Judicial Review of Foreign Route Orders Under the Federal Aviation Act

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I. INTRODUCTION

The Federal Aviation Act[1] empowers the Civil Aeronautics Board (CAB) to determine the operating routes of both foreign and domestic carriers.[2] The Board's determinations as to foreign routes however are not

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1. 49 U.S.C. §§ 1301-1542 (1958) (*as amended by* The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705). This Act superseded the Civil Aeronautics Act of 1938, ch. 601 52 Stat. 973 (1938), without substantial change.

2. 49 U.S.C. §§ 1371, 1372 (1976).

final.[3] Under Section 801 of the Act,[4] the Board's recommendations on awards of foreign routes are submitted to the President who retains final say over the Board's decisions.

As originally enacted, the Act placed no limits on the authority of the President to substitute his judgment for the recommendation of the Board. Under a recent amendment to the Act,[5] however, the President can now disapprove a Board action only "on the basis of foreign relations or national defense considerations."[6]

Under the Act, private rights, determined by an administrative process, may be subordinated to public policy demands as determined by the President. The theory of presidential involvement in foreign route awards is that such awards could involve considerations of foreign policy and national defense. The Act thus raises interesting questions about the best way to reconcile important but divergent public and private interests. The judicial review section in the Act[7] provides that: "Any order, affirmative or negative, issued by the Board or Secretary of Transportation under the Act, 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 . . ." On its face the statute resolves one potential set of conflicts by insulating presidential decisions on routes of foreign carriers from any judicial review. The President's decision on such routes is final. The Act does not specifically refer to the reviewability of orders involving the foreign routes of U.S. carriers. However, the Act does say that "any order . . . issued by the Board" (with the stated exception for orders in respect of foreign carriers subject to presidential approval) will be subject to judicial review. This language would lead one to believe that orders involving the foreign routes of U.S. carriers would be reviewable.

The Supreme Court, however, in the celebrated case of *Chicago & Southern Air Lines v. Waterman Steamship Corporation*,[8] decided that such was not the intent of Congress. By a 5-4 decision, the Court concluded that Section 1006 of the Act[9] did not empower the Court to review Board orders involving the foreign routes of U.S. carriers.

Waterman involved an appeal by a U.S. carrier that had lost a foreign route competition to another U.S. carrier. The losing carrier argued that the

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3. This lack of finality applies both to the routes of foreign carriers and to the foreign routes of U.S. carriers.

4. 49 U.S.C. § 1461 (1976).

5. Section 801 of the Act was amended by Section 34 of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 34, 92 Stat. 1705, enacted October 24, 1978 and discussed further in text section V *infra*.

6. 49 U.S.C. § 1461 (Supp. II 1978).

7. Pub. L. No. 85-726, § 1006(a), 72 Stat. 795 (1958) (as amended 1978).

8. 333 U.S. 103 (1948).

9. *Supra* note 7.

Board's decision granting the route to its competitor was not supported by the evidence in the administrative record. The Fifth Circuit reversed the decision of the Board.[10] The Supreme Court, however, reinstated the Board's decision, finding that Section 1006 of the Act did not authorize judicial review of the merits of the Board's order.

Justice Jackson, writing for the majority, reasoned that the final decision on the route rested with the President, since he had approved the Board's recommendation under Section 801.[11] The Court observed that this decision could be based on a multitude of political factors which in the Court's view would not be susceptible to judicial review.[12] The decision might also be based on confidential information.[13] The dissent, written by Justice Douglas, while agreeing that the President's decision could not be reviewed,[14] disputed the majority's contention that the decision on appeal was, in fact, the President's.[15] In the dissent's view, the President, by not disapproving the Board's decision on which carrier should win the route, had merely confirmed what the Board had done without making an independant determination of the merits of the decision on the route.[16] Accordingly, the dissent saw no reason not to treat the final order establishing the route as reviewable in the ordinary course.[17]

Waterman has substantial doctrinal significance since, in the context of foreign air routes, it grants the President plenary authority to override private rights by invoking foreign policy or national defense considerations. However, one could rationally question whether judicial review should be cut off merely because foreign policy or defense is involved. Apart from the fact that the quality of the decision-making process suffers when it is insulated from review,[18] the right to judicial review should not be summarily cut off, even if foreign policy and defense must eventually supersede private rights on the merits.[19]

The lower federal courts have been troubled by the *Waterman* limitation on judicial review. In a series of cases beginning in 1950 and culminating in 1965, the lower courts have moved steadily toward limiting

10. Waterman Steamship Corp. v. CAB, 159 F.2d 828 (5th Cir. 1947), *rev'd*, 333 U.S. 103 (1948).

11. 333 U.S. at 110-11.

12. *Id*. at 111-12.

13. *Id*. at 111.

14. *Id*. at 115.

15. *Id*. at 116.

16. *Id*.

17. *Id*.

18. *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 (1973); *Section 801 of the Federal Aviation Act – The President and the Award of International Air Routes to Domestic Carriers: A Proposal for Change*, 45 N.Y.U. L. REV. 517 (1970).

19. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 401-10 (1958).

Waterman.[20] In the 1965 decision in *American Airlines v. CAB*[21] this trend reached fruition. The U.S. Court of Appeals for the District of Columbia held that Section 1006 authorized review of the Board order enabling U.S. carriers to operate "split charters"[22] over the North Atlantic. The court distinguished *Waterman* on the ground that the basis of the petition for review in that case differed. In *Waterman*, the petitioner challenged the sufficiency of the evidence underlying the Board's order, whereas in *American Airlines* the petitioner challenged the statutory authority of the Board to approve "split charters."[23] However, the court did not explain why this distinction should make a difference. In both cases an affirmative ruling for the petitioner would involve the court in foreign affairs. The opinion in *American Airlines* explicitly opened the door to review of foreign route awards to U.S. carriers in some instances.

The judicial branch has not been alone in the effort to limit *Waterman*. Both Congress and the Executive have also acted. In the case of the Executive, former President Ford, in 1976, issued an order[24] which, *inter alia*, directed his foreign policy advisors to tell him when a route award would not affect foreign policy. He would then, under the terms of the order, advise the Board that the award did not have foreign policy or defense importance. The purpose of the disclaimer would be to "assur[e] whatever opportunity is available under the law for judicial review."[25] While the court found that the disclaimer did not affect judicial review,[26] the order was nonetheless an effort to expand its availability.

Congress has also attempted to limit *Waterman*. In 1978, it amended Section 801 of the Act expressly to limit presidential review to foreign policy and defense. The original Act contained no such express limitation. While this change in itself would not limit *Waterman*, the amended Act also provides that the President may veto a Board decision, (but not that he need approve it) and that "any . . . Board action not disapproved . . . shall take effect as action of the Board, not the President, and as such, shall be subject to judicial review."[27] While these provisions are not free from ambiguity, they seem to indicate that Congress wants any Board action not

20. These cases are ably discussed in Miller, *The Waterman Doctrine Revisited*, 54 GEO. L.J. (1965-1966). They are also discussed in this article *infra*, at 119-26.

21. 348 F.2d 349 (D.C. Cir. 1965).

22. A "split charter" is one in which an aircraft can be split between two eligible groups. Before enacting a regulation approving "split charters" the Board had limited each aircraft to a single group charter.

23. 348 F.2d at 352.

24. Exec. Order No. 11,920, 41 Fed. Reg. 23665 (1976).

25. *Id*. § 3(b).

26. Braniff Airways, Inc. v. CAB, 581 F.2d 846 (D.C. Cir. 1978). This opinion is discussed *infra*, at 125.

27. 49 U.S.C. § 1461 (1958) (as amended 1978).

disapproved to be "subject to judicial review."[28]

This article contends that judicial review ought to be available for all CAB orders involving foreign routes, whether they are approved or disapproved.[29] While in agreement with judicial and executive attempts to limit *Waterman*, it argues that Congress did not go far enough when, in 1978, it apparently limited judicial review to non-disapproved orders. Moreover, while the lower courts have demonstrated sound judgment in attempting to limit *Waterman*, it is suggested here that the present state of the decisional law is unsatisfactory. Under *American Airlines*,[30] for example, the availability of judicial review for orders involving U.S. carriers turns on the nature of the challenge. If the challenger asserts that the Board's action violated statutory authority, judicial review is available. When the challenge alleges that the Board's order lacks substantial support in the record, judicial review is not available. The nature of the challenge to the Board's order, however, does not indicate the probability that judicial review might interfere with foreign policy. Therefore, determining the availability of review by the nature of the challenge is analytically unsound. Similarly, determining the availability of judicial review by the citizenship of the carrier subject to the order is not analytically defensible. While review of awards for foreign carrier routes is forbidden under the Act, *American Airlines* permits judicial examination of awards to U.S. carriers, thus making citizenship a factor in determining the availability of judicial review.

