Changes in Presidential Powers Over the Awarding of International Air Routes: Effects and Implications of Section 801(a) of the Airline Deregulation Act of 1978

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Congress amended the international air route-awarding procedures established in earlier legislation when it enacted section 801(a) of the Airline Deregulation Act of 1978. Changes in the procedures were necessary for two reasons. First, the original route-licensing scheme was designed by Congress to balance presidential discretion concerning defense and foreign policy with congressional authority over foreign commerce. However, by precluding judicial review of challenges by foreign air carriers, Congress thwarted its own intent and established the President as the final authority in awarding routes to such carriers. Secondly, by also precluding review of certain challenges by citizen carriers, the courts destroyed the remains of the original legislative design, and extended the President’s dominance over

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   The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in foreign air transportation, or any permit issuable to any foreign air carrier under section 402 of this Act, shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such certificates or permits solely on the basis of foreign relations or national defense considerations which are within the President’s jurisdiction, but not upon the basis of economic or carrier selection considerations. Any such disapproval shall be issued in a public document, setting forth the reasons for the disapproval to the extent national security permits, within sixty days after submission of the Board’s action to the President. Any such Board action so disapproved shall be null and void. Any such Board action not disapproved within the foregoing time limits shall take effect as action of the Board, not the President, and as such shall be subject to judicial review as provided in section 1006 of this Act.

(Emphasis added).
6. The only reason offered for the exclusion of foreign carriers’ claims from review in section 1006(a) was that the War, State and Navy Departments believed that only the President could properly weigh the risks of espionage involved in allowing foreign passengers to fly over United States defense fortifications. Hearings on H.R. 9738 Before the House Comm. on Interstate and Foreign Commerce, 75th Cong., 3d Sess. 147-48 (1938) [hereinafter cited as H.R. 9738]. However, this reasoning would apply as well to citizen carriers, since they also carry foreign passengers.
7. 49 U.S.C. § 1301(3) (1976) defines an “air carrier” as “any citizen of the United States who undertakes . . . to engage in air transportation.” (Emphasis added). Thus, a “citizen carrier” as
international route awards. The amended section 801(a) eliminates most of the objectionable aspects of the original scheme by restricting the scope and exercise of presidential review, while enlarging the opportunities for judicial review. If the courts interpret the statute in a way which leaves its design intact, the new law should produce important effects in foreign and domestic air travel, in route-awarding procedures, and in the separation of powers among the three branches of the national government. Whether the courts will follow the statutory language of section 801(a) remains to be seen, however, since they have not adhered to congressional intent in the past.

Since the original international route-licensing system embodied in sections 801(a) and 1006(a) of the Civil Aeronautics Act of 1938 served as the basis for the new section 801(a) scheme, this comment will first delineate the legislative history of those sections as a means of clarifying the congressional intent in enacting the 1938 Act. Next, it will present the statutory scheme for the awarding of international routes

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8 See text accompanying notes 34-65 infra.
10 See text accompanying notes 34-65 infra.
The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation or air transportation between places in the same territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

(Emphasis added). As enacted in the 1938 Act, section 801 had no subsections. However, in 1972, an amendment to section 801 was enacted, adding a new subsection concerning Presidential review of rates, fares, and charges in "foreign air transportation," which became section 801(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1976) (current version at Pub. L. No. 95-504, 92 Stat. 1705 (1978)). See Pub. L. No. 92-259, § 2, 86 Stat. 95, 96 (1972). Thus, for the purposes of this comment, section 801 of the Civil Aeronautics Act of 1938, and later the Federal Aviation Act of 1958, will be referred to as section 801(a).

12 49 U.S.C. § 1486(a) (1976) provides:
Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.
embodied in the former legislation in order to demonstrate the interrelation-
ship between former section 801(a) and section 1006(a), which the
new section 801(a) greatly altered. Thirdly, this comment will examine
the development of the case law interpreting that statutory scheme to
discover the judicial rationale for denying review to citizen carriers.
Fourthly, it will critique both the congressional and the judicial ver-
sions of the route-licensing system in order to explain why the amend-
ment of former section 801(a) became necessary. Furthermore, the
major changes propounded by the new section 801(a) will be analyzed,
and a proposed interpretation of the new statute will be offered. Fi-
nally, this comment will explore the predominantly favorable effects
and implications which the new section 801(a) procedures are likely to
have on foreign and domestic air commerce, route-licensing practices,
and the separation of powers among the legislative, executive, and judi-
cial branches.

LEGISLATIVE HISTORY OF FORMER SECTION 801(a)
AND SECTION 1006(a)

The legislative history of the Civil Aeronautics Act of 1938 estab-
ishes that, while proponents of presidential review of Civil Aeronau-
tics Board (CAB) international route-award orders probably com-
prehended the commercial value of the airlines, they viewed inter-
national aviation principally in military and political terms.\(^4\) World
War I had demonstrated the value of aircraft in military operations,
and the threat of another war in Europe caused executive officials to
assert, during congressional hearings on the 1938 Act, that the Presi-
dent, as Commander-in-Chief, should play a key role in the develop-
ment of an international air network.\(^5\) Furthermore, international
airlines were regarded as important intelligence gathering tools in the
conduct of foreign affairs.\(^6\) Moreover, before World War II, individ-
ual carriers generally obtained the right to operate international routes
through direct negotiations with foreign governments.\(^7\) Participation

\(^{14}\) H.R. 9738, supra note 6, at 37-38, 147-48; Presidential Powers, supra note 4, at 1179.

