from the Vietnam War to Africa. The American anti-apartheid movement, and public attention paid to South Africa, would remain relatively limited in scope until the mid-1970s.


A domestic civil rights challenge to SAA offered American activists the opportunity to bypass the foreign policy establishment and make anti-apartheid arguments in domestic legal institutions where a small group of people was guaranteed a fair hearing. Scholars of law and social movements have described how activists can mobilize by using the discursive frameworks and rights language provided by law, and the strategies and legal victories of previous movements. Here, anti-apartheid activists challenged SAA’s entry into the United States by drawing on the legal accomplishments of the domestic civil rights movement, specifically statutes, executive orders, and judicial precedents recognizing the constitutional obligation of government institutions to practice nondiscrimination and ensure the equal protection of the laws. Activists argued that discriminatory air travel could not possibly be part of the “public interest” that the Civil Aeronautics Board (CAB) was statutorily required to protect, that SAA operations in the United States were barred by the Federal Aviation


Act’s (FAA) ban on discrimination, that SAA was violating federal employment and state public accommodations laws, that South African tourist advertisements were deceptive, and that federal action in favor of an apartheid government violated the constitutional guarantee of equal protection.

In doing so, ACOA and Representative Diggs took advantage of the multiplicity of nondiscrimination laws and the fragmentation of power in the American political system. But although these activists were able to air their arguments in a variety of legal and non-legal arenas—including the White House, Congress, federal and state agencies, federal and state courts, press conferences, and demonstrations—they often failed to persuade their audience. Recent scholarship on administrative constitutionalism has examined how agency officials engaged in their own interpretation of their constitutional responsibilities, and has demonstrated that agencies generally had enough autonomy to act if they wanted to, and to stall if they did not. Here, although many officials were willing to act


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when the demand was squarely within their jurisdiction, most were extremely reluctant to intercede in anything that looked like foreign policy, to interfere with presidential prerogatives, or to confront South Africa’s sovereign authority even as it spilled onto American soil.15

The campaign’s successes and failures are instructive regarding the relationship of legal institutions to social movements. Framing demands around existing civil rights law necessarily limited what activists could ask for and what domestic institutions could provide. Anti-apartheid activists were well aware that convincing officials somewhere in the federal bureaucracy to revoke a route permit would do little, if anything, to change South Africa’s domestic racial policies. However, convincing any part of the United States government to take a stand against apartheid could create both legal precedent and a possible template for further action while minimizing overall United States entanglement with a repellent system. And the campaign itself, whether it succeeded or failed, could garner needed publicity, counteract South Africa’s tourist message by highlighting the harms of apartheid, and build support for private divestment and public sanctions.16 In practice, the successes were limited and legalistic. Where domestic civil rights law directly conflicted with apartheid law, government officials and SAA representatives often figured out how to technically comply with the former without really challenging the latter, and the foreign policy context meant more failures than successes. Domestic legal institutions were reluctant to get involved with anything that looked like foreign policy, and turned to legal doctrines that drew sharp jurisdictional lines. Nor were the publicity gains as large as many had hoped. Although ACOA and Diggs’s efforts gained intermittent news coverage, and served as thorns in many officials’ sides, the campaign offered only incremental gains. Significant domestic popular resistance against the United States


15. Culverson, Contesting Apartheid, 3; Metz, “The Anti-Apartheid Movement and the Populist Instinct in American Politics.”

government’s policy on apartheid did not come until after the Soweto uprising of 1976 and the creation of TransAfrica in 1977. Only once mass movement pressures became overwhelming did Congress pass the Comprehensive Anti-Apartheid Act of 1986 (over President Ronald Reagan’s veto), forcing the executive branch to bend.17

+++ Leading the charge against SAA was ACOA, an inter-racial anti-colonialist and anticommunist organization that dominated United States anti-apartheid activism from its creation in the early 1950s until the massive expansion of the movement in the late 1970s.18 ACOA was created from Americans for South African Resistance, an inter-racial group established by ministers and members of the Congress of Racial Equality (CORE) in 1952 in support of South Africa’s Defiance Campaign. ACOA organized or participated in most significant anti-apartheid activism in the 1960s, often joining with student groups, progressive churches, and civil rights groups such as CORE, the National Association for the Advancement of Colored People (NAACP), and the Student Nonviolent Coordinating Committee (SNCC) to pressure

17. Love, The U.S. Anti-Apartheid Movement; Culverson, Contesting Apartheid; and Nesbitt, Race for Sanctions.
businesses to withdraw their investments from South Africa.\textsuperscript{19} ACOA also protested instances of United States government involvement with South Africa—such as South Africa’s quotas for exporting sugar to the United States—but to little effect.\textsuperscript{20} The group had somewhat more success challenging the application of apartheid rules to Americans in South Africa; in 1967, protests from ACOA, civil rights groups, and members of Congress led to the cancellation of shore leave for an aircraft carrier refueling in Cape Town where Americans would have been subjected to apartheid laws.\textsuperscript{21}

ACOA Executive Director (and CORE co-founder) George Houser seized on the SAA flight permit as an opportunity to engage the federal government about a decision seemingly at odds with American civil rights policy. CORE’s 1947 Journey of Reconciliation (which Houser had helped organize) and 1961 Freedom Rides had highlighted both the fluidity and the importance of jurisdictional boundaries for civil rights; such issues were presented in new ways when the federal government allowed an airline operated by an apartheid government to land in New York City.\textsuperscript{22} Working closely with ACOA on the issue was Representative Diggs, a longtime opponent of segregation at home and apartheid abroad.\textsuperscript{23}


\textsuperscript{20} Houser, “Meeting Africa’s Challenge”; and Shepherd, \textit{Anti-Apartheid}, 93–94.


becoming chair of the House Foreign Affairs Committee’s Subcommittee on Africa in January 1969, Diggs immediately used his position to draw more attention to African issues generally and to South African apartheid in particular.

Houser and Diggs began by challenging the permit that SAA had been granted by the federal CAB which handled all domestic and foreign route permits. As an independent board, the CAB was formally removed from most political checks, and in practice, it was largely ignored by all but airlines and their lawyers. Discussions about whether to award SAA a route had quietly begun in 1967, when South African officials informed the United States that SAA planned to begin service to the United States. State Department representatives recognized that South Africa’s route request was legally and politically fraught. The United States and South Africa had signed a bilateral air transport agreement in 1947 that promised each nation reciprocal access to the other’s airspace and landing facilities, and Pan American Airlines (Pan Am), an American airline, had been flying between New York City and Johannesburg ever since. But SAA’s request to amend this agreement to specify its own route—part of South Africa’s broader effort to develop its (white) tourist industry—threatened to upset the precarious balance that the Johnson administration had struck in its South African policy. Granting the request would mean violating a 1962 United Nations General Assembly resolution calling on member

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nations to end all trade and diplomatic relations with South Africa, including “[r]efusing landing and passage facilities” to South African aircraft.27 (By the late 1960s, almost all African nations had denied SAA access to their airspace, forcing SAA to fly to Europe and South America via more costly ocean routes rather than directly over West Africa.28) Although the United States had largely ignored this nonbinding resolution, entering formal route negotiations with South Africa would be public and, a State Department official warned, “would very probably be seized upon by anti-apartheid groups as a rallying point around which to protest U.S.-South African economic cooperation.”29 Such a protest “could seriously complicate U.S.-South African relations, to say nothing of relations at home and with the American states.”30

However, rejecting the request and moving to cancel the bilateral agreement (or stalling as long as possible, another possibility the State Department considered) would have antagonized South African officials, who expected that their request would be granted as a matter of course.31 It also would have threatened the United States airline industry. Pan Am had enjoyed a practical monopoly over the New York City–Johannesburg route for two decades; for the United States to now deny SAA reciprocal access to this profitable route almost certainly would have led South African officials to retaliate against Pan Am, and to deny other United States airlines access in the future.32