The purpose of this article is to examine *Waterman* and subsequent decisions and to suggest a rational system for handling challenges to Board orders involving foreign routes. First I examine the question raised by *Waterman* of whether judicial review is necessarily inconsistent with presidential involvement in the review process. While this issue has been addressed before,[31] it will here be examined in greater detail with particular emphasis on CAB decisions involving foreign routes.

The second portion of the paper explores the logic of defining the availability of judicial review in terms of the citzenship of the carrier and the type of challenge made to the Board's action. It concludes that these criteria make no sense in light of the rationale (*i.e.* the need for a pure foreign policy) for limiting judicial review in the first place.

Next I suggest a new approach to the problem of defining a valid role for judicial review of foreign route awards. I suggest that the law no longer permits the unbridled discretion accorded the President by *Waterman*.

28. See discussion in section V *infra*, at 135.

29. If the President does not disapprove the order, it should be reviewable. If he does disapprove it, the President's veto should be reviewable.

30. 348 F.2d 349 (D.C. Cir. 1965).

31. Hochman, *Judicial Review of Administrative Processes In Which The President Participates*, 74 HARV. L. REV. 684 (1961).

While I recognize a need to vest substantial discretion in the President over foreign policy and defense, I contend that this is accomplished by the arbitrary and capricious limitation on review embodied in the Administrative Procedure Act.[32]

The final portion of the paper examines the likely effect of the 1978 amendment of Section 801 on the availability of judicial review. It applauds the apparent effort, through the amendment, to authorize judicial review of all foreign route awards not disapproved by the President. However, it criticizes Congress for not authorizing limited judicial review of presidential disapprovals as well.

II. The Reviewability of CAB Orders Involving Foreign Routes–Waterman and the Question Whether At Least Some Awards (Those Not Involving Foreign Policy) Should be Reviewable

Waterman involved in part a dispute between the majority and dissent concerning the practical effect of presidential approval of a foreign route award to a U.S. carrier. The narrow issue raised by the dispute was whether a court should be permitted to infer from the President's failure to alter the Board's recommendation that the final order did not involve foreign policy and therefore, should be subject to review. However, the more important question is whether judicial review is appropriate when *it is clear that* the final decision does not involve foreign policy. If it were clear which elements of a Board recommendation involved foreign policy, and which did not, there would be no legitimate objection to judicial review of the latter elements. This, however, was not the conclusion that was reached by the U.S. Court of Appeals for the District of Columbia, in the recent case of *Braniff Airways, Inc. v. Civil Aeronautics Board*.[33] Because the reasoning in *Braniff* is potentially quite destructive of legitimate efforts to expand judicial review, the opinion merits extended discussion.

Braniff involved the first test of the procedure established by Executive Order 11920[34] whereby the President, in order to maximize the opportunity for judicial review, would state whether or not the route award involved foreign policy. In *Braniff*, the Board's recommendation that a foreign route be granted was approved by the President with the comment (issued in a letter to the Board) that: "The issues presented in this proceeding are not affected by any substantial defense or foreign policy considerations, and no defense or foreign policy considerations underlie my decision." Except for the existence of the disclaimer, review would clearly be cut off by *Water-*

32. 5 U.S.C. §§ 551-706 (1970).

33. 581 F.2d 846 (D.C. Cir. 1978).

34. Exec. Order No. 11,920, *supra* note 24.

man. The court concluded however, that the disclaimer was not effective to remove the case from *Waterman*. It found constitutional objections to the disclaimer,[35] and concluded as a practical matter that a presidential decision on a Board recommendation could never be entirely free of foreign policy concerns.

Without addressing the constitutional objections in complete detail, it should be noted that the presidential disclaimer did not, in fact control the application of judicial review. The disclaimer merely informed the court that the President had determined that the route recommendation did not involve foreign policy. It was then up to the court to evaluate the disclaimer and to decide whether or not judicial review would be appropriate. The cases cited in *Braniff* support the theory that the court may entertain foreign and defense policy advice from the executive. For example, *Alfred Dunhill of London, Inc. v. Republic of Cuba* and *First National City Bank v. Banco Nacional de Cuba*,[36] involved adjudiciations concerning the legality of Cuban government expropriation decrees.[37] The court received advice from the executive concerning the possible impact of a decision on foreign relations and while not feeling necessarily bound by the advice, gave it due consideration. Moreover, in the *American Airlines* case,[38] the same court that decided *Braniff* noted that the Justice Department had indicated that the "split charter" order did not involve foreign policy, and relied on this advice. In reading *Braniff* one is struck by the summary manner in which these complex constitutional issues are treated.[39] Watergate had just occurred and perhaps the court mirrored a country in no mood to be generous

35. 581 F.2d at 850-51. The court concluded that the disclaimer, in effect, gave the President the power to determine when judicial review would be available, and when it would not be, and that the court's reviewing the Board's order would thus violate the constitutional prohibition against advisory opinions.

36. 425 U.S. 682 (1976); 406 U.S. 759 (1972).

37. These cases examined whether the Court could adjudicate the legality of such decrees in light of the so-called *Bernstein* exception to the Act of State doctrine, holding that a court can review the legality of an act of a foreign State if it is advised by the executive that foreign policy would not be adversely affected. Bernstein v. N.V. Nederlandsche-Amerikaanschke Stoomvart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). Some members of the Court expressed concern that the *Bernstein* exception was invalid because it placed substantial control of judicial business in the hands of the Executive. The Court, however, did not disapprove the *Bernstein* exception, and there is nothing improper about lower court's receiving advise from the Executive in Act of State situations.

38. 348 F.2d 349 (D.C. Cir. 1965).

39. The court's discussion of the advisory opinion argument, for example, is contained in a single sentence. The court reasoned that a remand of the presidentially reviewed decision to the Board would run the risk of having the President overrule the court's decision. The fallacy in this argument has been pointed out at length. Hochman, *Judicial Review of Administrative Processes in Which the President Participates*, 74 HARV. L. REV. 684 (1961). It lies in the fact that the President would not have any right to overrule a decision made by the court. While the President could change the order that was reviewed (and remanded) by the court, he could not alter a binding legal precedent of the court. *Id*. at 703-07.

to the executive. The Supreme Court has not addressed the effect of the disclaimer and the discussion in *Braniff* does not reflect a persuasively reasoned result.

Of more interest to the present discussion is the contention that all foreign route grants necessarily implicate foreign and defense policy. If this were true, even route awards which the President does not question would not be reviewable. The court's position however is weak. It argues that "general foreign policy considerations, including balance of both payments and competitive opportunity, are at play" whenever the President reviews a foreign route recommendation. This is undoubtedly true, but arguably irrelevant.

Of course, the decision to approve or disapprove a route grant could entail general considerations of U.S. economic policy. For example, in the *Braniff* case, it is conceivable that the President approved the grant in part because he wanted a U.S. carrier to begin service so as to enhance U.S. competitiveness abroad. Yet, query whether a concern with U.S. competitiveness should take precedence in a particular case over the interests of the parties in judicial review. Surely it is one thing to premise nonreview on particular defense or foreign policy interests and quite a different matter to override the right of review because the U.S. needs to improve its balance of payments position.[40] *Waterman* seems to suggest that presidential insulation is justifiable because his decision may have a fairly immediate and particularized impact on the friendly relations between the U.S. and the foreign country, or on the ability of the U.S. to defend itself. This would seem to be quite different from overriding private rights on the ground that over the long-term, the U.S. has a substantial interest in well-balanced foreign trade.

As a matter of practice, it seems evident that there are instances in which Board recommendations approved by (or not disapproved by) the President do not involve foreign policy. *Braniff*, where the route involved a U.S. carrier, appears to have been one such case. The same could be true in a case involving a foreign carrier. The foreign government could be entirely neutral as to which one foreign carrier should be selected to serve a route.

If, except for presidential involvement in the review process, certain route awards have no foreign policy dimension, then these route awards should be reviewable by the courts. *Waterman* would not prevent review since the basis for the *Waterman* holding was that there was no way to conclude that that order did not involve foreign policy.

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40. While a consistently adverse balance of payments position could de-stabilize the relations between the U.S. and foreign countries, the likelihood of a particular route grant doing so is *de minimis*.

It should be emphasized that this discussion has addressed the question of whether court review of presidentially approved orders is possible without involving the court in foreign policy. It concludes that such review is possible if the route award (or elements of the award) does not involve foreign policy. A more formidable question however, is whether a court should be able to review cases where the final decision does reflect presidential thinking. The following two sections address this question, first demonstrating that the decisional law under *Waterman* has not presented a logical solution for differentiating orders that should be reviewed from orders that should not be, and secondly that the underlying constitutional basis of *Waterman* has been so eroded by subsequent decisions that *Waterman* has in effect, been overruled.