\(^{15}\) See H.R. 9738, supra note 6, at 37-48, 147-48. Interestingly enough, the President did not
seek the approval power granted in former section 801(a), but rather the Departments of Navy,
State, and War jointly advocated presidential review as essential to national defense and foreign
policy. Id. at 147-48. While the State and Defense Departments most likely prefer the former
section 801(a) over the new section 801(a), officials from these departments did not testify regard-
ing the amendment of former section 801(a) during congressional hearings on the 1978 Act and its
prior versions.

\(^{16}\) Presidential Powers, supra note 4, at 1178-79 & n.17.

\(^{17}\) See generally O. Lissitzyn, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY 365-
403 (1942) [hereinafter cited as Lissitzyn]. After World War II, route agreements began to be
by the President in the route-awarding procedure in the pre-war era would therefore help to insure that these negotiated agreements would not conflict with American foreign policy objectives in the interested countries.\(^8\)

However, the 1938 Act also evidenced congressional intent to restrict presidential prerogative. First, section 1006(a) itself clearly distinguished between the scope of judicial review to be accorded foreign air carriers as opposed to citizen air carriers.\(^9\) Secondly, it would have been inconsistent for Congress to create an agency such as the CAB, which possessed expertise regarding the highly technical airline industry, while simultaneously authorizing the President to completely disregard the Board's route-award decisions.\(^2\) Therefore, other provisions of the 1938 Act instructed the CAB to consider the needs of national defense\(^2\) and to act in accordance with American foreign policy\(^2\) in the decision-making process. Thus, Congress must have intended that the presidential power of modification of CAB orders would rarely be employed.\(^2\)

### The Statutory Scheme Embodied in Former Section 801(a) and Section 1006(a)

The regulatory scheme embodied in the 1938 Act required carriers to be certified as capable of operating an air route before they could be awarded a specific route. The drafters established distinct certification negotiated between governments, and wide-ranging route proceedings were instituted under the CAB's auspices. See Whitney, *Integrity of Agency Judicial Process Under the Federal Aviation Act, The Special Problem Posed by International Airline Route Awards*, 14 WM. & MARY L. REV. 787, 797-800 (1973) [hereinafter cited as Whitney].

\(^8\) See generally Lissitzyn, *supra* note 17, at 365-403.
\(^9\) 49 U.S.C. § 1486(a) (1976). Section 1006(a) as introduced provided for judicial review except as to "any order in respect of foreign air transportation approved by the President," but in its final form provided instead for preclusion of review as to "any order in respect of any foreign air carrier subject to the approval of the President," so that the congressional intent to deny review only to foreign carriers is clear. See 83 CONG. REC. 6764 (1938) (emphasis added).
\(^2\) Presidential Powers, *supra* note 4, at 1180 n.27.

(c) [T]he Board shall consider the following . . . as being in the public interest . . .:

(1) the encouragement and development of an air transportation system properly adapted to the present and future needs of . . . the national defense;

(4) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the national defense.

procedures for citizen carriers under section 401 and for foreign carriers under section 402 of the 1938 Act. However, the section 401 and 402 procedures were quite similar in actual operation, so it is unwarranted to treat the separate procedures as a justification for the distinction between citizen and foreign carriers as to reviewability.

Nevertheless, once carriers qualified to operate an air route, procedures different from those used to award domestic routes were instituted for granting international routes primarily because Congress viewed international aviation in military rather than commercial terms. This outlook on international aviation led Congress to provide in section 801(a) of the Act for standardless presidential approval or disapproval of the terms of any CAB order which issued, denied, transferred, amended, cancelled, suspended, or revoked any certificate authorizing a citizen to engage in overseas, foreign, or intraterritorial air

26 The procedures for citizen air carriers to obtain certificates of public convenience and necessity are described in 49 U.S.C. § 1371 (1976), as amended by Airline Deregulation Act of 1978, Pub. L. No. 95-504, §§ 6-21(a)(2), 92 Stat. 1705, 1710-23 (1978), while the requirements for foreign air carriers to obtain permits are detailed in 49 U.S.C. § 1372 (1976), as amended by Airline Deregulation Act of 1978, Pub. L. No. 95-504, §§ 21(b)(1), (b)(2), 92 Stat. 1705, 1723-24 (1978). The key similarities between the two procedures are that (1) carriers may not engage in air transportation unless they hold a certificate or a permit; (2) issuance of certificates and permits are both based upon findings that the carrier is "fit, willing, and able" to properly perform air transportation and that such transportation will serve the public interest (or public convenience and necessity); (3) application procedures for certificates and permits are identical; (4) both foreign and citizen carriers are entitled to have the public receive notice of their applications, to file a protest or memorandum in opposition to or in support of their applications, and to receive a public hearing on their applications; (5) any permit or certificate may be altered, amended, modified, cancelled, or revoked by the Board after notice or hearing, and (6) no certificate or permit may be transferred unless the Board approves the transfer as being in the public interest. Compare 49 U.S.C. § 1371 (1976) with 49 U.S.C. § 1372 (1976).