No doubt to the relief of government officials, no outside groups seemed to notice when the State Department held formal negotiations over the route in December 1967. Representatives from the State Department, the CAB, and South Africa avoided thorny questions about race relations and instead, as was typical in international airline route negotiations, focused on ensuring that one nation did not gain too much of an economic advantage. Nor was there any controversy over the approval of the proposed route in the spring of 1968, after it had been reviewed by United States airlines (for economic issues) and selected members of Congress

30. Ibid.
31. Ibid.
32. Travelers could also reach South Africa by changing airlines abroad.
(for political ones). (Although he was among those consulted, Representative Diggs did not then protest, perhaps because he was not yet chair of the subcommittee, or perhaps because he did not yet see the permit’s significance.33) The proposed route had also received a positive recommendation from Undersecretary of State Nicholas deB. Katzenbach, who in a previous position at the Justice Department had played a crucial role in the desegregation of Southern institutions (including working with the Interstate Commerce Commission in response to the Freedom Riders’ campaign).34 Katzenbach apparently saw it as a foreign policy decision, not a civil rights one. Noting only the political stakes, he pointed out: “There is some risk of domestic and foreign criticism, but I doubt that it will be great—particularly if we play it very low key.”35 This approach worked, and the State Department’s announcement of the route in late June was met with silence.36

The CAB was the last stop, and SAA quickly filed an application with the CAB to secure the airline’s permit to fly in and out of the United States.37 Using the expedited process it favored for foreign route hearings, the CAB hearing examiner and the parties sped through the prehearing conference and the hearing in 15 minutes.38 No one expressed concern about apartheid during the process, which was hardly surprising given that the only people participating were representatives from the CAB, SAA, and Pan Am. The CAB’s permit decision turned, as always, on whether the carrier was “fit, willing, and able properly to perform such air transportation” and whether “such transportation will be in the public interest.”39 As was customary, the examiner’s “fitness” inquiry focused entirely on technical and economic issues regarding equipment, passenger load, and anticipated revenues from passenger, mail, and cargo carriage.40

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34. Nicholas deB. Katzenbach, Some of It was Fun: Working with RFK and LBJ (New York: W.W. Norton, 2008), 46–47.
35. Katzenbach to President Lyndon B. Johnson, memorandum, March 4, 1968, 3, Folder AV 6 S AFR 1/1/67, Box 553, CFPF:E, RG 59, NACP.
36. State Department press release, June 28, 1968, Folder South Africa, Box 97, Records Relating to International Aviation Negotiation, Records of Board Members: G. Joseph Minetti (hereafter Minetti Papers), Records of the Civil Aeronautics Board, Record Group 197 (hereafter RG 197), NACP.
38. Transcript, September 16, 1968, Docket 20054, Box 922, Selected Docket Files 1938–84, Docket Section, Office of the Secretary (hereafter Docket 20054), RG 197, NACP.
and given the existence of the 1947 bilateral agreement and the previous year’s diplomatic negotiations over the route, the public interest question was essentially decided from the moment of application.\(^{41}\) (The FAA explicitly required the CAB to honor relevant international agreements, and, as CAB member Louis Hector had observed in 1959, the board’s “purported independent power to find that a route granted in a bilateral is not in the public interest” was at this point “so theoretical as to be nonexistent.”\(^{42}\) Accepting the examiner’s recommendation, the CAB granted SAA’s route permit application in October, and President Lyndon B. Johnson signed off in November.\(^{43}\)

The permit was thus final by the time that ACOA members learned about it. ACOA Washington Director Gary Gappert argued to the State Department several days later—possibly after reading the very short article in the *New York Times* about the permit—that the CAB should have rejected the permit, given South Africa’s apartheid policy.\(^{44}\) As he claimed, “Even limited involvement with another state leads inexorably towards further involvement. That is what bureaucratic inertia means.”\(^{45}\) Instead, he emphasized, “An active policy of disengagement is needed to prevent further involvement with the racial insanity of South Africa.”\(^{46}\) Once granted, the route permit did not expire, but the CAB could amend, suspend, or revoke a permit if the board found it was in the public interest to do so.\(^{47}\) This became the focus of activists’ efforts. In January 1969, ACOA asked the new president to reopen Johnson’s permit decision. As Houser argued to President Richard Nixon, the request “is founded on


\(^{42}\) Federal Aviation Act of 1958 § 1102; *British Overseas Airways Corporation, Foreign Air Carrier Permit*, 29 C.A.B. 583, 596 (1959) (Hector, concurring); Calkins, “Acquisition of Operating Authority by Foreign Air Carriers,” 67.

\(^{43}\) *South African Airways, Foreign Permit*, 49 C.A.B. 337 (1968). Given the foreign policy concerns involved, the president was required by statute to personally approve each foreign route permit. See Federal Aviation Act of 1958 § 801; and Oliver J. Lissitzyn, “The Legal Status of Executive Agreements on Air Transportation,” *Journal of Air Law and Commerce* 17 (1950): 436–53.


\(^{45}\) Gappert to Joseph Palmer II, November 19, 1968, Folder AV 6 S AFR 1/1/67, Box 553, CFPF-E, RG 59, NACP.

\(^{46}\) Ibid.

\(^{47}\) Federal Aviation Act, § 402(f).
the fundamental principle of all American civil rights legislation.”

ACOA and Representative Diggs also wrote to the CAB, demanding a new hearing in which SAA’s racial practices would be part of the public interest consideration. Were non-white Americans allowed to get South African visas? Would they be discriminated against in South Africa? No one had raised these questions at the original hearing. Although CAB officials had limited their consideration of the public interest to economic and technical concerns, ACOA began articulating a much more capacious understanding of the public and its interests that was grounded in American civil rights law and policy. By the late 1960s, they argued, the “public interest” certainly included nondiscrimination. The harm from the SAA permit was twofold; first, the public interest was not served by South Africa’s “flagrant and outrageous apartheid policies.” Second, the harm also affected “American citizens who would be entitled to enjoy amenities in South Africa without discrimination, but who clearly would face such discrimination if they took advantage of the reciprocal rights of American citizens to visit South Africa.”

ACOA officials also reached out to the public and to other members of Congress to support their calls for a new hearing. As Houser argued in a letter to the *New York Times*: “Given the nature of the troubled state of race relations in the U.S., and the nature of our civil rights legislation, it cannot by any stretch of the imagination be called ‘in the public interest’ to allow South African Airways to fly into Kennedy International Airport.” ACOA’s Washington Director Gary Gappert explained to several members of Congress, “This new ‘service’ brings apartheid to JFK airport.” Thus prodded, many wrote to the CAB to protest the lack of hearings, the flagrant violation of the 1962 United Nations resolution,


51. Ibid.


53. Gappert to Representative John Conyers Jr., February 28, 1969, Folder 14, Box 104, microfilm reel 9, ACOA Records. (A handwritten note indicates that a “similar letter” was sent to nine other “liberal Congressmen,” a third letter was sent to “GOP Congressmen,” and a fourth letter was sent to “DC groups.”)
and the harm to Americans that would result from the permit. Civil rights attorney Floyd B. McKissick wrote that the permit was “hypocritical, and insulting to American Blacks.”\(^5^4\) James T. Harris Jr., Executive Director of the National Catholic Conference for Interracial Justice, pointed out: “It is particularly ironic that the financial and public relations benefits of the landing permits should be granted to this barbaric government at a time when the United States is attempting through use of interstate commerce procedures and related actions to cleanse itself of the more obvious manifestations of domestic apartheid.”\(^5^5\) The United Nation’s Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa expressed its “particular distress” about SAA’s permit after being contacted by ACOA.\(^5^6\)