III. The Decisional Law Governing Judicial Review of Foreign Route Orders

The decisional law under Section 1006(a) indicates that the courts have been uncomfortable with *Waterman*, and have attempted to interpret the opinion narrowly so that some form of judicial review would be available for challenges to Board orders involving the foreign routes of U.S. carriers. The development of the law has not been smooth, however. Differences of opinion are evident amongst the circuits as well as among the judges of the same court, and it has been difficult to predict from one case to the next which direction the development would take. Thirty-three years after *Waterman* there are substantial questions concerning the scope of 1006(a) which have not been answered. Moreover, the decisional mosaic defining the availability of judicial review under 1006(a) does not hold together.

Waterman, which established that 1006(a) does not authorize judicial review even of foreign route awards of U.S. carriers, has been a substantial obstacle for parties seeking review of such Board orders. Much of the case law concerns the proper reach of the implied exemption from judicial review created by *Waterman* for Section 1006(a) of the Act.

In assessing *Waterman*, it should be remembered that the Court construed a statute which explicitly precluded judicial review of orders involving foreign carriers, while appearing to authorize judicial review of orders involving U.S. carriers. The operations of foreign carriers inevitably involve foreign countries. Thus it can be presumed that Congress favored according the President broad discretion in rendering the foreign affairs judgments that such operations might involve.[41] The situation with respect to U.S.

41. Without such discretion, it would arguably be difficult for the President to follow through quickly on diplomatic initiatives, and it also might be difficult for him to execute a comprehensive foreign policy plan since the court might refuse to allow a route which the President considered essential to other elements of his foreign policy. *See* Pan American – Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir.) (Judge Wright concurring), *cert. denied*, 380 U.S. 931 (1965).

carriers differed, however, in that their operations include both domestic and foreign routes. The statute does not exclude by its terms judicial review of any routes of U.S. carriers. Yet, unless it could be said that the foreign policy and defense impact of foreign route awards to U.S. carriers is less substantial than the impact of route awards to foreign carriers, Congress would have legislated irrationally if it had excluded from judicial review the routes of foreign carriers, but not the foreign routes of U.S. carriers.

The majority opinion in *Waterman* highlights the fact that the foreign routes of U.S. carriers could have significant impact upon foreign policy and defense decisions. Indeed, this fact is used as justification of the holding of the opinion. While it has been suggested that a distinction should be drawn between the foreign and defense policy importance of foreign route awards to U.S. carriers, and route grants to foreign carriers,[42] it seems impossible empirically to verify this conclusion. It is conceivable that U.S. strategic interests could be affected by selection of a U.S. carrier to fly a particular route. Moreover, it is conceivable that the foreign relations between the United States and a foreign country could be affected by the selection of a particular U.S. carrier.[43] This is not to say that in most cases the selection of the carrier will make a large difference from a foreign policy or a defense point of view. Indeed in most cases it should make little, if any, difference.[44] However, the point is that one cannot predict how often either a route grant to a U.S. carrier or a grant to a foreign carrier affects foreign policy.

Assuming there could be strategic considerations in the grant of foreign routes to U.S. carriers, it is difficult to conclude that the Court was wrong in perceiving that Congress would not have intended the 1006(a) exemption from judicial review to be limited to foreign carriers, had it considered the matter. Accordingly the problem with *Waterman* was not that it accorded equal treatment to all foreign routes in their reviewability. Rather, the problem with *Waterman* was that it submerged important private rights to the unbridled discretion of the President by categorically cutting off the availability of judicial review. The judicial decisions that have followed *Waterman* have had to deal with the fact that it often seems unjust in practice to deny judicial review to a party who has a colorable claim for relief, and who desires to present that claim in court.

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42. Miller, *The Waterman Doctrine Revisited*, 54 GEO. L. J. 5, 15-22 (1965-66).

43. Brief of Civil Aeronautics Board, 12-27 *supra*; Chicago & S. Airlines v. Waterman Steamship Co., 333 U.S. 103 (1948).

44. *See Hearings on S. 2551, S. 3364 and S. 3536 Before the Subcommittee on Aviation of the Senate Committee on Commerce*, 94th Cong., 2d Sess. (1976) (April 6-8, 12-13, June 14-17).

Between 1948 when *Waterman* was decided,[45] and 1965 when the Court of Appeals of the District of Columbia decided *American Airlines*,[46] courts of appeals addressed the limits of their section 1006(a) jurisdiction in five cases.[47] On each occasion the court declined to entertain the appeal on jurisdictional grounds. Nevertheless, the opinions indicate a basic desire to limit *Waterman*. However, because the courts have not had a consistent theory of limitation, the opinions do not clarify the law. In the Second Circuit, it appeared that the court would review a presidentially approved order when the President of the Board had allegedly acted beyond their legal powers in issuing the order.[48] In the District of Columbia Circuit, however, it appeared that the court was of two minds. One faction of the court seemed to feel that 1006(a), as construed by *Waterman*, never permitted review of foreign route orders by courts of appeals.[49] A second faction, however, seemed to agree with the Second Circuit's view that 1006(a) permitted review when the President's or the Board's power was at issue.[50] Thus, in *American Airlines* when the court was faced with the issue of

45. 333 U.S. 103 (1948). *Waterman* was foreshadowed by the Second Circuit in Pan American Airways Co. v. CAB, 121 F.2d 810 (2d Cir. 1941).

46. 348 F.2d 349 (D.C. Cir. 1965).

47. Pan American – Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 934 (1965); Alaska Airlines, Inc. v. Pan American World Airways, 321 F.2d 394 (D.C. Cir. 1963); British Overseas Airways Corp. v. CAB, 304 F.2d 952 (D.C. Cir. 1962); United Sttes Overseas Airlines v. CAB, 222 F.2d 303 (D.C. Cir. 1955); Trans World Airlines v. CAB, 184 F.2d 66 (2d Cir. 1950), *cert. denied*, 340 U.S. 941 (1951). These opinions are discussed in Miller, *The Waterman Doctrine Revisited*, 54 GEO L.J. 5 (1965-1966).

48. *See* Trans World Airlines v. CAB, 184 F.2d 66 (2d Cir. 1950). The court held in this case that under *Waterman* it did not have jurisdiction over an appeal challenging Board approval of a merger between Pan Am and another international carrier. The court, however, left open the possibility that the order would have been reviewable if the Board (or the President) had acted "beyond its lawful authority," *Id.* at 70, thus refusing to foreclose review entirely.

49. For example, in United States Overseas Airlines v. CAB, 222 F.2d 303 (D.C. Cir. 1965) and British Overseas Airways Corp. v. CAB, 304 F.2d 952 (D.C. Cir. 1962), the court rejected appeals under section 1006(a) on the ground that *Waterman* precluded jurisdiction. Judge Wright, in a concurring opinion in Pan American Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir. 1964) reiterated this position. While in both cases, *Waterman* could have been distinguished, the court declined to do so.

50. Alaska Airlines, Inc. v. Pan American World Airways, 321 F.2d 394 (D.C. Cir. 1963). The case involved the question whether the Board could terminate Pan Am's service to Alaska without finding that it had willfully violated its certificate authority. The court reversed a district court finding that this could not be done. In addressing the *Waterman* issue, the court noted that:

> Whether the President has statutory or constitutional authority to terminate Pan American's route authorization for reasons of public convenience and necessity is quite a different question from the one which faced the Court in *Waterman*. That case neither settles nor illuminates more than faintly the issues which would face a court reviewing the authority of the Board or the President in this case to terminate Pan American's route authorization.

321 F.2d at 396. This language suggests that statutory review of foreign route orders (at least those involving U.S. carriers) would be available where the case involved the issue of the statutory or constitutional authority of the Board or the President to act.

whether Board orders involving presidential approval could ever be reviewed under 1006(a) the precedents seemed to point in opposite directions. Judge Burger, however, resolved the uncertainty boldy. In writing for the court, he ruled that statutory review would be available where the petitioner claimed that "awards made by the Board, with Presidential approval, exceed[ed] the Board's power under the Act."[51] Because *American Airlines* resolves previously unsettled questions, and because it interprets 1006(a) in a manner arguably inconsistent with *Waterman*, it will be instructive to examine the opinion in some detail.