The major differences between the procedures are that (1) the terms, conditions, and limitations imposed upon a certificate holder are much more detailed and far-reaching than those placed upon a permit holder; (2) the certificate issuance requirements also apply to temporary and supplemental (charter) air transportation, while the permit requirements extend only to foreign air transportation; and (3) certification procedures for citizen carriers also contain subsections concerning rights in the use of airspace, abandonment of routes, compliance with labor legislation, carriage by mail, application for new mail service, and additional powers and duties of the CAB with respect to supplemental carriers, all of which are not included in the requirements for granting permits to foreign carriers. Compare 49 U.S.C. § 1371 (1976) with 49 U.S.C. § 1372 (1976).
27 H.R. 9738, supra note 6, at 37-38, 147-48; Presidential Powers, supra note 4, at 1179.
28 Presidential review was standardless because the Chief Executive was not required to base his approval or disapproval solely on foreign policy or defense factors, but also could consider vague economic and carrier selection grounds. 49 U.S.C. § 1461(a) (1976) (current version at Pub. L. No. 95-504, § 34, 92 Stat. 1705, 1740 (1978)).
transportation or any permit issuable to a foreign carrier. Following presidential review, section 1006(a) stated that challenges by citizen carriers would be reviewable by the courts of appeals, while foreign carriers' challenges were rendered nonreviewable.

**Development of the Case Law Interpreting Former Section 801(a) and Section 1006(a)**

The courts frustrated the legislative intent to restrict presidential prerogative by initially developing an interpretation of section 1006(a) which completely precluded review of challenges by citizen carriers. Even though the courts subsequently devised an exception to this preclusion doctrine in cases involving citizen carriers' challenges to the CAB's statutory authority, their disregard for the statutory scheme destroyed the balance that Congress had created between legislative power over foreign commerce and executive control of foreign policy and defense. The courts thus installed the President as the dominant authority in the international route-licensing process.

The seminal case interpreting section 1006(a) is *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.* In *Waterman*, the Supreme Court held that citizen carriers' challenges to CAB international route-award orders for lack of substantial evidence were nonreviewable under section 1006(a) despite section 801(a)'s provision for reviewability. This decision was grounded on two constitutionally-based considerations. First, the Court reasoned that:

The very nature of executive decisions as to foreign policy is political, not judicial. They are delicate, complex, and involve large elements of prophecy. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibilities and have long been held to belong in the domain of political power not subject to political intrusion or inquiry.

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29 The terms "overseas air transportation," "foreign air transportation," and "transportation between places in the same territory or possession" are defined in 49 U.S.C. § 1301(21) (1976).
32 See text accompanying notes 34-45, and note 45, infra.
33 See text accompanying notes 46-55 infra.
34 333 U.S. 103 (1948) (five-to-four decision), rev'g Waterman S.S. Corp. v. CAB, 159 F.2d 828 (5th Cir. 1947). The Court of Appeals for the Fifth Circuit, concluding that presidential approval indicated only that the Chief Executive consented to the CAB's order, not that the courts were deprived of the power to review the order, held that citizen carriers' challenges were reviewable under section 1006(a). Id. at 831.
35 333 U.S. at 105, 114. See id. at 117 (dissenting opinion).
36 Id. at 111.
Secondly, the Court believed that any judicial decision concerning foreign air routes would be an advisory opinion which could be ignored by the President.  

The Waterman dissenters, treating the route order as a dual entity because it represented a concurrence by the CAB and the President that the route should be served and the chosen carrier should operate the route, argued that review restricted to the action of the Board should be permissible. Justice Douglas, speaking for the dissent, reasoned that presidential approval could not validate Board orders in those cases in which the CAB had exceeded its statutory authority. However, the dissenters agreed with the majority that presidential disapproval of CAB orders for foreign relations or military reasons would be nonreviewable.  

Despite the logic of the dissenters' argument, the Waterman doctrine was extended to its limits in United States Overseas Airline, Inc. (USOA) v. CAB. The Court of Appeals for the District of Columbia Circuit held in USOA that procedural due process challenges to CAB actions were also immune from review, basing its decision on two denials of certiorari by the Supreme Court in earlier cases involving such challenges. Therefore, the Waterman doctrine of nonreviewability now encompassed all citizen carrier challenges concerning the international route-licensing process, regardless of the nature of the dispute.  

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37 Id. at 113. The court stated:  
[t]o revise or review an administrative decision, which has only the force of a recommendation to the President, would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. Id. 