Seeking even more public support for their calls for new hearings, ACOA planned demonstrations against the SAA flights. ACOA organized buses to greet SAA’s first arrival at New York’s Kennedy Airport on February 23 and invited New Yorkers to “Commemorate the arrival of apartheid in New York.”\(^5^7\) An estimated 100 protesters—including a former chair of the New York City Commission on Human Rights, and members of ACOA, the African Liberation Committee, and the Episcopal Churchmen for South Africa—met at the airport, carrying signs reading “South Africa is the Mississippi of the world”; “Quarantine S.A.A. carrier of apartheid”; and “Racist pigs.”\(^5^8\) The effect, however, was limited; SAA shielded arriving passengers from the demonstration by concealing arrival gate information from protestors and bringing the passengers through the airport in a roundabout way.\(^5^9\) And although the protest’s planning and aftermath was covered in African and African-American newspapers, the protest received just passing mention in the *New York Times*.\(^6^0\) Undeterred, ACOA led protests in coming

\(^{54}\) Floyd B. McKissick to Crooker, May 12, 1969, Docket 20054, RG 197, NACP.  
\(^{55}\) James T. Harris, Jr. to Gappert (copying Crooker), April 8, 1969, 1, Docket 20054, RG 197, NACP.  
\(^{56}\) Abdulrahim Abby Farah, Chair, to Secretary-General U Thant, February 20, 1969, 2, U.N. Doc. S/9019.  
\(^{57}\) ACOA, Fly the Last Ocean flyer, Folder 22, Box 104, microfilm reel 9, ACOA Records.  
\(^{59}\) Draft, “Thoughts on NYT story on S.A.A.” 1969, 2, Folder 17, Box 104, microfilm reel 9, ACOA Records.  
weeks at the airport, at the SAA and British Overseas Airways Corporation ticket offices, and at the advertising agency handling the SAA account, and distributed anti-apartheid leaflets to passengers on an early March flight.\textsuperscript{61}

However, the CAB declined to revisit the permit, because, as the CAB chair explained, the time for reconsideration had passed.\textsuperscript{62} (And, as one official explained to those who wrote in protest, it was not the CAB’s fault that those protesting had missed their chance to participate in the original proceedings.\textsuperscript{63}) This was hardly surprising. Board members traditionally declined to address non-aviation and non-economic questions if at all possible.\textsuperscript{64} In addition, the CAB was responsible for both regulating and promoting civil aeronautics, and was therefore solicitous of the economic interests of American airlines (many of which were eager to gain access to their own South African routes).\textsuperscript{65} Furthermore, although the board was legally independent, it was entirely deferential to the White House on international route permits. In this area, the president had, as the Supreme Court had once described, “a positive and detailed control over the Board’s decisions, unparalleled in the history of American administrative bodies.”\textsuperscript{66} For board members to assert themselves on United States–South Africa policy by challenging a route carefully negotiated by the State Department and approved by the White House would likely have antagonized members of Congress (who might launch an investigation or cut the board’s appropriations) and the president (who would probably simply reverse the board’s decision).\textsuperscript{67}


\textsuperscript{62} Crooker to Houser, March 26, 1969, Folder 17, Box 201, Diggs Papers, MSRC-HU.

\textsuperscript{63} John W. Dregge, Director, Community and Congressional Relations, to multiple correspondents (form letter), April 4, 1969, Docket 20054, RG 197, NACP.

\textsuperscript{64} The CAB had been reluctant to take any action about airport segregation years earlier, instead directing parties to the Justice Department. See Robert G. Dixon Jr., “Civil Rights in Air Transportation and Government Initiative,” \textit{Virginia Law Review} 49 (1963): 205–31; Barnes, \textit{Journey from Jim Crow}, 141, 200; and ortlepp, \textit{Jim Crow Terminals}.

\textsuperscript{65} Federal Aviation Act of 1958, §102.


\textsuperscript{67} Caves, \textit{Air Transport and its Regulators}, 270–99.
The White House similarly deflected these demands, claiming that the president was powerless to act.68 ACOA had no more success asking the White House to revisit the 1947 bilateral agreement itself, which had been signed before South Africa’s National Party formally imposed apartheid in 1948.69 In fact, the Nixon administration would soon move to strengthen the United States relationship with South Africa.70 The State Department maintained something of a hands-off policy; seeking to advise Botswana President Seretse Khama on his spring 1969 trip to the United States, the State Department notified the Botswana embassy that “Department seeking avoid any official US participation SAA inaugural flights but would not wish influence President Khama’s decision.”71

Given the recalcitrance of the CAB and the White House on the matter, Diggs used his own position in Congress to challenge the permit. In late March, Diggs and several other members of Congress delivered special order speeches on the House floor. Drawing on speeches prepared for them by ACOA, members pointed to the ways that white supremacy in South Africa was harming non-white South Africans and encroaching on American civil rights.72 Calling the permit “a callous insult by our foreign policymakers,” Diggs argued that “Black Americans can only regard the extension of racially discriminatory facilities to John F. Kennedy International Airport as a retrogressive step against the achievement of full human rights in this country.”73 Representative Frank Morse (R-MA) was “deeply concerned” that the permit “has diminished our dedication to justice in the eyes of black Africans and black Americans alike” and could be seen “as official ‘sanction’ of the system of apartheid.”74 Nor was it beneficial at home, Representative John Conyers Jr. (D-MI) argued.

68. Robert Ellsworth, Assistant to the President, to Houser, February 17, 1969, Folder [GEN] CA 7 Cases-Decisions [1969–70], Box 13, WHCF:SF CA, RNPL.
69. Houser to Nixon, April 10, 1969, Folder [GEN] CA 7 Cases-Decisions [1969–70], WHCF:SF CA, RNPL. An April 10 memo from Ellsworth affixed to the letter noted: “No further answer to this letter.”
71. State Department telegram, Action: Amembassy, Gaberones, March 17, 1969, Folder AV 6 S AFR 1/1/67, Box 553, CFPF:E, RG 59, NACP.
72. Gappert to Diggs, memorandum, March 25, 1969, Folder 17, Box 201, Diggs Papers, MSRC-HU; draft speeches, Folder 23, Box 104, microfilm reel 9, ACOA Records.
73. 115 Cong. Rec. 7791 (March 26, 1969).
74. Ibid., 7795.
“Do we not have enough racial problems in the United States without seeking to create others?”

The next week, in only the second set of congressional hearings focused on South Africa and apartheid, the House Subcommittee on Africa called on representatives from the CAB and the State Department to explain the permit decision. Subcommittee members demanded to hear why the CAB had not considered South Africa’s racial policies when evaluating whether the permit was in the “public interest.” CAB and State Department representatives made clear, however, that they did not believe that the CAB had the authority to do so. Joseph Goldman, the CAB’s general counsel, stated that the board’s responsibility under the FAA was “essentially economic.” The issue of South African apartheid, by contrast, “is basically a diplomatic and foreign relations question,” which was for others to determine. Goldman argued that the CAB “was not free to decide that aversion to apartheid, et cetera, discrimination against blacks, that may exist and, as I understand, does exist in the Republic of South Africa, would justify a refusal to grant the permit.” Frank Loy of the State Department agreed that granting the permit was an essentially neutral act that did not change the United States–South Africa relationship. ACOA’s Houser, also testifying, sharply confronted the CAB’s reluctance to delve further into questions of the public interest than it had, arguing that “by no stretch of the imagination can it be called in the public interest to allow an institution which is an agent of a state whose basic laws are based on racial discrimination to promote itself any function in the United States.”

In an appendix to the hearing, Diggs had printed letters of support from representatives of several religious groups; these included a letter from the secretary of International Affairs of the Episcopal Church notifying Diggs that the church’s executive council had decided in late March to boycott SAA for travel.

In June, Diggs introduced a bill (drafted by ACOA and cosponsored with more than twenty other members) to amend the FAA “to safeguard

75. Ibid.
78. Ibid., 13.
79. Ibid., 16.
80. Ibid., 18–20.
81. Ibid., 34.
82. Rev. Herschel Halbert, Secretary, International Affairs, Episcopal Church, to Diggs, April 25, 1969, printed in *South Africa and United States Foreign Policy*, Appendix B, 80.
American citizens from racial and religious discrimination.”  