In *American Airlines*, the court faced a challenge to separate Board orders authorizing two U.S. carriers to conduct transatlantic charters[52] and permitting them to charter their aircraft to two different groups. Judge (now Chief Justice) Burger, writing for the court, began his analysis of the jurisdictional point by articulating the holding in *Waterman*, a decision he later distinguished, as follows:

> In *Chicago & Southern Air Lines v. Waterman Steamship Corp.* . . . the Supreme Court held that orders granting or denying applications of citizen carriers to engage in overseas and foreign air transportation are exempt from Court of Appeals review under Section 1006 of the Civil Aeronautics Act to the same extent as are orders affecting foreign carriers, since both types of orders are subject to Presidential approval.[53]

This characterization of the holding, fails to capture the notion that it was not presidential approval, *per se*, which caused the *Waterman* court to rule as it did but, rather, that presidential approval infused such orders with foreign policy and defense importance, thus removing them from the purview of the court. Had the opinion been characterized in this way, however, Judge Burger would have had great difficulty concluding what he found to be the underlying assumption of *Waterman*, namely that: "Clearly *Waterman* presupposes lawfully exercised congressional authority in the Board's action, in the first instance, as an indispensable predicate, without which there is nothing a Presidential action can approve."[54] *Waterman*, however, does not suggest that the order submitted by the Board to the President must be "legal" in order for the President to approve it. Because *Waterman* found that the President had plenary power to distribute routes as he wished, the presumption, if anything, should have been that the *Waterman*

51. 348 F.2d at 352.

52. Previously, the Board's regulations authorized an aircraft only to be chartered to one eligible group. 40 C.A.B. 233, 264-72 (1964). The petitions at issue in *American* alleged, *inter alia*, that the Board exceeded its statutory authority when it amended the regulation so as to authorize split charters. Because the orders attacked in court involved foreign routes, the first question the court had to face was whether it had jurisdiction under section 1006(a) to review the order. The court concluded that it could review the order.

53. 348 F.2d at 351-52.

54. 348 F.2d at 352.

court would not have determined that the President could only approve "legal orders." The meaning of the word "legal" in this context also raises questions not answered by the *American Airlines* court. For example, in *Waterman* it was alleged that the order was not "legal", since it lacked evidentiary support in the administrative record. Yet, there was no review of that "illegality". Judge Burger, however, drew a spurious distinction between types of Board transgressions: a transgression involving an order which lacks statutory support is reviewable, while an order which lacks evidentiary support, or which deprives a party of constitutional due process,[55] is not reviewable.

The justification for these distinctions is that the President must be free to consider evidentiary factors outside the record when he makes his decision on the route. Therefore, whether the Board properly weighs or considers the evidence is less important than whether it abides by congressional limitations on the scope of its power as expressed in the Act.

While this argument may seem plausible, it is troubling because it asserts, in effect, that the administrative process has little substantive importance. However, what the argument overlooks is that Congress declared that a particular kind of administrative process should precede presidential action.[56] In placing greater weight upon substantive statutory guidance than upon procedural directives the court is, in effect, engaging in the implied assumption that the process of distributing routes will be damaged less when the Board violates procedural standards than when it violates substantive standards. There is no reason to believe, however, that this assumption would prove viable in the real world.[57]

The rule established by *American* breaks down the immunity from judicial review that all foreign route awards had previously enjoyed. It authorized court review where a challenge involves a contention that the Board exceeded its statutory authority when it issued the award. Because the case did not involve foreign carrier route awards, however, it could not be considered definitive on the availability of judicial review for challenges to orders involving foreign carriers.

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55. *See*, United States Overseas Airlines v. CAB, 222 F.2d 303 (D.C. Cir. 1955), holding that a challenge based on a constitutional violation was not reviewable.

56. For example, under the Act applicants for certificate authority to operate foreign routes and applicants for permit authority to operate such routes, are entitled to hearings before the Board and other procedural safeguards. 49 U.S.C. §§ 1371, 1372 (1979).

57. Judge Burger purports to find support for his ruling in *Alaska Airlines*. While he notes that *British Overseas Airways Corp.*, contains language arguably precluding court review, he distinguishes that holding on the ground that *American Airlines* involved a different kind of challenge. The court is correct in finding support for its judgment in the opinion in the *Alaska Airlines* case. However, the court's reading of *British Overseas Airways Corp.* is incorrect. That case held that section 1006(a) of the Act did not authorize statutory review of orders involving foreign routes. Thus, the holding was contrary to the ruling in *American Airlines*.

After *American*, the state of the law thus seemed to be as follows: 1006(a), by its terms, made orders of the Board involving the routes of foreign carriers nonreviewable; *Waterman* read into the statute an implied exemption from review of foreign route awards to U.S. carriers; *American Airlines* decided that statutory review was available under 1006(a) where the challenge alleged that the Board had exceeded its statutory authority when it issued an order involving U.S. carriers; *American Airlines*, however, did not authorize review when the challenge alleged that the Board violated procedural requirements or the Constitution.

It is clear from this description of the progress of the law that *American Airlines* would not be the last word on the availability of judicial review under 1006(a). *American Airlines* had opened up a crack in *Waterman*, but the size of the crack would have to be tested. History shows that the law did continue to develop. The decisions after *American Airlines* concern the applicability of that holding to petitions for review of Board orders involving foreign carriers. As a result of the post-*American Airlines* cases, a party may never obtain judicial review of Board orders involving foreign carriers irrespective of the nature of the challenge to the order. Thus, under current practice, U.S. carrier route awards are reviewable only when the challenge to the order is based on the Board's statutory authority, and foreign carrier awards are never reviewable.

The first case to apply *American Airlines* in the context of a foreign carrier order[58] arose in the D.C. Circuit.[59] The suit involved a decision by the Board to authorize a foreign carrier to operate inclusive charter tours from Germany to the United States.[60] The Board took the position that it was not required to insist that these foreign tour operators be licensed because their organizational activities would all occur abroad.

On the merits of the case the court agreed with the Board, finding that the agency was justified in considering its licensing authority discretionary.[61] On the issue of the court's jurisdiction to review the Board's order, the court concluded that it was highly unlikely that jurisdiction extended

58. Pan American World Airways, Inc. v. CAB, 392 F.2d 483 (D.C. Cir. 1969). The court's discussion of the section 1006(a) issue is dicta. Nevertheless, the discussion of section 1006(a) is lengthy and detailed, and provides a fair hint of how the court would address the issue if it were faced with a need to do so.

59. A previous decision in the Second Circuit, Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1961) also examined section 1006(a), but rested on *American Airlines*, and did not advance the law past that point.

60. The Board had previously recommended to the President that U.S. carriers be authorized to operate inclusive tour charters across the Atlantic, and felt that the public interest demanded that the same rights be granted to foreign carriers. It thus rejected the recommendation of the hearing examiner, who ruled against the foreign carriers, and granted the applications. 392 F.2d at 486-90.

61. *Id*. at 496.

over these foreign tour operator orders. The court noted that *American Airlines* had limited the *Waterman* bar to direct review by excepting challenges based on lack of statutory power.[62]

> However, "where a foreign air carrier is involved, the issue is not whether the reach of the statute should be extended beyond its apparent coverage because of considerations of national defense and foreign policy; rather it is whether an exception should be carved from the plain language of the statute itself."[63]

The court noted that *American Airlines* (and a Second Circuit decision following *American Airlines*)[64] were "not dispositive." The court also noted that in a pre-*American* decision involving a foreign carrier order,[65] it had said that there could be no direct review under 1006(a) "now or later."[66]

The opinion in *Pan Am* thus takes a strong position against judicial review of orders involving foreign carriers whether review is sought in the district court or the court of appeals. Whereas the Supreme Court in *Waterman* had equalized the judicial treatment accorded orders involving foreign carriers with orders involving U.S. carriers, the *Pan Am* opinion, while not dispositive, began the process of again differentiating these two classes of Board orders.

After a five year hiatus, the same court again addressed the jurisdictional issue as it pertained to orders involving foreign carriers.[67] In *Dan-Air Services, Ltd. v. CAB*,[68] two foreign charter carriers challenged a Board order requiring them to file individual applications to operate charter flights on a flight-by-flight basis.[69] The carriers challenged the order both in district court and in the court of appeals,[70] alleging that the Board had violated their procedural rights,[71] and also had discriminated against them in the

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62. *Id*. at 493.

63. *Id*.

64. Pan American World Airways, Inc. v. CAB, 392 F.2d 483 (D.C. Cir. 1969).

65. British Overseas Airways Corp. v. CAB, 304 F.2d 952 (D.C. Cir. 1962).

66. 392 F.2d at 493.

67. Previously, a district court in the southern district of New York also had concluded that orders involving foreign carriers were not subject to judicial review. CAB v. Donaldson Line (Air Service) Ltd., 343 F. Supp. 1059 (S.D.N.Y. 1972).

68. 475 F.2d 408 (D.C. Cir. 1973).