38 Justices Douglas, Black, Reed, and Rutledge.  
39 Presidential Powers, supra note 4, at 1183.  
40 333 U.S. at 116 (Douglas, J., dissenting).  
41 Id.  
42 Id.  
43 222 F.2d 303 (D.C. Cir. 1955).  
44 Id. at 304. Procedural due process questions, according to Justice Douglas' Waterman dissent, include right to notice, adequacy of hearings, and arbitrariness of rulings. 333 U.S. at 117-18 (Douglas, J., dissenting).  
45 In cases involving foreign carriers' claims for review, the courts generally have applied the language of section 1006(a) to deny review. However, the courts have granted review to foreign carriers in two instances. In Dan-Air Services, Ltd. v. CAB, 475 F.2d 408 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia Circuit granted review because the CAB order merely imposed a condition in petitioners' operating authority, and did not involve an amendment, cancellation, revocation, or suspension of the permit, which would have required Presidential approval under former section 801(a). Id. at 413. On the merits, the court upheld the order because the petitioners failed to prove that the Board had abused its discretion. Id. at 413-14. In British Airways Bd. v. CAB, 563 F.2d 3 (2d Cir. 1977), the Court of Appeals for the Second
Subsequent decisions, however, applied the *Waterman* dissenters’ dual entity theory\(^{46}\) in order to limit the applicability of the *Waterman* doctrine. The impetus for this approach arose out of the Justice Department’s concession in *Alaska Airlines, Inc. v. Pan American World Airways, Inc.*\(^{47}\) that a presidentially-approved final route-award order concerning citizen carriers would be subject to judicial review on the “limited question” of whether the CAB and the President had overstepped their statutory or constitutional authorities.\(^{48}\) In *Alaska Airlines*, however, since no final order had yet been issued, the Court of Appeals for the District of Columbia Circuit declined review as premature.\(^{49}\) Shortly thereafter, in *American Airlines, Inc. v. CAB*,\(^{50}\) the same court held for the first time that the *Waterman* doctrine did not preclude judicial review of citizen carriers’ allegations that the Board had exceeded its statutory authority.\(^{51}\) Then-Judge Burger reasoned that, unless the CAB acted within its statutory authority, its order would be invalid, and the President would have nothing to approve. Therefore, the political question doctrine would not operate to bar review.\(^{52}\)

The limit on the scope of the *Waterman* doctrine attained its full development in 1967 in *Pan American World Airways, Inc. v. CAB*.\(^{53}\) In *Pan American*, the Court of Appeals for the Second Circuit held that the CAB had actually overstepped its authority.\(^{54}\) This was the first time before or after *Waterman* that any court of appeals had so held. An equally-divided Supreme Court summarily affirmed, thus treating the *Waterman* doctrine on the merits for the only time since it was decided in 1948.\(^{55}\) Therefore, the *Waterman* doctrine of

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\(^{46}\) See text accompanying note 39 supra.

\(^{47}\) 321 F.2d 394 (D.C. Cir. 1963).

\(^{48}\) *Id.* at 396. The court did not further elaborate upon the Justice Department’s position. *Id.*

\(^{49}\) *Id.*

\(^{50}\) 348 F.2d 349 (D.C. Cir. 1965).

\(^{51}\) *Id.* at 352. On the merits, the court held that the CAB possessed the power to authorize split charter flights, in which two supplemental (charter) carriers, neither of which could fill the entire aircraft, each would utilize one-half of the plane’s capacity. *Id.* at 351, 354.

\(^{52}\) *Id.* at 352.


\(^{54}\) *Id.* at 772, 775, 782 (emphasis added). The court traced the legislative history of the supplemental (charter) air transportation provisions in the Federal Aviation Act of 1958, and concluded that by allowing the charter carriers to sell individual tickets “in direct competition with the regularly scheduled airlines” the Board violated the 1958 Act’s basic policies. *Id.* at 777-81.

\(^{55}\) 391 U.S. at 461 (per curiam). The four-to-four split indicated that the court still was painfully divided on the issue of nonreviewability of presidentially-approved CAB orders.
nonreviewability, which had extended to all challenges by citizen carriers at its zenith, no longer prevented review when the CAB had allegedly exceeded its statutory authority.

However, this doctrine continued to preclude review when presidentially-approved CAB route orders were challenged by citizen carriers for lack of substantial evidence. Waterman itself had involved a challenge to the substantiality of the evidence supporting a Board order. Nearly two decades later, the American Airlines court distinguished in dictum between allegations that the CAB had overstepped its authority and that the Board's orders were not supported by substantial evidence. The American Airlines court reasoned that substantial evidence challenges attack the "correctness" rather than the validity of the order, and thus are subject to the President's nonreviewable discretion concerning broad "evidentiary" policy factors not relevant in CAB proceedings.

Braniff Airways, Inc. v. CAB, the most recent case involving a citizen carrier's challenge to a Board order for lack of substantial evidence, presented a factual situation which seemed to mandate the abandonment of the American Airlines dictum. President Ford, in his approval of a CAB foreign route order, had exercised his power for the first time under Executive Order No. 11,920 to state that his decision was not based on defense or foreign policy considerations. The Court of Appeals for the District of Columbia Circuit nevertheless held that the petitioners' allegations were nonreviewable for three major reasons. First, the court ruled that the President had unconstitutionally attempted to create the power of judicial review by promulgating the

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56 333 U.S. at 117 (dissenting opinion).
57 348 F.2d at 352.
58 581 F.2d 846 (D.C. Cir. 1978).
59 3 C.F.R. 121 (1977). The relevant portions provide:
3(b) Orders involving foreign and overseas air transportation certificates of U.S. carriers that are subject to the approval of the President are not subject to judicial review when the President approves or disapproves an order for reasons of defense or foreign policy. All disapprovals necessarily are based on such a Presidential decision, but approval by the President does not necessarily imply the existence of any defense or foreign policy reason. For the purpose of assuring whatever opportunity is available under the law for judicial review of CAB decisions, all departments and agencies which make recommendations to the President pursuant to section 801 should indicate separately whether, and why, if the order or any portion of the order is approved, the President cannot state in his approval, that no defense or foreign policy reason underlies his action.
Id. at 122-23 (emphasis added).
60 581 F.2d at 848.
62 581 F.2d at 852.
Executive Order.63 Next, it found that any decision it might render would be an advisory opinion since the President could disregard it in any future executive review.64 Finally, the court felt that the award of an international air route invariably presented a political question involving defense and foreign policy consideration.65

Thus, the state of the law concerning reviewability of citizen carriers’ claims could be expressed in two unconditional principles at the time of the enactment of the new section 801(a). While the Alaska Airlines and Pan American decisions indicated that questions involving the CAB’s statutory authority were reviewable, notwithstanding Presidential approval, the American Airlines and Braniff Airways cases demonstrated that questions regarding the substantiality of the evidence supporting presidentially-approved CAB orders remained nonreviewable, even when the President stated that no political questions influenced his decision.