The amendment, roughly modeled on Title VI of the Civil Rights Act of 1964 barring discrimination in federally assisted programs, sought to bar flights to and from countries with laws that discriminated against American citizens.  

Bilateral agreements would stay in place, but flight permits would be suspended on the grounds that “it is not in the interest of the United States to implement international air agreements” where foreign laws meant “that implementation would result in discrimination against American citizens on the basis of race, religion, or creed.”  

ACOA argued that this amendment, which in practice would only have applied to South Africa, did not interfere with South African sovereignty; “it just insures that Americans of any color and creed are not discriminated against in the use of facilities provided by the U.S. government to another government.”  

As Gappert explained, the bill “applies a civil rights principle to foreign air commerce legislation.”  

However, although Diggs was free to hold whatever hearings he liked, legislative change faced a steeper path. Some members of Congress were sympathetic to South Africa as a political ally; others were receptive to its elaborate propaganda efforts to cast South Africa, and apartheid, in a positive light. And many outside Congress—including officials at the CAB, the State Department, and the Department of Transportation—opposed the bill’s proposed interference with the executive branch’s

85. H.R. 12042.  
86. Proposed Amendment to the Federal Aviation Act by the American Committee on Africa, South Africa and United States Foreign Policy, Appendix B, 78.  
decision-making authority.\footnote{Whitney Gillilland, Acting Chairman, CAB to Representative Harley O. Staggers, July 10, 1970; David M. Abshire, Assistant Secretary for Congressional Relations, State Department to Staggers, July 31, 1970; and James A. Washington Jr., General Counsel, Department of Transportation to Staggers, July 31, 1970; all in Folder H.R. 12042, 91st Cong., House Committee on Interstate and Foreign Commerce, Records of the United States House of Representatives, Record Group 233 (hereafter RG 233), National Archives and Records Administration, Washington DC (hereafter NARA).}

The bill died in the House Interstate and Foreign Commerce Committee’s Subcommittee on Transportation and Aeronautics (whose chair had recently enjoyed a free trip to South Africa on SAA).\footnote{Such perks were common; the CAB’s chief hearing examiner was also on this flight. Nonetheless, ACOA was “appalled” by Representative Samuel N. Friedel’s flight. Gappert to Friedel, April 30, 1969, printed in \textit{South Africa and United States Foreign Policy}, Appendix B, 77; see also Lillian Wiggins, “Friedel, Holiday Inns Hit on S. Africa links,” \textit{Baltimore Afro-American}, May 17, 1969, 1. Friedel defended his civil rights record in an extension of remarks in the House. 115 Cong. Rec. 14267 (May 28, 1969).}

AlthoughDiggs and ACOA officials failed to convince the CAB, the White House, or Congress to revoke the SAA permit, they recognized that more was at stake for both South Africa and the anti-apartheid movement than the weekly SAA flight between Johannesburg and New York. The flights were part of South Africa’s attempts to develop a tourist industry that would improve the nation’s economy and (by sharply restricting who could visit, and what those visitors could see) supplement its propaganda efforts abroad. Well aware of South Africa’s publicity efforts, ACOA offered its own campaign to instead frame South African travel as a civil rights problem.

Advertising was part of this strategy; as Houser argued to Nixon in January: “The wonderful vacation of the South African Airways ads is a racist vacation, and part of South African Airways’ function is to sell the acceptance of South Africa’s form of racism to the American people.”\footnote{Houser to Nixon, January 28, 1969, 2, Folder [GEN] CA 7 Cases- Decisions [1969–70], Box 13, WHCF:SF CA, RNPL.}

Thus, ACOA tried to counter South Africa’s narrative in the American press, directly challenging SAA advertisements that highlighted South Africa’s attractions but failed to mention the apartheid restrictions on their use: “Ironically, some ads feature the ‘uncrowded’ condition of beaches and other playgrounds, leaving the potential visitor without suspicion that 80 per cent of the people are not permitted there.”\footnote{ACOA, “South Africa Scores Again as South African Airways Bids for U.S. Tourists,” January 28, 1969, 3, Folder 14, Box 104, microfilm reel 9, ACOA Records.}

ACOA soon went further, creating and distributing “A Black Tourist’s Guide to South Africa,” because “it might be relevant for any American black or white, to
think about the nature of the South African ‘way of life’ before accepting that warm welcome being extended by the South African government and its airline company, South African Airways.93 Arriving in South Africa, tourists could expect to immediately experience discrimination in the airports, where “blacks may not use the regular bar lounges, restaurants or restrooms.”94 Once in the country, the American traveler would encounter segregated transportation, hotels, restaurants, pubs, beaches, parks, and post offices; museums and tourist attractions were only open to black men and women on the weekly “African visiting day.”95 (Although South African officials repeatedly stated that formal discrimination rules did not apply to non-South African black travelers, informal discrimination was common.96)

ACOA also ran its own rebuttal advertisement, in response to the SAA advertisement inviting “139 distinguished Americans” to take their inaugural flight. In February, A. Philip Randolph, on behalf of ACOA, sought 139 distinguished African Americans (who were presumably unwelcome both in South Africa and in most American country clubs) to sign onto a response advertisement.97 The response was strong; 161 prominent African Americans including Muhammed Ali, Arthur Ashe, Gordon Parks, Nina Simone, Count Basie, Bayard Rustin, James Forman, Julian Bond, Charles Evers, Ralph D. Abernathy, H. Rap Brown, Dorothy I. Height, Whitney M. Young Jr., Harry Belafonte, Representative Shirley Chisholm, Representative John Conyers Jr., Representative Adam Clayton Powell, Professor Charles V. Hamilton, and individuals affiliated with the United Auto Workers, the NAACP, the United Methodist Church, and the National Welfare Rights Organization, signed a statement (distributed widely and printed in the New York Times in May) reciting the now-familiar arguments against the SAA permit and emphasizing that “South African Airways: The tourism you promote is racism. Racism is not welcome here.”98 Advertising was also a site where ACOA’s public

94. Ibid., 1.
95. Ibid., 2.
96. “Grave Implications for South Africa of Her Official Policy on Non-white Tourists,” Southern Africa’s Travel and Trade News Pictorial, June 4, 1969; and Amembassy, Cape Town to State Department, Airgram, June 11, 1969, both in Folder Inco Tourism S 1/1/67, Box 1162, CFPF:E, RG 59, NACP; and Amembassy, Pretoria, to State Department, Airgram, January 22, 1970, Folder AV S 1/1/70, Box 661, Subject Numeric Files, 1970–73, Economic (hereafter SNF:E), RG 59, NACP.
97. A. Philip Randolph to Diggs, February 3, 1969, 1, Folder 17, Box 201, Diggs Papers, MSRC-HU.
protests bore fruit; the advertising agency of Henry W. Graff, Inc. stopped representing SAA after protests (protests against Gaynor and Ducas, which took up the account, were less successful) and the New Yorker and the Saturday Review declined SAA’s advertisements.\footnote{Summary: Immediate Results of South African Airways Campaign,” July 22, 1969, Folder 14, Box 104, microfilm reel 9, ACOA Records. ACOA took credit for this, but the agency pointed to long-distance communication problems, and SAA claimed they did not like Graff’s work. “S.A.A. Has Changed New York Agency,” Rand Daily Mail, August 18, 1969, 2.} A few years later, after black stewardesses working for American Airlines contacted ACOA, the airline stopped running advertisements for South African tourism in their in-flight magazine.\footnote{Raymond Heard, “US Airline to Stop SA Adverts,” Rand Daily Mail, May 17, 1971, 2.}