69. The Board's charter regulation for foreign charter carriers did not require that each flight be approved individually. 14 C.F.R. § 214.9(a) (1980). However, the Board had inserted in the operating permits of all foreign carriers, including the petitioners in *Dan-Air*, that it might require the carrier to obtain individual flight approval "if it finds such action to be required in the public interest." 475 F.2d at 411. Individual flight approval was an onerous condition for the charter operator, since it required approval by the Board prior to each flight.

70. The carriers sought an injunction in district court, and then filed a statutory appeal under section 1006(a). The court of appeals consolidated the two separate actions when they reached it. 475 F.2d at 409 n.1.

71. The carriers claimed that they were entitled to a hearing prior to the Board's issuing an order requiring flight-by-flight approval of each charter flight. The carriers also claimed that the

manner of enforcing the permits. The court minced few words on either the jurisdictional issue or the merits. As to the merits, the court found nothing of substance. It noted that the carrier had agreed to the prior approval condition when it accepted the permit, and found no violation of the carrier's procedural rights in the way the condition was enforced. On the jurisdictional issue,[72] the court held that the statute "clearly precluded" review.[73] This holding applied both to the petition for statutory review and to the district court action, since both were before the court and subject to the single opinion. Thus, the court followed *Pan American* in declining to extend *American Airlines* to orders involving foreign carriers.

The next case involving application of 1006(a), *Diggs v. CAB*[74] also concerned a foreign carrier. Petitioners challenged a presidentially-approved Board order which granted South African Airways a route. Their contention was that South African Airways discriminated against blacks on domestic flights in South Africa and in its facilities in South Africa. They alleged that the order violated the Act and the Constitution.[75]

What was new about *Diggs* was that the petition seeking review included both consitutional and statutory claims. (*Dan-Air* had already decided that *American Airlines* did not apply to the statutory claim). The court, however, did not believe that distinction made any difference.[76] The court did not address the question of whether petitioners could challenge the Board's order in the district court, but seemed to resolve it by deciding that neither the district court nor the court of appeals had jurisdiction.

The next case involving 1006 is *British Airways Board v. CAB*.[77] In that case, the Board had ordered *British Airways* to file its operating schedules and any changes in schedules with the Board.[78] *British Airways*, however, refused to file its schedules. Thereafter, the Board issued a second

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order requiring flight-by-flight approval was ineffective since it had not been submitted to the President for his approval.

72. Technically the jurisdictional issue arose only in respect to the challenge to the validity of the condition in the permit authorizing the Board to insist upon flight-by-flight approval of all charter flights. The order requiring the carrier to obtain prior approval for each charter flight did not require presidential approval, and, therefore, was not subject to the review limitation of section 1006(a).

73. 475 F.2d at 413.

74. 516 F.2d 1248 (D.C. Cir. 1975).

75. *Id*. at 1249.

76. *Id*. at 1249-50.

77. 563 F.2d 3 (2d Cir. 1977).

78. The Board acted pursuant to Part 213 of its Economic Regulations, 14 C.F.R. § 213.2 (1980) which were incorporated by reference into the permits of all foreign carriers. This regulation empowered the Board in certain circumstances to order foreign carriers to file traffic data and operating schedules to and from the U.S. The Board invoked Part 213 against *British Airways* because the British government had allegedly violated the terms of its bilateral air transport agreement with the United States, by depriving U.S. carriers of a fair opportunity to compete in the U.S.-Britain market.

order under Part 213, which required *British Airways* to reduce the number of daily flights made to the United States. The President, however, disapproved this action, finding that the dispute between the United States and the British had been resolved diplomatically. The President instructed the Board to "rescind" the original order which required *British Airways* to file its schedules.

In response to the President's directive, the Board did "rescind" the filing order, but it only did so prospectively. It noted in its order that the airline would be subject to enforcement liability for not filing the schedules as ordered by the Board. British Airways then appealed, claiming the Board violated the President's directive in not rescinding the order retroactively as well as prospectively.

Because the filing order did not need presidential approval,[79] the court found that it had jurisdiction under 1006. At the same time, however, the court concluded that the President had the power to instruct the Board to rescind the filing order. The court found that a true recission was retroactive as well as prospective. Accordingly, it set aside the prospective order, concluding that the Board had "improperly ignored a presidential directive."[80]

While the decision contains nothing new on the application of 1006, it does illustrate how the review provisions of the Act operate in practice. In the case, there was judicial review of the filing order only because the President and the Board had agreed that individual filing orders would not have to be reviewed. This result was arbitrary in the sense that the President could as easily have demanded to approve each filing order.[81] The availability of review was thus dependent upon a procedural convention, and not something Congress provided in the Act.[82]

The final case on the appropriate application of 1006(a), *Braniff Airways Inc. v. CAB*,[83] is unexceptionable in its discussion and application of 1006(a).[84] However, the opinion highlights the fact, unemphasized in previous opinions, that *Waterman* was, indeed, intended to apply only to "final

79. Rather than approving each Part 213 filing order the President had previously approved the filing regulation.

80. 563 F.2d at 7.

81. The Act provides for presidential approval of each Board order involving a foreign route which affects the operating rights of the carrier. 49 U.S.C. §§ 1371, 1372 (1976). *See* British Airways Bd. v. CAB, 304 F.2d 952 (D.C. Cir. 1962).

82. The case was decided properly since the factors that rationally would be determinative, indicated that review was appropriate. Thus, the Board arguably had violated U.S. foreign policy and only the court could steer the Board back to a proper course. By reviewing the order, the court not only did not interrupt foreign policy but, indeed, effectuated the policy by blocking the Board.

83. 581 F.2d 846 (D.C. Cir. 1978). This opinion has been discussed previously *supra* at 112.

84. The case holds that *Waterman* precludes judicial review of orders involving the foreign routes of U.S. carriers. *See* discussion pp. at 114-17 *supra*.

orders [that] embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate."[85] This would tend to undercut the *American Airlines* holding that the immunity from review enjoyed by foreign route order was premised upon presidential review *per se*.[86]

The holdings of the post-*American Airlines* opinions thus reflect a curious two-directional movement in the courts. On the one hand, the pre-*American* courts, feeling uncomfortable with the absolutism of *Waterman*, refused to apply it to statutory power challenges to Board orders involving the foreign routes of U.S. carriers.[87] On the other hand the same courts declined to limit *Waterman* when it comes to Board orders involving foreign carriers.[88] The result of this development leaves the law in an anomolous state: orders involving U.S. carriers are reviewable in some situations, but not others; and orders involving foreign carriers are never reviewable. Does the law as it stands make sense? This question can be answered only by measuring the law against the foreign and defense standards that were the reason for the insulation from judicial review in the first place.

To justify the current situation, one would have to make the case that foreign policy is more likely to be damaged when courts review orders involving foreign carriers than when they review orders involving U.S. carriers. Also the likelihood of injury to foreign policy must be greater when a substantive violation is involved, than when a procedural violation is alleged.

There is no reason to believe, however, that either case can be made.[89] No available evidence suggests that the routes of foreign carriers have greater foreign policy importance than the foreign routes of U.S. carriers. Any route award might or might not have foreign policy importance, and one cannot predict in advance which routes will have such importance and which will not. The same can be said for route orders challenged as to statutory power, as compared to route orders challenged as to procedural infirmity. The probability of any particular order having foreign policy importance is equal to the probability of any other having such importance and the nature of the challenge is unrelated to the potential foreign policy importance of the route. On this analysis, the existing regime, which makes distinctions based upon the citizenship of the carrier and the nature of the challenge to the award, would seem to be fundamentally unsound. The next question, therefore, is whether the current regime can effectively be changed and, if so, the appropriate direction for reform.[90]

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85. 581 F.2d at 850 (quoting *Waterman*).

86. *See* discussion p. 120 *supra*.

87. *See* Diggs v. CAB, 516 F.2d 1248 (D.C. Cir. 1975).

88. *See, e.g.*, Dan-Air Services Ltd. v. CAB, 475 F.2d 408 (D.C. Cir. 1973).

89. *But see*, Miller, *The Waterman Doctrine Revisited*, 54 GEO. L.J. 5, 17-22 (1965-1966).

90. The discussion in the text examines the law from the standpoint of whether or not foreign policy is furthered by the distinctions drawn by the courts. However, there are also other interests

IV. Is *Waterman* Still Good Law?

If the system created by the case law under 1006 is unsound, one must next determine what a workable substitute would be. This article contends that the current hodgepodge should be replaced by a simple rule that judicial review is available for all Board orders involving foreign routes. Since, as argued below, *Waterman* has been undermined in its constitutional underpinnings by subsequent cases, it should be possible for the courts to begin permitting judicial review under 1006 for all Board orders involving U.S. carriers. Because of the categorical prohibition in the statute against review of Board orders involving foreign carriers, it may take Congress to effectuate review of Board orders affecting foreign carrier routes.[91] The following two sections address these points, and analyze recent amendments to Section 801 of the Act to assess their potential impact on judicial review.