THE NEED FOR CHANGES IN THE FORMER INTERNATIONAL ROUTE-AWARDING PROCESS

The international route-licensing scheme embodied in former section 801(a) and section 1006(a) was intended to balance congressional power over foreign commerce and presidential control of foreign policy and defense.66 However, by providing in section 1006(a) that foreign carriers’ challenges would be nonreviewable, Congress did not implement the balance but rather allowed the President to make the final decision concerning foreign carriers’ route-awards. Since Congress still believed that citizens carriers’ claims should be reviewable, despite the importance it attached to unrestricted presidential review in injecting national security considerations into the route-award decision, there were no compelling national security reasons for rendering foreign carriers’ claims nonreviewable.67

By precluding review of foreign carriers’ challenges in section 1006 (a), Congress had also allowed the courts to adopt a broad interpreta-

63 Id. at 851. While the court believed that the judiciary had the power to create judicial review, the Constitution confers on Congress the power “to constitute Tribunals inferior to the Supreme Court.” U.S. CONST. art. I, § 8, cl. 9.
64 581 F.2d at 851.
65 Id. at 852. Paradoxically, by differing with President Ford concerning the presence of defense and foreign policy considerations, the court was engaging in the very practice it condemned—dealing with a political question.
66 See text accompanying notes 14-23 supra.
67 See note 6 supra.
tion of that section. The courts created the immunity from review because they believed that political questions were invariably involved in international route cases. Furthermore, the courts asserted that the presence of these political questions would render judicial review advisory, subject to subsequent revision by the Chief Executive.

The judicial application of the political question doctrine to bar review of challenges by foreign carriers was incorrect. The President frequently approved or disapproved of route orders based upon economic or carrier selection grounds, which should have been amenable to judicial review, rather than on nonreviewable foreign policy or defense grounds. This misapplication was at least partly attributable to Congress' failure in former section 801(a) to restrict the scope of presidential review to only foreign policy and defense factors. If those factors were sufficiently compelling to justify presidential veto of a particular CAB route order, then it would have been appropriate for the courts to abstain from reviewing the President's decision. Unfortunately, this was not always the case when the President vetoed a CAB order.

The courts also misconstrued the advisory opinion doctrine in creating the distinction between nonreviewable questions of substantial evidentiary support for CAB decisions and reviewable questions of the

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68 If Congress had provided for judicial review in all cases, it would have been more difficult, if not impossible, for the courts to have created exceptions where review would be barred.

69 See text accompanying notes 34-65 supra.


71 Carrier selection grounds include the desire to strengthen a financially ailing carrier, a particular carrier's superior equipment, and favoritism, among others. Roberts, Criteria for the Award of a Foreign Air Route to a Domestic Air Carrier (pt. 1), 15 S.C.L. REV. 864, 917 (1963); Presidential Powers, supra note 4, at 1176, 1178.

72 For a discussion of the ex parte determination of international route awards, including allegations by some carriers of "cronyism" and favoritism for particular carriers involving several Presidents after they overturned CAB route orders, see N.Y. Times, Jan. 1, 1978, § 4, at 10, col. 3; Whitney, supra note 17, at 796-803; Markham, Two Proposals for Amendment of the Federal Aviation Act of 1958, 35 J. AIR. L. & COM. 591, 596-603 (1969) [hereinafter cited as Markham]; Note, Section 801 of the Federal Aviation Act—The President & the Award of International Air Routes to Domestic Carriers: A Proposal for Change, 45 N.Y.U. L. REV. 517, 527-35 (1970) (emphasis added).


74 See note 72 supra.
CAB's statutory authority. However, there is a basis for this distinc-
tion. The question of whether the CAB has exceeded its statutory au-
thority in issuing a challenged order goes to the legal validity of the
order, and involves statutory interpretation, a normal function of the
courts. The substantial evidence question, on the other hand, is more
subjective in nature, and is concerned with the "correctness" of the or-
der. Moreover, once it is conceded that Presidential discretion re-
arding foreign affairs is nonreviewable as a political matter, it be-
comes clear that the substantial evidence question may be beyond
judicial cognizance, for even if the court reversed the President's deci-
sion, its judgment would be advisory only and could be ignored by the
President.