Advertising also offered new legal opportunities. Diggs adopted the suggestion of his subcommittee colleague Benjamin S. Rosenthal (D-NY) that SAA’s advertising strategy was ripe for a legal challenge under United States law.\footnote{Rosenthal to Diggs, April 29, 1969, Folder 2, Box 201, Diggs Papers, MSRC-HU.} Advertisements welcoming all Americans were deceptive, Diggs protested to the Federal Trade Commission, because “nowhere is there a reference to the completely segregated facilities which exist in South Africa nor to the fact that racial segregation there is not a matter of custom alone but of law.”\footnote{Diggs to Paul Rand Dixon, Federal Trade Commission, May 1, 1969, Folder 2, Box 201, Diggs Papers, MSRC-HU.} The commission directed him back to the CAB, which had full authority over airline advertising practices, and on this matter, at least, the CAB was willing to act.\footnote{Federal Aviation Act, § 411.} Diggs was tireless in his correspondence, the complaint was more like something that the CAB routinely handled, and the content of SAA’s advertisements presented few foreign policy questions. Board officials asked SAA to omit references to any sites or experiences not available to tourists on a nondiscriminatory basis, and Diggs’s office trumpeted this victory.\footnote{Richard J. O’Melia to Diggs, October 2, 1969, 1, Folder 2, Box 201, Diggs Papers, MSRC-HU; and Press release, October 7, 1969, Folder 17, Box 201, Diggs Papers, MSRC-HU.} Diggs continued to police SAA advertising over the next several years, flagging problematic advertisements and reminding the board that that the airline was limited to “advertising solely about the beauty and the grandeur of the airplane itself. Advertisements relating to the beauty of the country, the warmth of the people, the thrill of a game reserve, the comfort of a guide, would overstep the legal boundaries of the Airways.”\footnote{Diggs to O’Melia, March 17, 1970, Folder 17, Box 201, Diggs Papers, MSRC-HU.}
grudgingly adapted their advertising, and pulled questionable advertisements upon complaint instead of going through a formal CAB hearing.

Other aspects of South African travel opened up additional opportunities to deploy United States civil rights law. The United States Postal Service (USPS) paid SAA to carry mail; if the airline discriminated (a proposition for which there was not yet hard evidence), such payment would violate the ban on discrimination in federally funded activities in Title VI of the Civil Rights Act of 1964. When Diggs demanded an explanation, a USPS official explained that it was a matter of postal priorities. SAA offered service on days that Pan Am did not, and it was postal policy “to advance the mail wherever possible.”

Diggs rejected the idea that the decision was simply about mail; as he wrote to the United States postmaster general, “your patrons are NOT entitled to such service at a sacrifice which is contradictory to our official position on apartheid and which demeans the dignity of 25 million black Americans and their supporters.”

Noting that SAA had recently denied him an unrestricted visa, Diggs argued: “To send mail on a plane that I, as Chairman of the House Foreign Affairs Subcommittee on Africa cannot travel on, simply because I am black, is the height of repugnancy.” Estimating United States payments to SAA at a few thousand dollars a month, Diggs argued that continued service “represents another example of our furthering the economic advancement of the most racist government in the world.” He accused the postmaster general of “supporting a government which has established segregated customs facilities at their airports consistent with their separation of the races in every aspect of life in their society. Even your own state of Alabama was not quite that bad before federal law and Supreme Court edicts broke down its legal racial barriers.”

Diggs’s accusations garnered some publicity in black newspapers, but the USPS was unmoved. Relying on State Department guidance that it was up to the USPS to determine whether United States postal interests were important enough to overcome “the general policy position of limiting official relationships with South Africa,” the

106. Jerry L. Reynolds to Diggs, July 31, 1969, Folder 2, Box 201, Diggs Papers, MSRC-HU.

107. Diggs to Winton M. Blount, August 6, 1969, 2, Folder 2, Box 201, Diggs Papers, MSRC-HU.

108. Ibid.

109. Ibid., 1.

110. Ibid.

USPS stood by its service.\textsuperscript{112} Without concrete evidence of SAA discrimination for a Title VI claim, there was little that activists could do to push the USPS to take a firmer stand against apartheid than other parts of the government. Diggs’s committee raised the issue a few years later in a 1971 hearing, and Representative John C. Culver (D-IA) suggested: “Let the mail be a few days late. Wouldn’t that be a kind of a daily reminder to people that you have to pay some price to be part of a civilized world community of nations?”\textsuperscript{113} The USPS official demurred, stating that such a decision would “require direction from the policy level of the government.”\textsuperscript{114}

Diggs launched a more successful Title VI challenge against Pan Am’s South Africa service a few years later.\textsuperscript{115} Pan Am’s attentiveness to South African preferences had led the airline to stop showing a Sidney Poitier movie after South African passengers complained.\textsuperscript{116} More problematic from a legal standpoint was that the airline avoided using black flight crews on its South African routes.\textsuperscript{117} The airline suggested that it wanted to spare its staff “unequal treatment” in South Africa, but at Diggs’s prodding the CAB, the Department of Health, Education, and Welfare and the Labor Department’s Office of Federal Contract Compliance pushed the airline, as a government contractor, to comply with federal nondiscrimination law.\textsuperscript{118} By February 1972, Pan Am had agreed to change its staffing policy and work with the South African government to put together a list of

\textsuperscript{112} Carl F. Salans, Deputy Legal Adviser, State Department, to David A. Nelson, General Counsel, USPS, August 21, 1969, Folder AV 6 S AFR 1/1/67, Box 553, CFPF:E, RG 59, NACP.


\textsuperscript{114} Ibid. (J. F. Jones, Director, Traffic Management Division, Operations Department, USPS).

\textsuperscript{115} ACOA and Diggs did not try to revoke Pan Am’s 1947 permit, although throughout this period they did monitor the status of Pan Am’s request for additional service to South Africa.


restaurants, stores, and other public accommodations that would offer service to all crew members on an integrated basis.\textsuperscript{119}

Yet another legal challenge was framed around South Africa’s visa restrictions. From the beginning of the SAA campaign, ACOA had been seeking evidence of discrimination in SAA reservations, in visa applications, and on flights that could be used for publicity and for lawsuits.\textsuperscript{120} Americans’ right to travel across state lines had been at the heart of earlier domestic civil rights activity; here the right to engage in global travel (much discussed in the Cold War context) was implicated by restrictive South African policies.\textsuperscript{121} Through “Project Inequality,” ACOA recruited black and white volunteers to book travel to South Africa in order to gather evidence of discriminatory treatment.\textsuperscript{122} Testers were encouraged to ask SAA representatives pointed questions about the effect of apartheid laws on American visitors, and, because one could make airline reservations without paying in advance, ACOA suggested that testers might wait to cancel them “if you want to harass the airways a little.”\textsuperscript{123}

As ACOA staffers quickly realized, discrimination occurred before anyone boarded the flight. South Africa’s restrictive visa process prevented almost all black Americans (and white American critics of apartheid) from boarding SAA flights in the first place (and thus made a formal SAA segregation policy unnecessary).\textsuperscript{124} Although the South African government had no official policy on the matter, United States embassy officials in South Africa reported an informal policy of determining whether

\begin{itemize}
  \item \textsuperscript{119}Francis L. Lennon, Senior Director, Flight Service Operations, Pan Am, to J. Driessen, Secretary for Transport, Pretoria, February 12, 1971, Folder South Africa 7, Box 357, Diggs Papers, MSRC-HU; and Associated Press, “Pan Am to Use Blacks on South Africa Flights,” \textit{New York Times}, February 11, 1972, 74.
  \item \textsuperscript{121}The Foreign Assistance Act of 1961 acknowledged “the right of all private persons to travel and pursue their lawful activities without discrimination as to race or religion.” Pub. L. No. 87–195, 75 Stat. 424, § 102.
  \item \textsuperscript{122}Project Inequality—South African Airways, n.d., Folder 14, Box 104, microfilm reel 9, ACOA Records.
  \item \textsuperscript{123}Ibid.; see also South African Airways Quiz-IN, n.d., Folder 14, Box 104, microfilm reel 9, ACOA Records.
\end{itemize}
the prospective non-white traveler had made travel plans “to minimize chance of incidents embarrassing to either the traveler or the authorities, given the apartheid environment in South Africa.”