In attempting to appraise the validity of *Waterman* in light of the subsequent case law, it is important to begin with a restatement of the basic reasoning of the decision. The Court held that despite the fact that the language in 1006 did not exempt orders involving U.S. carriers from judicial review, such an exemption should be implied from the language in the provision. The Court noted that there was no evidence in the legislative history that Congress considered the problem of judicial review of orders involving the foreign routes of U.S. carriers.[92] However, the Court inferred that Congress would not have intended to authorize review of U.S. carrier foreign routes had it considered the matter.[93] The Court thus takes account of constitutional considerations in its interpretation of 1006.[94]

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involved in deciding whether and in what instances judicial review should be available. For example, a carrier adversely effected by a Board order involving a foreign route has an interest in gaining review of the order in order to protect its statutory rights. The carrier may be a U.S. carrier or a foreign carrier and the seriousness of the carrier's deprivation resulting from the Board's order is not determined by its citizenship. Thus, it is arbitrary to turn the carrier's right to review on the question of its citizenship. Likewise, it is arbitrary to base judicial review on the nature of the carrier's challenge to the Board's order. Whether the challenge alleges a violation of procedural or substantive rights, the deprivation occasioned by the challenged order could be substantial. Moreover, the extent to which the challenged order gave rise to a genuine deprivation would not be determined by whether the alleged defect was procedural or substantive.

91. Theoretically, it would be possible, and arguably consistent with *Waterman*, to interpret the statutory exemption applicable to foreign carriers non-literally. However, as a practical matter, in light of the strong stand taken previously by the court in Diggs v. CAB, 516 F.2d 1248 (D.C. Cir. 1975), and Pan American World Airways, Inc. v. CAB, 392 F.2d 483 (D.C. Cir. 1968), it seems improbable that change in the manner of construing the exemption can be accomplished without a statutory amendment.

92. 333 U.S. at 110.

93. *See* Miller, *The Waterman Doctrine Revisited*, 54 Geo. L.J. 5, 15 n.59 (1965-1966).

94. It is interesting to note that in the first draft of the bill that became the Act, judicial review was provided for any order except those "not properly subject to review by courts of law." *See Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives*,

The Court's discussion of the constitutional issues does not explicitly address the scope of the powers of the various branches. However, the Court rests its decision on the ground, *inter alia*, that the Constitution committed to the political branches, Congress and the President, the authority to decide and implement foreign policy.[95] Accordingly, the Court could not have access to the confidential information on which the President based his decision and should not attempt to participate in the decision-making process. In deciding whether or not these views of the proper roles of the branches in foreign affairs are still valid, it will be useful to discuss two recent opinions of *en banc* courts of appeals, *Zweibon v. Mitchell*,[96] and *United States v. Butenko*.[97] Both of these opinions analyze the extent to which the various branches have a role to play in the exercise of the foreign affairs power of the central government. In addition, the opinions thoroughly canvass Supreme Court precedent on the appropriate division of powers between the branches of government where the action of any one branch might affect the relationship between the United States and foreign governments.

Zweibon was a civil suit for damages against the Attorney General and various officials of the FBI. Plaintiffs, members of the Jewish Defense League (JDL), alleged that they had been the subjects of illegal FBI wiretaps. They claimed that the warrantless taps violated the Fourth Amendment, and Title III of the *Omnibus Crime Control and Safe Street Act of 1968*.[98] The case raised the question of whether the fact that the "surveillance . . . was authorized by the President of the United States . . . in the exercise of his authority relating to the nation's foreign affairs . . ." insulated the tap from the Constitution and statute, and prevented the court from determining its legality.[99] Analysis of this question necessitated the

75th Cong. 3d Sess. (1938). The wording of this provision was changed in Committee. When the bill was reported to the floor it only exempted orders involving the routes of foreign carriers. The reasons for the House Committee changes in the wording of the provision of the bill relating to the exemption from review are not known. However, it appears that originally the sponsors desired to authorize judicial review to the full extent that the Constitution permitted. The House Committee made the judgment that the Constitution permitted judicial review of U.S. carrier routes, but not of foreign carrier routes. The original Senate bill reflected a different judgment about what the constitution permitted, because it exempted U.S. carrier foreign routes, as well as the routes of foreign carriers. However, the Senate later went along with the House, and limited the exemption to foreign carrier routes.

95. 333 U.S. at 111-12.

96. 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944, (1976).

97. 494 F.2d 593 (3d Cir.) (*en banc*), *cert. denied sub nom.*, Ivanov v. United States, 419 U.S. 881 (1974).

98. 18 U.S.C. §§ 2510-250 (1979). The Act authorized federal wiretapping in some circumstances, but required appropriate officials to obtain a warrant and follow other prescribed procedures.

99. The federal government conceded that it had wiretapped and overheard plaintiffs' conversations.

courts deciding issues similar to those considered by the Court in the *Waterman* case.

The first question was whether the Fourth Amendment applied to a foreign security wiretap, or whether the fact that the tap was instituted pursuant to the President's directive insulated it from judicial review.[100] The court determined that the Fourth Amendment did apply and that judicial review was not foreclosed because the President felt the tap was necessary for foreign affairs reasons. The court recognized that the extent of the President's prerogatives in the authorizing of national security wiretaps had not been addressed by the Supreme Court,[101] but it came down strongly on the side of limited powers.

The reasoning of the court is interesting. Essentially, it concluded that the Fourth Amendment did not say that the President was immune from its reach; therefore, it was up to the proponents of presidential immunity to prove their case. The court then noted that the proponents had not supported their position that the national security demanded that the constitutional system cease to operate when the President needed to place a national security wiretap. The court's reading of Supreme Court precedent indicated precisely the opposite view, namely that presidential powers were circumscribed, even in situations involving national security.[102]

This analysis of Supreme Court authority dealing with the immunity issue indicates that the President's power has always been limited. For example, in both *United States v. Belmont*[103] and *United States v. Pink*,[104] cases dealing with the validity of an executive agreement in which the U.S.

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100. The President did not question his obligation to submit to the court's process by timely answering the complaint filed by the plaintiffs. *Cf*. Freund, *Forward: On Presidential Privilege*. 88 HARV. L. REV. 1, 18-20 (1974). The government contended that the tap involved foreign security because it needed to stem JDL activities against Soviet officials. It was alleged that if the activities did not stop the Soviet government might take reprisals against U.S. citizens in the Soviet Union.

101. The question was explicitly left open in United States v. United States Dist. Court, 407 U.S. 287 (1971), which concerned the extent to which the President could authorize an *internal security* wiretap without judicial review. In that case the Court held that the Fourth Amendment (and its warrant requirement) applied to the tap, but noted that the case required "no judgment on the scope of the President's surveillance powers with respect to the activities of foreign powers, within or without this country." 407 U.S. at 308. As to the internal security tap, the Court held that the President's constitutional power to "preserve, protect, and defend the constitution", was circumscribed by the Fourth Amendment. *Id*. at 308-14.

102. 516 F.2d at 619-27. In addition to examining the government's contention that Supreme Court authority supported absolute presidential discretion, the court examined the argument that prior executive practice suggested that the President had absolute freedom to wiretap in the foreign security field. The court held that the executive practice "has never received Supreme Court approval" and that "an unconstitutional practice, no matter how inveterate, cannot be condoned by the judiciary." *Id*. at 616. The court found, moreover, that the practice was not what the proponents of presidential immunity made it out to be. *Id*. at 616-19.

103. 301 U.S. 324 (1937).

104. 315 U.S. 203 (1942).

accepted an assignment of claims from the Russian government for property that had been confiscated after the revolution of 1917, the Court did examine the constitutional validity of the President's agreement with the Soviet Foreign Minister (Mr. Litvinov). The Court dismissed the argument that the executive's act infringed on any rights protected by the constitution.[105] In both cases the Court squarely addressed the constitutional issue[106] and did not abstain from reviewing it just because of presidential involvement.