Nevertheless, the distinction is untenable for two reasons. First,
the primary goal of judicial review "should not be to insure 'correct'
decisions, but to preserve the integrity of the decision-making proc-
3ess." Therefore, the critical distinction is not between the validity and
the "correctness" of the order. Rather, the distinction is between
whether the proper procedures have been followed and the relevant
factors properly weighed, and whether these procedures and factors
have not received sufficient consideration. Secondly, when determin-
ing the substantiality of evidentiary support for the CAB's order, the
court is merely deciding whether the Board has abused its discretion,
a legitimate judicial function. Indeed, "[t]hat consideration of an
agency determination is an 'issue appropriate for judicial resolution' is
too well-established to discuss." In this situation, the court's decision
concerning the substantiality of evidentiary support for the CAB's or-
der would be final and binding as to the issues it decides and, therefore,
not impermissibly advisory. If the court were to affirm the President's
decision, the controversy regarding the route award would end. If the
court were to reject the President's choice, the President could select the
same carrier a second time, but only after the CAB had made addi-

75 American Airlines, 348 F.2d at 352.
76 Barnes Freight Line, Inc. v. ICC, 569 F.2d 912, 923-24 (5th Cir. 1978). The court presaged
this rule by declaring that "Courts of Appeals are not expert at evaluating the transportation
requirements of the country and should defer, appropriately, to the (Interstate Commerce) Com-
mission's broad discretion and expertise. We do try, however, to develop some expertise about
integration." Id. at 923.
77 Hochman, supra note 70, at 709-11.
78 Air Line Pilots Ass'n Int'l v. Department of Transp., 446 F.2d 236, 241 (5th Cir. 1971). The
case involved an appeal of an FAA decision that the construction of three high-rise complexes in
downtown Dallas would not be a hazard to air navigation. Id. at 238-39. The court reversed the
FAA's decision based on the FAA's failure to satisfy procedural due process notice requirements
at its hearing. Id. at 244.
tional fact findings on remand. Thus, the President would not be disregarding the court’s opinion; he would be making a new (albeit identical) decision based upon new fact findings.

Congress’ deference to the President in foreign carrier cases, and the courts’ deference in many citizen carrier cases as well, encouraged abuse and manipulation of the CAB’s quasi-judicial process, as carriers compiled extra-record arguments and sought ex parte determinations of route awards by the Chief Executive.\textsuperscript{79} The immunity from judicial review established in section 1006(a) and in \textit{Waterman} and its progeny represented “a sharp departure from the procedures normally provided for the protection of both public and private interests in regulatory proceedings.”\textsuperscript{80} Citizen and foreign carriers alike were denied access to the courts to redress wrongs committed by the CAB and other carriers in administrative proceedings until Congress finally recognized that the President’s role in the route-awarding process had grown too extensive and enacted the new section 801(a) as part of the Airline Deregulation Act of 1978.\textsuperscript{81}

\textsuperscript{79} See note 72 \textit{supra}.  
\textsuperscript{80} Markham, \textit{supra} note 72, at 595.  

The debate on S. 3914, 84th Cong., 2d Sess. (1956), is particularly valuable in presenting the opposing views. While the Senate felt that presidential discretion should be limited to defense or foreign policy considerations, the State Department believed that such factors invariably arose in international route proceedings: “[I]t is difficult to conceive of a case which may not potentially affect foreign policy considerations. Every certificate or permit involving foreign air transportation involves foreign countries and accordingly, touches upon foreign relations.” 103 Cong. Rec. 5134 (1957) (Comments of the Department of State on S. 3914—bill to amend section 801(a)). Both former section 801(a) and section 1006(a) were reenacted in the 1958 Act without change. The broad interpretation given section 1006(a) by the courts is presumed to have been incorporated into the 1958 Act under normal rules of statutory construction. Markham, \textit{supra} note 72, at 592. It is questionable whether the usual rules apply in this case, however, because Congress disclaimed any intention of embracing judicial interpretations of section 1006(a). H.R. Rep. No. 2556, 85th Cong., 2d Sess. 90 (1958).

The legislative history of the new section 801(a) is not voluminous. Therefore, it is necessary to interpolate in some cases as to the statute’s intended meaning.

Executive Order No. 11,920, 3 C.F.R. 121 (1977), was the first formal response to the abuses of the route-awarding process under the former section 801(a). It provided for publication of CAB orders five days after submission to the President instead of after presidential approval or disapproval. The order also placed limitations on ex parte contracts with the executive branch by parties to international route proceedings. Most importantly, the order broadened the possibilities for judicial review by allowing the President to disclaim foreign policy and defense considerations
Changes in the International Route-Awarding Process Created by the New Section 801(a)

The new section 801(a) in the 1978 Act imposes three major and three minor changes upon the former international route-awarding process. The significant changes include: (1) restriction of presidential review to foreign relations or national defense considerations only; (2) subjection of route orders only to a limited presidential veto (disapproval) power rather than to executive approval; and (3) a requirement that any Board action not disapproved within sixty days of its submission to the President takes effect as action of the CAB, not the President, and thus becomes subject to judicial review as provided in section 1006(a). The less important changes, which are relevant because they interact with the major changes to comprise a comprehensive route-awarding process, are: (1) an inference from the change in language from former section 801(a) that CAB decisions may be published immediately, rather than following submission to the President; (2) a requirement that if the President disapproves of a CAB order, he must publicly state the reasons for his disapproval to the extent allowed by national security; and (3) restriction of presidential review to route orders involving only "foreign air transportation."

The new section 801(a) clearly has two primary purposes. First, in his approvals of CAB decisions. Id. at 122-23. See note 59 supra, concerning the Presidential disclaimer.