During the 1960s, South Africa had refused visa applications from prominent black critics including Martin Luther King Jr. and Arthur Ashe; in 1969, Diggs himself was denied an unrestricted visa to travel to South Africa.

As a lawyer at SAA’s chosen law firm put it, South Africa excluded “Blacks and agitators. South Africa doesn’t want them; it decided as a matter of national policy to keep them out.”

ACOA challenged these travel practices under New York’s broad public accommodations laws, with the help of state-level allies. Drawing on evidence of discriminatory treatment that ACOA had gathered, New York Attorney General Louis J. Lefkowitz argued to the New York State Division of Human Rights in December 1969 that SAA had violated New York law “in that it has directly or indirectly refused, withheld from or denied to non-white persons the accommodations, advantages, facilities or privileges of its services as a public conveyance on account of the race or color of such persons.”

The complaint was directed not against the South African government (which could claim sovereign immunity) but rather against SAA (the aviation agency of the South African government that had waived its sovereign immunity claims to obtain the 1968 route permit). The airline, Lefkowitz argued, “has in effect carried the apartheid policy of South Africa to the doorstep of our own State through the denial of its facilities to black Americans.”

125. Amembassy, Pretoria, to State Department, Airgram, January 22, 1970, 2, Folder AV S 1/1/70, Box 661, SNF:E, RG 59, NACP.


128. Verified complaint, Lefkowitz v. South African Airways, New York State Division of Human Rights, December 4, 1969, 5, Folder 2, Box 201, Diggs Papers, MSRC-HU.


130. Lefkowitz, quoted in News Release, December 8, 1969, Folder 2, Box 201, Diggs Papers, MSRC-HU. SAA lawyers had themselves previously described SAA as “an instrumentality of the Government of South Africa” and “the name under which the Airways Department of the Administration operates commercially.” Brief of South African Airways to Examiner Hyman S. Goldberg, September 16, 1968, 2, 2 fn 1, Docket 20054, RG 197, NACP.
Although SAA did not make visa decisions, Lefkowitz charged that the airline, as “an instrumentality” of South Africa, was implicated, because it only allowed passengers with valid visas to travel.\(^{131}\) Existing rules about travel documentation meant that SAA could not act otherwise, but a finding of discrimination might have meant that SAA could not provide service on those terms within New York.

The New York State Division of Human Rights promptly ordered a public hearing into whether state laws were being violated.\(^{132}\) South African officials strongly objected to a public hearing on something they considered to be a challenge to their sovereignty, and asked the State Department to intervene.\(^{133}\) (Perhaps realizing that a passive approach would allow them to oppose apartheid without actually doing anything, State Department officials chose to wait and see what happened, noting internally: “The complaint is weak but we have no interest in taking the heat off SAA.”\(^{134}\)) South Africa had more luck with a legal challenge on the grounds that the State Division of Human Rights had no jurisdiction.\(^{135}\) Although the complaint was directed against the airline, SAA lawyers argued that it was really an attack on South Africa’s visa process itself. SAA had no authority over South Africa’s visa decisions, they argued, and the State Division on Human Rights could not inquire into a foreign country’s visa process. The grounds were twofold: foreign policy questions were reserved for the federal government, and the “act of state” doctrine barred courts in one country from telling another country what to do within its borders.\(^{136}\) The New York Supreme Court soon agreed. An order by the

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133. State Department, Memorandum of Conversation, December 17, 1969, 2, Folder AV 6 S AFR 1/1/67, Box 553, CFPF:E, RG 59, NACP; and State Department, Memorandum of Conversation, February 12, 1970, 1, and South Africa, Aide Memoire, July 16, 1970, both in Folder AV S 1/1/70, Box 661, SNF:E, RG 59, NACP.

134. State Department, Memorandum of Conversation, December 17, 1969, 2, Folder AV 6 S AFR 1/1/67, Box 553, CFPF:E, RG 59, NACP.


136. SAA, Application to Reopen and Notice of Motion to Dismiss the Complaint, to Vacate the Notice of Hearing, and for Other Relief, \textit{Lefkowitz v. South African Airways}, Case No. Ia-CP-0446-69, New York State Division of Human Rights, February 10, 1970, in Exhibits Accompanying Petitioner’s Petition and Memorandum in Support Thereof, Folder 17, Box 94, Series I: Lawyers’ Committee for Civil Rights Under Law Southern
Division of Human Rights “would necessarily be directed against a foreign government or its consular agent, exercising sovereign power. This it may not do, for such action would interfere with an act of state and with the foreign policy of the United States, which has seen fit to permit petitioner to operate in and out of the United States, carrying passengers to and from the Republic of South Africa. Foreign policy is a Federal concern, not amenable to State action.”

Therefore, “[h]owever abhorrent the discriminatory policies of the Republic of South Africa and its consulate in New York, no administrative or judicial remedy is here available against them.”

Although several legal observers criticized the court’s logic, arguing that it was mistakenly relying on the act of state doctrine in order to avoid the complications of the foreign policy questions, the court’s decision spelled the end of this particular legal approach. Nor was the CAB newly persuaded by this evidence of discrimination; when contacted by the commissioner of the New York State Division of Human Rights, CAB Chair Secor D. Browne responded that “the airline’s refusal to carry passengers who cannot obtain visas does not constitute discrimination in air transportation.”

Little more was done on the travel front over the next few years, although ACOA continued its anti-apartheid efforts and Diggs stayed busy holding hearings on South Africa, protesting the government’s encouragement of private investment in South Africa, proposing an extension of United States nondiscrimination law to cover government

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138. South African Airways, 64 Misc. 2d at 712.


140. Browne to Robert J. Mangum, February 16, 1971, 2, Folder South Africa, Box 97, Records Relating to International Aviation Negotiation, Minetti Papers, RG 197, NACP. Statutory language barred domestic and foreign air carriers from “subject[ing] any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” Federal Aviation Act, §404(b).
contractors’ hiring practices abroad, fighting South Africa’s sugar quotas and the Nixon administration’s weakening of the arms embargo, and calling for the closure of a segregated NASA tracking station in South Africa. President Nixon named Diggs as a delegate to the United Nations in 1971, but he soon resigned in protest of the administration’s policies.

ACOA and Diggs were quick to marshal their forces when they learned that SAA was applying to the CAB for a new route permit that would allow them to fly from Johannesburg to New York via Sal Island (Cape Verde) and/or Las Palmas (the Canary Islands) in December 1972. This time around, anti-apartheid forces had experience engaging with the CAB, and were represented by lawyers from the Southern Africa Project of the Lawyers’ Committee for Civil Rights Under Law. ACOA and Diggs sought leave to intervene in the permit decision, joined by the Black United Front of Washington DC, the African Heritage Studies


Association, and IFCO-Action. They were also joined by members of the new Congressional Black Caucus (which Diggs had helped establish in 1971).144 “As Black citizens and members of Congress” they cited their knowledge of South Africa and their “substantial interest in assisting in the protection of the Constitutional right of Black citizens to equal protection of the laws.”145 Diggs, joined by members of the Congressional Black Caucus and others, also took the opportunity to introduce a new bill to amend the FAA to address racial and ethnic discrimination, but this legislative proposal met with no more success than previous ones.146