United States v. Curtiss Wright Export Corp.[107] was also cited by the government for the contention that the President had unreviewable discretion to institute a foreign security tap, but the court found that *Curtiss-Wright* did not support the proposition. *Curtiss-Wright* involved a situation in which Congress had delegated to the Executive branch the power to prohibit American companies from selling arms to any nation engaged in conflict in an area of Bolivia called the Chaco. The delegation was attacked as an unconstitutional delegation of legislative power to the President. The Court sustained the delegation, asserting in the opinion that the federal government possessed inherent powers over foreign affairs, which stemmed directly from the King of England.[108] Much of this inherent power was asserted to lie in the President who possessed "delicate, plenary and exclusive power, as the sole organ of the federal government in the field of international relations. . . ."[109] However, the validity of Justice Sutherland's contention as to the origin of the federal power over foreign affairs has been vigorously questioned.[110] Whether or not Sutherland was correct in his history, even he, with his sweeping statement about presidential power, hesitated to extend the concept of "inherent power" to its logical conclusion. As Judge Wright notes, Sutherland recognized that the foreign affairs

105. In *Belmont*, the contention was that the Russian decrees, to the extent they applied to Russian property held by the U.S. nationals, violated the Fifth Amendment. The Court held that: "[O]ur Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens." 301 U.S. at 332. In *Pink*, foreign creditors of a nationalized Russian company had received an assignment from a New York state court of assets held by the receiver of the company's New York branch. The Court was thus asked to find that granting the U.S. priority over these foreign creditors violated their Fifth Amendment rights. The Court held that: "[T]he Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] nationals." 315 U.S. at 328. The Court further held that the policy of the State of New York, which was to favor these foreign creditors, would have to yield to the policy of the U.S., which was to recognize the Russian government. 315 U.S. at 231-34.

106. The only issue that the court would not address, finding that the executive's judgment was conclusive, was the validity of the executive's recognition of the foreign government.

107. 299 U.S. 304 (1936).

108. 299 U.S. at 316-18.

109. 299 U.S. at 320.

110. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973). The Third Circuit in *Butenko*, accepted the fact that Sutherland was wrong, and found that the government's power over foreign affairs was delegated by the people, and was thus subject to constitutional limitations.

power, as every other power "must be exercised in subordination to the applicable provisions of the constitution."[111]

What the *Zweibon* opinion thus concluded about Supreme Court precedent on the foreign affairs power is as follows: first, such powers must be exercised within the constraints of the Constitution; and, second, the judiciary determines whether these constraints have been honored. Because the government contended that the court could not have access to the secret information needed to judge the validity of the tap, the court also went on to determine whether confidential information can be ordered produced if it is necessary for the court to render a rational decision. Quoting *United States v. Nixon*,[112] Judge Wright noted that the Court had "reiterated the long-standing judicial position that the applicability of any privilege is undeniably a question for the court to decide," thus ruling that the court could order the pertinent material produced.[113] This reading of *Nixon* is clearly correct, since the opinion explicitly authorized the trial judge to review national security materials *in camera* to determine the validity of the claims of privilege made for the White House tapes.[114]

The remainder of the discussion in *Zweibon* concerns the scope of the substantive power to the President to order a foreign security wiretap and is not relevant to the question of the proper role of the political branches and the Court in the foreign affairs area.[115] Because the Omnibus Crime Control and Safe Streets Act of 1968 explicitly left undisturbed all the President's constitutional powers over foreign affairs, the opinion did not need to address the limits of Congress's power to legislate over foreign affairs. This issue, however, arises in a situation like *Waterman*, because there the President may approve a Board order which violates the Act, or may himself order a result which violates the Act. When this happens, the power of Congress, in effect, is being subordinated to the power of the President. In *Waterman* the Court found that it could not act though the President may be violating a standard set down by Congress. However, the Court's conception of its role under the Constitution is outmoded; two opinions by judges of the Third Circuit in *United States v. Butenko* sketch a more logical view of the Court's function as an arbiter between the political

111. 299 U.S. at 320 (quoted in 516 F.2d at 621).

112. 418 U.S. 683 (1974).

113. *Id*. at 624-25.

114. *See* Freund, *Forward: On Presidential Privilege*, 88 HARV. L. REV. 1, 32-35 (1974); *cf*. Henkin, *Executive Privilege: Mr. Nixon Loses But the Presidency Largely Prevails*, 22 U. CAL. L.A. REV. 40 (1974).

115. The court holds that so long as the target of the tap is a domestic organization unaffiliated with a foreign power, the Fourth Amendment's warrant requirement applies, except in unusual circumstances. A plurality of the Court also found that the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 were applicable. 516 F.2d at 628-70.

branches in foreign affairs.[116]

Butenko involved the question of whether a foreign security wiretap on two suspected Russian spies[117] violated either the Fourth Amendment or Section 605 of the Federal Communications Act, which prohibited all unconsented-to wiretapping.[118] The court held that Section 605 was not applicable,[119] but concluded that the Fourth Amendment was. It found that the test of "reasonableness" under the Amendment was a very relaxed one, and the scope of review was limited to the question of whether, in fact, the tap was for foreign security. (The warrant requirement of the Fourth Amendment was held inapplicable.) The opinions of Chief Judge Seitz (joined in by Judge Van Dusen) and Judge Gibbons review at some length the power of Congress over foreign affairs. The ideas in the opinions are directly relevant to the concept of the separation of powers set forth by Justice Jackson in *Waterman*.

Judge Seitz disputes the majority's contention that Section 605 of the Communications Act, if it applied to a foreign security wiretap, might be unconstitutional. He notes that the Supreme Court had previously held that Section 605 applied to wiretapping by federal agents. He concedes that the previous case[120] "concerned executive authority over domestic matters,"[121] while "the case before us, as cast by the majority, involved Presidential powers over foreign affairs."[122] However, he notes that:

> The only constitutional provision cited by the majority as authority for the executive decision-making that 'foreign intelligence information' supposedly aids is Article II, section 2's declaration that the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . This provision certainly cannot be said to be any more important that Article II, section 3's charge that the President 'take care that the laws be faithfully exe-

116. 494 F.2d 593 (3d Cir.) (en banc), *cert. denied sub nom. Ivanov v. United States*, 419 U.S. 881 (1974). While these views were not adopted by the court, the opinions of Judges Gibbons (dissenting) and Seitz (concurring in part and dissenting in part) are cited in *Zweibon* and because they are extensive and cogent, might well guide the Supreme Court when it faces the problem of delineating the proper role of the court in reviewing foreign security wiretaps.

117. One, Ivanov, was a Soviety national; the other, Butenko, was an American by birth. 494 F.2d at 596.

118. Section 605 provides, in relevant part, that: "[N]o person not being authorized by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication, to any person." 47 U.S.C. § 605 (1979).

119. The court found no indication in the legislative history of the statute that Congress intended Section 605 to apply in a foreign security case. Since a ruling that it did apply "would have raised constitutional questions", the court inferred from the lack of history that it was not intended to apply. 494 F.2d at 601.

120. Nardone v. United States, 302 U.S. 379 (1947).

121. 494 F.2d at 610.

122. *Id*.

> cuted,' nor can wiretapping be deemed any more crucial to accomplishment of the President's duties as Commander-in-Chief than to his faithful execution of the laws . . . The President is certainly no 'Lone Ranger' in the foreign affairs field, possessed, as the majority intimates, of vast constitutional powers to be exercised independently of Congress. All of the federal government's power including foreign affairs powers, are subject to constitutional limitations, *United States v. Curtiss-Wright Export Corp.*, *supra*., and one such limitation of the President's power is the exercise of Congressional power. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[123]

This concept boldly equates the President's power over internal affairs with his power over external affairs. One would be hard pressed to dispute the assertion that the President's power to "take care that the laws be faithfully executed" is at least as important as his powers as Commander-in-Chief of the Army and Navy.

Judge Gibbons, in his opinion, describes the origins of the various foreign affairs powers in the Constitution. He finds that they were all once possessed by the Continental Congress which granted some of them to the President when the Constitution was founded. In light of this origin, "the provisions transferring some of those powers to the executive in 1787 should it seems to me, be read narrowly rather than expansively."[124] As to the question whether Congress could prohibit the President from wiretapping for national security reasons, he concluded that: "I have no question that Congress could, and did in 605, prohibit anyone, including foreign affairs intelligence agents, from wiretapping."[125]

Judge Gibbons' tracing of the foreign affairs powers to their source lends substantial weight to the argument that the President's foreign affairs powers are limited. If all foreign affairs power were once legislative, but some were ceded to the executive, the President's power to act must be circumscribed. Judge Seitz points out that the duty to maintain domestic order is surely as important as the duty to maintain a country safe from external dangers. Since the President's domestic powers are circumscribed by the Constitution, with the Court defining the reach of the powers, they must be equally circumscribed in the foreign realm.

The relevance of *Zweibon*, and the Gibbons and Seitz opinions in

123. 494 F.2d at 610 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J. concurring)).

124. 494 F.2d at 634.

125. 494 F.2d at 635.