Two subcommittees of the American Bar Association agreed that the Executive Order was inadequate to meet the ex parte contacts problem, but differed in their testimony before the Senate on earlier versions of the 1978 Act as to how former section 801(a) should be changed. The Section of Administrative Law believed that the President should be completely removed from the certification procedure for citizen carriers. Hearings on S. 2551, S. 3364 and S. 3536 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transp., 94th Cong., 2d Sess. 792 (1976) (statement of Lee M. Hydeman, Vice Chairman, Subcomm. on Ad. Law, ABA.) [hereinafter cited as S. 2551], while the Standing Committee on Aeronautical Law favored legislation which would restrict the President to a limited veto power based exclusively on defense and foreign policy grounds. Hearings on S. 292 and S. 689 Before the Subcomm. on Aviation of the Senate Comm. of Commerce, Science and Transp., 95th Cong., 1st Sess. 462 (1977) (statement of Henry C. Thumann, Chairman, Standing Comm. on Aeronautical Law, ABA). But see id. at 444 (statement of William T. Seawell, Chairman, Pan American World Airways, Inc.), which contended that the Executive Order dealt with the problem of secret lobbying in the executive branch "fully and effectively," and that repeal of section 801(a) would produce confusion, litigation, and foreign relations problems. Id. In fact, one of the proposed bills adopted the Administrative Law Section's position, id. S.689, at 55-96, but the final version of the new 801(a) closely followed the Aeronautical Law Committee's views. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 34, 92 Stat. 1705, 1740 (1978).

83 Review previously had also extended to routes involving "overseas air transportation" and "transportation between places in the same Territory or possession." See 49 U.S.C. § 1301(21) (1976) (definitions of these terms).
the statute is designed to restrict the scope and exercise of executive review.\textsuperscript{84} Secondly, it seeks to broaden the opportunities for judicial review of challenges of all types to the route-awarding process.\textsuperscript{85}

The new statute limits the scope of review in two ways. First, the confinement of presidential review to foreign policy or defense considerations reflects Congress' judgment that the CAB, not the President, should determine which routes and carriers will best serve the public interest.\textsuperscript{86} Thus, the CAB alone is authorized to consider economic and carrier selection grounds for the awarding of a foreign air route.\textsuperscript{87} By placing the CAB in control of these factors, Congress apparently intended to hinder carriers' efforts to obtain ex parte determinations of route orders by the President, which would usually be based upon these nonpolitical factors.\textsuperscript{88} Secondly, executive review is restricted to route orders involving "foreign air transportation." The rationale for this restraint is that the erosion of the United States' network of possessions has eliminated the need for presidential review of "overseas air transportation" and "air transportation between places in the same territory or possession."\textsuperscript{89}

The exercise of presidential review is restricted by three different means. First, the President may now only disapprove of CAB foreign route decisions, whereas under the former section 801(a), he might also approve or modify the Board's orders.\textsuperscript{90} Moreover, CAB decisions may be published immediately upon their issuance, because the requirement in former section 801(a) that "all decisions by the Board shall be submitted to the President before publication thereof"\textsuperscript{91} has been removed in the new statute.\textsuperscript{92} Finally, the Chief Executive must now state publicly the reasons for his disapproval of a CAB order whenever national security permits such disclosure.\textsuperscript{93} Public awareness of both the CAB's rationales for its route decisions and the President's


\textsuperscript{85} \textit{Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 34, 92 Stat. 1705, 1740 (1978).}

\textsuperscript{86} H.R. REP. No. 1211, \textit{supra} note 81, at 19.

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} For a discussion of ex parte determinations of foreign route awards, see note 72 \textit{supra}.


\textsuperscript{93} \textit{Id.}
explanations for his disapprovals of CAB orders should serve to further restrict the President's discretion.

The other principal purpose behind the new section 801(a) is to subject any CAB orders not disapproved by the President to judicial review as provided in section 1006(a).\textsuperscript{94} No longer are foreign or citizen carriers' challenges subject to the President's approval under the new section 801(a). Instead, these allegations are "presented to the President for review," and he may only disapprove of the CAB international route order. Even the disapproval must be based on narrowly defined defense and foreign policy considerations.\textsuperscript{95} Yet, since section 1006(a) precludes review of foreign air carriers' challenges which are subject to the President's approval, an ambiguity is created as to whether such claims are reviewable under the new foreign route-awarding procedures.\textsuperscript{96}

One approach to resolving this ambiguity is to restrictively interpret new section 801(a) so that section 1006(a) continues to preclude review of challenges to route awards by foreign carriers. The major factor supporting this restrictive interpretation of new section 801(a) is that Congress did not also amend section 1006(a) when it enacted the 1978 Act. Thus, it can be argued that, if Congress wished to eliminate the distinction it originally created in the 1938 Act between foreign and citizen carriers' challenges, it could have clearly declared that intent. Therefore, since no such change was made, Congress must have intended that the distinction should remain intact.