CAB officials, by now familiar with ACOA and Diggs’s concern with the apartheid question in air transportation—and perhaps influenced by the increasing publicity given to anti-apartheid activism in the early 1970s—determined internally that this time they would “place in issue the question of South African Airways’ conformance with U.S. laws on equal employment opportunity and non-discrimination.”147 At the lengthy prehearing conference in February 1973, CAB Bureau Counsel Jerome Blum (the CAB official formally charged with representing the public interest before the board) proposed that the proceedings should cover not just the standard questions, but also whether SAA was compliant with the public accommodations and employment sections of the Civil Rights Act and the nondiscrimination and “deceptive practices” provisions of the FAA.148 ACOA, Diggs, and the other intervening parties (designated as the “joint intervenors”) sought an even broader discussion of SAA’s practices, and Diggs had tried to get the State Department to weigh in with information about South Africa’s discrimination against Americans.149 (The State Department felt that the issues had been

144. Ronald V. Dellums, Lying Down with the Lions: A Public Life from the Streets of Oakland to the Halls of Power (Boston: Beacon Press, 2000); and Tillery, Between Homeland and Motherland.
145. Petition for Leave to Intervene by Charles Coles Diggs, Yvonne Brathwaite Burke, Shirley Anita Chisholm, et al. (hereafter Joint Intervenors), February 16, 1973, 3, Docket 24944 vol. 1, Box 994, Selected Docket Files 1938-84, Docket Section, Office of the Secretary (hereafter Docket 24944 vol. 1), RG 197, NACP.
147. Memorandum, South African Airways Permit Amendment Application, December 15, 1972, Folder South Africa, Box 97, Records Relating to International Aviation Negotiation, Minetti Papers, RG 197, NACP.
149. Diggs to C. Clyde Ferguson Jr., Deputy Assistant Secretary for African Affairs, State Department, February 8, 1973 and attached memorandum, n.d., Folder AV S 1/1/70, Box 661, SNF:E, RG 59, NACP.
sufficiently raised, and was unwilling to interfere with presidential prerogatives. SAA, by contrast, strongly objected to the joint intervenors’ participation and the consideration of any issues touching on South Africa’s racial policy. As one SAA attorney argued: “This way lies madness.” However, the CAB’s administrative law judge (ALJ) followed the bureau counsel’s lead and agreed to consider evidence of Civil Rights Act violations “limited to matters occurring within the United States” and violations of the FAA insofar as they related to SAA’s “discrimination in ‘air transportation’” but not “another government’s general practices or policies.” The ALJ thus ordered SAA to provide information about how non-white Americans were treated on SAA’s international flights and at the international terminal of the Johannesburg airport, and about its advertising and employment practices within the United States. (One reporter noted that this “marked the first time that racial discrimination has been raised in a board hearing on landing rights.”)

None of the parties was satisfied with this decision. SAA opposed even this domestic inquiry, arguing that there was no discrimination on the international flights or in the international terminal of the Johannesburg airport, and that there the CAB’s inquiry should end. And, the airline argued, the joint intervenors had no place in the hearing; the public interest was adequately represented by the CAB’s bureau counsel, and “the alleged interest of the petitioners is based on political opposition towards the Government of the Republic of South Africa rather than on any matters involving air transportation.” Politics and diplomacy were “the only lawful and appropriate means whereby petitioners may pursue their interest.”

150. Ferguson to Diggs, February 20, 1973, 2, Folder AV S 1/1/70, Box 661, SNF:E, RG 59, NACP. State Department surveys indicated no formal segregation on SAA international flights. Amembassy Pretoria to State Department, Airgram, January 22, 1970, Folder AV S 1/1/70, Box 661, SNF:E, RG 59, NACP.


154. Ibid., 10–12.


156. Answer of Applicant to Joint Petition to Intervene, February 23, 1973, 1, Docket 24944 vol. 1, RG 197, NACP.

157. Ibid., 4.
By contrast, the joint intervenors and the bureau counsel both petitioned the ALJ to broaden the issues under consideration. The joint intervenors argued that practices within South Africa affected American travelers, and that they were therefore relevant to the public interest determination before the board: “the inquiry to be undertaken in this proceeding cannot be limited by an arbitrary geographic ‘cut off’ point which excludes everything which occurs or originates from within South Africa.” Joint intervenors and the bureau counsel sought additional information about how non-white Americans would be treated on other SAA flights and at other airports in South Africa, arguing that travel from the United States to points beyond Johannesburg would still be within the “foreign air transportation” for which discrimination was barred under the FAA. The CAB bureau counsel also called for a more in-depth examination of SAA’s advertising practices, while the joint intervenors called for more information about SAA’s employment practices. Proof of employment discrimination was relevant not just to the question of SAA’s compliance with Title VII, they argued, but also to SAA’s ability to carry mail given Executive Order 11246 (1965), which barred employment discrimination by government contractors. The joint intervenors also argued that the evidence of visa discrimination that ACOA had presented to the New York State Division of Human Rights was relevant to the board’s public interest determination. The bureau counsel wanted more information about how SAA and the South African government coordinated, and the joint intervenors theorized that the government of South Africa might count as an “an indirect foreign air carrier” and therefore be subject to the FAA’s nondiscrimination provisions (an issue not raised in the state-level proceedings). Either way,

158. Joint Intervenors’ Objections to Prehearing Conference Report, March 2, 1973, 3, Docket 24944 vol. 1, RG 197, NACP.
159. Joint Intervenors’ Objections to Prehearing Conference Report, March 2, 1973, 11–14a; and Objections of the Bureau of Operating Rights to the Prehearing Conference Report, March 2, 1973, 2–3; both in Docket 24944 vol. 1, RG 197, NACP. The Federal Aviation Act of 1958 defined foreign air transportation as transportation between “a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.” § 101(21)(c).
160. Objections of the Bureau of Operating Rights to the Prehearing Conference Report, March 2, 1973, 4–5; and Request for Information, Feb. 27, 1973, both in Docket 24944 vol. 1, RG 197, NACP.
161. Joint Intervenors’ Objections to Prehearing Conference Report, March 2, 1973, 15–17, Docket 24944 vol. 1, RG 197, NACP.
162. Objections of the Bureau of Operating Rights to the Prehearing Conference Report, March 2, 1973, 4; and Joint Intervenors’ Objections to Prehearing Conference Report, March 2, 1973, 4, both in Docket 24944 vol. 1, RG 197, NACP.
South Africa’s visa policies meant that SAA was “unable to offer Americans the equal opportunity to avail themselves of the proposed foreign air transportation.”

Although SAA argued that the act of state doctrine barred the CAB from considering South Africa’s visa policies, the joint intervenors argued that a prudential doctrine that kept the courts from interfering in foreign policy decisions hardly applied to the board. The CAB was charged by Congress to inquire into whether the public interest was being served and to provide the president with all relevant information for his ultimate decision. The CAB’s statutory obligation to advise the president, they argued, “cannot be adequately fulfilled by a proceeding which considers whether Black Americans will be segregated aboard the Applicant’s flights from New York to Johannesburg, or in the ‘international’ enclave at Johannesburg airport, but which fails to inquire into the charge that the practices and policies of the Applicant’s parent effectively prevent Black Americans from getting on board those flights in the first place.” And granting the permit given such discrimination might also “constitute governmental action by our government in derogation of the constitutional due process rights of American citizens enunciated in Bolling v. Sharpe.”