Butenko to the question of whether the current law supports Justice Jackson's view in *Waterman* of the proper roles of the branches in foreign affairs, is that it is wrong to suppose the foreign realm is committed exclusively to the political branches. If Congress has legislative powers that may be paramount to the President's authority in foreign affairs, it will necessarily take action by the judicial branch to mark out the proper confines of the powers of the two branches.[126] Justice Jackson's notion in *Waterman* that the Court should stay out of the political arena where the political branches make decisions is inconsistent with the fact that an arbiter is necessary to mediate between the branches.

Before concluding this aspect of the discussion, it is necessary briefly to note a second branch of the political question doctrine, not directly founded on constitutional theory. Under this branch, a court has discretion to decline to resolve a dispute if the nature of the problem, though not necessarily constitutionally committed to another branch, does not lend itself to judicial resolution.[127] This branch differs from the constitutional commitment branch because it vests discretion in the court, based on prudential considerations, to exercise or not exercise jurisdiction as it sees fit.

We have already demonstrated that all matters involving foreign relations are not constitutionally committed to the political branches. Court precedents establish that the judicial branch has a role to play in protecting individual rights and arbitrating between the political branches.

The issue of whether prudential considerations ought to persuade the court to abstain from reviewing presidential decisions on air routes depends more on common sense than on judicial precedent. It seems fair to conclude that the answer to the question of whether court intervention is appropriate depends more upon one's assumption about the scope of judicial review than about philosophical musings on the nature of foreign affairs. A judicial inquiry, for example, into the question of whether the President was correct in determining that, for foreign policy reasons, a certain route should be given to carrier "X" despite the fact that the economic evidence in the record before the Board indicated that carrier "Y" would perform in a superior fashion, might be said to be impractical. The court, it would be said, does not have the expertise to assess the executive's judgment concerning the foreign policy requirement of having carrier "X" on the route. While this assessment might be correct if the court were asked to review the President's substantive judgment as to appropriate carrier, it would not be correct if all the court was asked to do was to examine the basis for the President's act. If the executive has been guided by rational criteria, the

126. *See* Henkin, *Is There a Political Question Doctrine*, 85 YALE L.J. 597 (1976).

127. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); McCloskey, *Forward: The Reapportionment Case*, 76 HARV. L. REV. 54, 60-64 (1962).

court would confirm the judgment; if not, the court would reverse the judgment. There would thus be a judicially discoverable standard for testing the executive's determination: this would be the arbitrary and capricious test set forth in the Administrative Procedure Act,[128] and regularly applied in other areas of administrative law, where agency expertise comes into play. Thus, given a limited standard of review, it does not appear that prudential concerns need keep the judicial branch from overseeing the distribution of foreign route awards,[129] irrespective of the involvement of foreign affairs.

The analysis contained in this section suggests that the Court engaged in an outmoded constitutional view in *Waterman*. Therefore, the Court's conclusion that Congress intended to insulate from judicial review presidential decisions on foreign routes for U..S. carriers is unsound. This unsoundness can be remedied by the Court overruling *Waterman*.[130] But, in order to provide judicial review of Board orders involving foreign carriers, Congress will have to amend the statute. The next section of this article examines a recent amendment to Section 801 of the Act which appears partially, but not fully, to authorize judicial review of orders involving foreign carriers. It suggests that the language of the amendment should be clarified, and concludes that Congress should explicitly provide that judicial review is available for all foreign route orders.

V. The Effect of Recent Amendments to Section 801 of the Act on the Availability of Judicial Review

Congress amended Section 801 of the Act in 1978 as part of its overall reform of the regulatory system governing domestic aviation.[131] The amendments to Section 801 are designed to remedy an open-ended presidential review process by requiring the President to act within sixty days on any Board recommendation and to limit his review to the foreign policy and defense aspects of the Board's recommendation.[132] Because Sections

128. 5 U.S.C. § 706(e) (1976); *Cf.* 1 British Airways Bd. v. Civil Aeronautics Board, 563 F.2d 3 (2d Cir. 1977). (arbitrary and capricious test applicable to determine the validity of Board's schedule filing order to British Airways).

129. While there could be a case in which the executive's determination as to a foreign policy requirement is overruled by a court this would only occur in instances in which there was absolutely no basis to support the executive's action. Most foreign governments presumably would not take this as a lack of cohesive foreign policy on the part of the United States.

130. The lower federal courts have developed partial remedies, but the resulting system has given rise to arbitrary distinctions. *See* pp. 117-26 *supra*.

131. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (approved Oct. 25, 1978). For a brief description of the Act, *see* Lowenfeld & Mendelsohn, *Economics, Politics and Law: Recent Developments in the World of International Air Charters*, 45 J. Air Law & Comm. 479, 498-99 (1979).

132. The presidential review process had been subjected to substantial misuse by carriers and other parties lobbying extensively for presidential favor. *See* Whitney, *Integrity of Agency Judicial Process Under the Federal Aviation Act: The Special Problem Posed by International Airline Route*

801 and 1006 closely interact, the changes in Section 801 potentially affect the availability of judicial review under Section 1006 of the Act. Congress, when considering the proposed amendments to Section 801, failed to recognize that any substantial reconstruction of 801 would have ramifications on the proper interpretation of Section 1006. As a result, the impact on the availability of judicial review of the changes made to Section 801 is not as clear as practitioners would ideally like.

Amended Section 801 provides that a Board recommendation not disapproved by the President, "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." Section 1006, which was unchanged, continues to provide that "any order . . . issued by the Board . . . except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 . . . shall be subject to judicial review."

If Section 1006(a) is read literally, it appears that the only orders immune from judicial review are those "subject to the approval of the President" under Section 801. However, under the amended version of Section 801, the President no longer approves any Board orders, whether they involve citizen or foreign carriers. Rather, the President may veto Board orders but if he does not veto them, they go into effect of their own force. The reconstruction of Section 801, thus seems to gut the judicial review exemption contained in 1006 for orders involving foreign carriers. Moreover, inasmuch as *Waterman* depends upon the exemption for foreign carriers, elimination of the exemption presumably would be taken as a Congressional overruling of *Waterman*. If Congress intended this significant result to occur, however, one would think it would have altered 1006 as well as 801, since 1006 is materially affected. There is no indication in the legislative history of the amendment, moreover, that Congress intended by indirection to rewrite 1006 as well as 801.

With regard to vetoed Board order Congress seems to have implicitly come out against judicial review. Thus the revisions of Section 801 establish that any Board action disapproved by the President shall be considered "null and void." This language seems to suggest that a party who is aggrieved by a presidential decision to veto a Board action would have no way to question the action since the underlying order is "null and void." This is not to suggest that the President's decision, which must be reduced to writing, and accompanied by a written explanation, could not be reviewed, at

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Awards, 14 WM & MARY L. REV. 787 (1973); 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 (1970). One commentator has claimed that the lobbying became so intense that the system harked back to the old "spoils system" under which the Postmaster General handed out lucrative mail contracts to those carriers most in his favor. *Id*. at 517-27.

least theoretically. Clearly, it is not "null and void." It must be conceded, that one would not expect Congress to authorize judicial review of veto decisions of the President without an explicit statement to that effect, especially since the veto can only be exercised, under revised 801, where foreign policy or defense demands rejection of the Board's recommendation. On the other hand, since Congress appears to have authorized review of Board orders not vetoed by the President, despite the fact that the President's decision not to exercise the veto could arise from considerations relating to foreign policy or defense, it would seem anomalous to conclude that Congress would not have wanted to authorize review of presidential vetoes because judicial review in those instances would involve foreign policy or defense.

The amendments to Section 801 improve the system of presidential review by limiting presidential discretion and shortening the time frame during which the review process must occur. However, it is unfortunate that the amendments do not clarify the extent to which the availability of judicial review is meant to be affected. Based on the analysis contained in this article, Congress should ideally clarify its position by authorizing limited judicial review for all Board orders involving foreign routes and for presidential vetoes of Board recommendations on foreign routes.

VI. Conclusion

The lower federal courts have attempted to limit the reach of *Waterman* by preserving judicial review where posssible. In the attempt to limit *Waterman*, the courts have utilized meaningless criteria for determining whether or not judicial review is available. *Waterman* itself was wrongly decided, because it rested on an erroneous conception of the appropriate roles of the various branches in foreign affairs and defense. Rather than continuing with the present system, the Court and Congress should establish a single rule that judicial review is always available for Board recommendations on foreign routes. In its recent amendments to Section 801 of the Act, Congress appears to have accomplished this end in part by authorizing judicial review of Board recommendations not vetoed by the President. However, it does not appear, under the amended version of 801, that presidential vetoes of Board recommendations are reviewable. This anomaly should be corrected if the interests of private parties, as well as the public, in a rationally conducted foreign route distribution system, are to be adequately protected.