The competing interpretation resolves the ambiguity by broadly interpreting new section 801(a) to repeal by implication the section 1006(a) bar to judicial review of foreign carriers' allegations. The "implication" here is that Congress has changed the basis for determining reviewability from whether the carrier is a United States citizen to whether there are sufficiently compelling foreign relations or national defense reasons to justify a presidential veto of a CAB order. Congress has thus adopted a more flexible approach to the political question aspect of the route-awarding process than that of the Waterman Court and its progeny.\textsuperscript{97} Therefore, only when these sufficiently compelling reasons result in an executive veto does the final order become a political matter beyond the scope of judicial review.\textsuperscript{98} When these reasons

\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.; 49 U.S.C. § 1486(a) (1976).
\textsuperscript{97} See text accompanying notes 34-65 supra.
\textsuperscript{98} See note 72 supra.
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are not present, the President cannot disapprove of the CAB's order, and the order becomes reviewable according to new section 801(a). Although the plain language of section 1006(a) appears to foreclose this result as to foreign carriers' challenges, it must be remembered that no longer are foreign carriers' allegations (or, for that matter, citizen carriers' allegations) regarding route orders subject to approval by the President. Thus, section 1006(a) is not applicable to the new section 801(a) process, in which CAB orders are merely presented to the President for review and are only subject to presidential disapproval. In conclusion, the broad interpretation, which would allow for judicial review of foreign air carriers' allegations, should be adopted by the courts in order to resolve the ambiguity created by the new section 801(a) and section 1006(a).

Effects and Implications of the New Section 801(a) Process

The significant changes which the new section 801(a) works on the international route-awarding process are likely to produce far-reaching effects in three separate areas. First, in the sphere of foreign and domestic air travel, the primary effect of the new section 801(a) procedure should be to promote competition for international air routes. With the lessened scope and importance of presidential review, carriers should be left free to concentrate their resources on acquiring new foreign routes, satisfying customers, and making profits rather than using them on attempts to reverse or preserve CAB decisions through the use of newly-developed extra-record considerations.

For example, Laker Airways, a small privately-owned British carrier, has experienced skyrocketing revenues and profits since it introduced sharply-reduced fares to its New York-London Skytrain. Moreover, Laker Airways has initiated an international fare-slashing war which has produced several important changes in foreign and domestic air travel.

First, United States citizen carriers such as Trans World Airlines and Pan American World Airways have joined in the fare-slashing, which has enabled them to attract former charter carrier customers. Secondly, the government-subsidized European carriers, which gener-

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100 Cf. S.2551, supra note 81, at 814 (former section 801(a) process encourages carriers to spend time and money on political activity, consultants, and involvement of their own officials in an effort to manipulate or protect themselves during the presidential review process).
101 N.Y. Times, June 28, 1978, at 43, cols. 3-5; id. at 57, col. 4.
103 Id.
ally operate market-sharing arrangements to limit competition, have been adversely affected by the price competition since their fares are currently twice as high as those of United States carriers.\textsuperscript{104} Moreover, the International Air Transport Association (IATA), an international fare-setting and rate-setting cartel,\textsuperscript{105} has been forced to permit its members to set their own fares on competitive routes without relinquishing their IATA membership.\textsuperscript{106} Finally, the United States has implemented an "open skies" policy, which seeks to eliminate unfair competitive practices faced by citizen carriers overseas through the negotiation of new bilateral airline treaties.\textsuperscript{107}

The second area in which the effects of the new section 801(a) are likely to be felt is in the actual route-licensing procedures. The elimination of economic and carrier selection grounds from the realm of presidential review should serve to abolish one means of favoring certain carriers to the exclusion of others during the route-awarding process. However, immediate publication of Board orders provides carriers with details of the CAB's reasoning, which are useful in the formulation of extra-record factual and policy arguments for presentation to the President during his review of foreign policy and defense factors.\textsuperscript{108} It would therefore be mistaken to suggest that the new section 801(a) will eliminate the occurrence of ex parte proceedings during the review of route awards by the executive branch, which undermine the integrity of the CAB's quasi-judicial proceedings. However, it is realistic to expect that these abuses will decline both in quantity and magnitude because, with the passage of new section 801(a), the Waterman doctrine and the case law that followed no longer preclude judicial review of carrier challenges to route orders.

Finally, in the separation of powers area, the new section 801(a) restrikes the balance between congressional power over foreign commerce and presidential discretion concerning foreign policy and national defense which Congress had sought to establish in the 1938 Act.\textsuperscript{109} Furthermore, by strengthening the judiciary's role in reviewing...


\textsuperscript{108} S. 2551, supra note 81, at 796.

\textsuperscript{109} \textit{See} Presidential Powers, supra note 4, at 1179.
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abuses of authority and discretion by the CAB and the President, section 801(a) now provides a check on arbitrary action by the CAB, as an arm of Congress, and by the executive branch. Therefore, the integrity of the CAB’s decision-making process should be enhanced and the occurrence of ex parte proceedings in the White House minimized.

CONCLUSION

Congress attempted, in enacting the Civil Aeronautics Act of 1938, to restrict presidential prerogative regarding the awarding of international air routes, while still encouraging executive input into the process. However, by precluding judicial review of foreign carriers’ allegations in section 1006(a), Congress allowed the courts to build upon an existing exception and thus to deny review to most citizen carrier challenges as well. As a result, the President became the ultimate source of route-awarding power, and the CAB’s quasi-judicial process was undermined, as carriers presented extra-record arguments to the President and sought ex parte determination of route awards.

It was not until the passage of the Airline Deregulation Act of 1978 that an attempt was made in the new section 801(a) to reform the abuses in the route-granting process. By restricting the President to a veto power over CAB decisions only when foreign policy and defense considerations are present, and by making all other route orders subject to judicial review, the new section 801(a) should have favorable, far-reaching effects upon competition for international routes, upon the route-licensing process itself, and upon the separation of powers among the three branches of the national government. Thus, it represents a welcome and long overdue change in United States aviation law.

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