The ALJ denied these objections and limited consideration of SAA’s alleged discrimination to the airline’s United States employment decisions and to travelers’ experiences on flights and in the Johannesburg airport. At the April 9 hearing, one SAA representative testified that there was no segregation on SAA planes, in the international part of the Johannesburg airport where American travelers would land, or on the bus transportation that SAA provided to downtown Johannesburg. Although non-white American travelers changing to other SAA flights would encounter segregated facilities in the domestic area of the Johannesburg airport, such travelers who were singled out on the basis of their race could avoid trouble by

163. Joint Intervenors’ Objections to Prehearing Conference Report, March 2, 1973, 7, Docket 24944 vol. 1, RG 197, NACP.
164. Ibid., 7–10.
165. Federal Aviation Act of 1958, § 102(c).
166. Joint Intervenors’ Objections to Prehearing Conference Report, March 2, 1973, 9, Docket 24944 vol. 1, RG 197, NACP.
167. Ibid., 5 ft. 3, drawing on Chandler, Note, 145.
168. Supplemental Prehearing Conference Report, March 8, 1973, Docket 24944 vol. 1, RG 197, NACP.
169. Hearing Transcript, April 9, 8–42 (testimony of Frans J. Swartz, Deputy Commercial Director), and SAA exhibit 10, both in Docket 24944 vol. 1, RG 197, NACP. According to one source, SAA had stopped segregating its domestic flights in anticipation of the permit application. David Weissbrodt and Georgina Mahoney, “International Legal Action Against Apartheid,” Law and Inequality 4 (1986): 485–508, at 506.
showing their travel documentation. The hearing also included significant discussion of SAA’s employment practices; another SAA representative pointed to letters from employment agencies that attested to their nondiscrimination in hiring, and to the fact that the airline employed a black typist and a black mailroom worker in the United States.  

Following the hearing, the bureau counsel recommended to the ALJ and the ALJ recommended to the board that the permit was, in fact, in the public interest, and should be granted. Opponents had failed to overcome the strong presumption that a route authorized by a bilateral agreement was in the public interest. The proceedings had revealed no evidence that SAA was in violation of the Civil Rights Act or of the nondiscrimination provisions of the FAA in its hiring, advertising, or services. Objections to South Africa’s own practices were beyond the board’s authority to resolve, the ALJ declared; such a question was for Congress, or the president, to determine. The CAB agreed. The board rejected the argument that it could examine SAA service throughout South Africa because American passengers might continue on SAA flights to other points in South Africa; such service did not oblige the CAB to examine domestic service or domestic facilities.

The effect of such examination would be to require the Board to evaluate the activities of a foreign carrier within its home country and to pass judgment on the internal policies of a foreign government. Such evaluation would necessarily inject the Board into the complex and delicate diplomatic questions affecting relations between the United States and a friendly foreign nation. In our judgment such involvement would neither be practicable nor redound to the benefit of the public interest. … Thus, however deeply the Board may deplore the racial policies and practices involved, it finds itself in agreement with the administrative law judge that the scope of the Board’s inquiry should be limited in this case to an examination of those international services specifically authorized in the applicant’s amended permit.

SAA’s compliance with United States law within the United States was sufficient to get the airline its permit, and board members declined to adopt a more capacious definition of the public interest. The CAB did, however, agree to limit SAA service to Johannesburg, rather than to “a point or points in the Republic of South Africa” (as the first permit had granted, and as was the custom at the CAB, even when the permit request was

170. Hearing Transcript, April 9, 43–74 (testimony of Reginald Brett, North American office manager), and SAA exhibit 19, both in Docket 24944 vol. 1, RG 197, NACP.
172. South African Airways, Permit Amendment, 63 C.A.B. at 379.
narrower). The ALJ and the board concluded that United States–South Africa service should not extend to those airports in the absence of information about discriminatory practices there.

Diggs’s effort to challenge this order in court was thwarted by a statutory bar on judicial review of presidential air route decisions. Although Diggs argued that the CAB’s statutory and constitutional duty to hear and present to the president evidence of racial discrimination trumped statutory language, the D.C. Circuit disagreed and the Supreme Court declined to hear the case. As in earlier litigation efforts, courts appeared to be going out of their way to avoid considering what many lawyers thought was not at all an easy question. SAA’s success here largely spelled the end of this particular campaign. Activists’ efforts to convince the CAB to hold SAA to domestic civil rights law had succeeded in some areas, but the airline’s ability to conform to these laws without changing its South African practices meant that the broader effort to extend federal nondiscrimination law to the South African travel experience had failed to change South Africa or the United States–South African relationship. A third SAA application in 1982, for a Houston–Johannesburg route, was met with significant resistance from several members of Congress (led by Representative Mickey Leland [D-TX]) and the now-stronger anti-apartheid movement. (Diggs did not participate, having resigned from Congress in 1980 after he was convicted of financial improprieties.) However, the CAB considered the discrimination question largely foreclosed by its previous proceedings. Although the board was “sympathetic to the concern of the petitioners as to general racial discrimination in South Africa” it argued that the federal government must handle the matter “with one voice and through the agency responsible for our general


foreign relations, i.e., the Department of State.” 177 The Reagan administration, having adopted a friendly policy of “constructive engagement” with South Africa, was not moved. 178

+++ This is, then, a story of both success and failure. The SAA campaign was one of many contemporaneous efforts by Americans to turn the United States government against South Africa, pressure private entities to divest, and support anti-apartheid activism by South Africans. Although less successful than some of these other efforts, the campaign is worth examining as a story of legal mobilization and of institutional behavior. Diggs and ACOA officials devised a strategy to target SAA and South African tourism that built on the executive, legislative, and judicial accomplishments of the civil rights movement. Civil rights activists knew well that legal institutions offered them the opportunity to be heard on the same terms as their opponents, no matter how small their movement, and that building small precedents in one area could leverage change in others. And for anti-apartheid activists, such institutions seemed like places to bypass the pro-South Africa views of the seemingly intractable national security bureaucracy, and to reach out to domestic policy officials who might be more amenable. As Representative Culver remarked to a USPS official in a 1971 hearing, “we are trying to shake up this silly bureaucracy to address themselves to these moral questions.” 179 They also provided publicity opportunities; ACOA reflected in 1969 that “Each approach to Washington was an opportunity for publicity, for reaching people who do not know the virulent nature of South African apartheid with information about it, and about South African propaganda here.” 180

But this legal and bureaucratic strategy narrowed activists’ demands and meant that even their successes were necessarily limited in scope. Diggs and ACOA wanted more than to make sure that SAA complied with civil rights laws by limiting its advertising claims, keeping its flights unsegregated, or hiring a few black employees in low-level positions in the United States. Such accomplishments, although real, did nothing to affect conditions in South Africa, change United States foreign policy toward South Africa, or jumpstart a mass movement. The battles over

South African travel indicate the difficulties of extending domestic civil rights law to a global arena. South Africa may have been the Mississippi of the world, but the legal tools activists used against Mississippi did not work as well against South Africa. The right to be heard was not enough; little could be done without a receptive audience. Although Congress, the White House, and the courts had been willing to expand federal authority over civil rights in the domestic context, each branch was decidedly unwilling to do so when foreign policy questions were involved. Government officials were not always convinced that SAA posed a simple civil rights issue; they were hesitant to contradict foreign policy determinations, and suspected that activists were trying to extend these laws across the ocean to tell another foreign sovereign what to do.

Larger victories would ultimately come from pressures deployed outside the federal government, not from within. The American anti-apartheid movement gained steam in the late 1970s and early 1980s, more by following the civil rights movement’s mass organizational strategies than by following their legal ones. TransAfrica, created shortly after the Soweto student uprising in 1976, soon took the lead in anti-apartheid organizing in the United States, and the larger and more public the movement was, the more successful the efforts were to pressure universities, local and state governments, banks, and businesses to cut their ties to South Africa and to push members of Congress to take action. Although the Reagan administration was less amenable to anti-apartheid arguments than the Carter administration had been, pressure on private businesses to divest and on the government to impose sanctions continued to gain momentum in the 1980s (especially as South Africa’s violent repression of its citizens was increasingly evident on United States television screens). By the mid-1980s, members of Congress were being arrested in front of the


SAA continued to fly its American routes until 1986, when Congress passed the Comprehensive Anti-Apartheid Act over President Reagan’s veto. The act barred a wide variety of economic entanglements between the United States and South Africa, and specifically prohibited South African planes from landing in the United States (and vice versa). Public pressure had led Congress to do what a small group of activists and their lawyers had been unable to do, and to do much more that they had only dreamed about. Air traffic between the two countries would not resume until 1991, once South Africa began dismantling its apartheid regime.


