Integrity of Agency Judicial Process Under the Federal Aviation Act: The Special Problem Posed by International Airline Route Awards

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ROUTE AWARDS

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The administrative process in this country developed in the latter
third of the nineteenth century to meet the inability of the tripartite
form of government established by the Constitution to deal adequately
with complex regulatory problems arising in industries whose economic
viability and conduct within society had become a matter of public
concern. It early became apparent that merely policing the conduct of
such industries was not sufficient, but rather that: "The primary em-
phasis of administrative activity had to center upon the guidance and
supervision of the industry as a whole." Courts were clearly unequal
to the task of providing such continuing surveillance and the specialized
expertise which it entailed.

Paradoxically, the administrative agencies created by Congress to
preside over industries such as railroads, pipelines, communications,
power, securities, and airlines did not follow the constitutional pattern
of separation of powers between the executive, the legislative, and the
judicial—each maintaining its independence by the tension resulting
from a balancing of powers. Rather these new agencies, which came
collectively to be referred to as the "Fourth Branch" of government,
each embraced rulemaking, adjudicatory, and enforcement
powers. Although preceded by the prefix "quasi," these powers are unmistakably
legislative, judicial, and executive in nature. The vesting in a single ad-
nomiscrative entity of such combined powers has been the source of many
of the institutional difficulties which have arisen in the administrative
process. The problems are particularly acute with respect to the "quasi-
judicial" powers of agencies.

It has long been recognized that an independent judiciary is a vital
prerequisite to effective democracy. Since as early as Hayburn's Case, it

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ington, D.C.
2. Id. at 2-4.
3. 2 U.S. (2 Dall.) 408 (1792). Beyond the "constitutional" courts which were of
concern in Hayburn's Case, Congress has created "legislative" courts whose raison d'etre
the doctrine has developed that so-called "constitutional" courts—those created pursuant to article III of the Constitution—may not take jurisdiction over any matter in which their decision would be subject to revision by the executive branch. Although such rigid separation and independence is not required of legislative courts and administrative tribunals, there remains implicit in our constitutional system of separate powers the conviction that to the degree independence of the judicial function diminishes, the probability of injustice increases.

In light of these considerations, it is not surprising that there have been occasional proposals to separate the quasi-judicial function of the agencies from their executive and rulemaking functions. As early as 1938, it was suggested that:

The development of the administrative process has led to a substantial modification of the traditional doctrine of the separation of powers. In special areas of regulation, executive, legislative and judicial powers have been combined in a single instrumentality, but such a commingling of functions is justified only where the Congress finds that it is necessary to the effective performance of the regulatory responsibilities of the Federal Government. Our task force believes that wherever practicable there should be a complete separation of the judicial functions of administrative agencies from their own functions.

More recently, the Hector Memorandum advocated with respect to the Civil Aeronautics Board that:

Adjudication of major litigated cases and appeals from administrative action should be performed by an administrative court, free from policymaking or administrative detail . . . . In any field
of Government regulation there are major, contested matters, where there are parties in substantial and vigorous opposition, and where substantial rights—public and private—are involved. Such cases should be tried by an administrative court de novo, either by the court itself or by hearing officers performing the functions of special masters. Such cases should be decided on the basis of policies formally established and announced in regulations, or formal policy statements by the appropriate arm of the executive branch. Such policies would be binding on the administrative court unless they were held to go beyond the basic statutory authorization.6

Three specific considerations have been advanced for separating the judicial function of agencies. First, as noted by the Hector Memorandum, although administrative hearings and procedures are lengthy and even over-judicialized, the "adjudicated cases do not give the parties the full judicial hearing to which they are entitled."7 In the context of the Civil Aeronautics Board, this paradoxical situation arises because such cases are not decided "on the basis of general principles and standards known to the parties and applicable to all cases"8 and because the CAB frequently reverses the trial examiner and substitutes its judgment, although it does not study the evidentiary record and entrusts the writing of its decision to anonymous opinion-writers who justify the Board's extra-record conclusions as to what the desired result of the case should be.9

A second basis advanced for separating the judicial function is the incredible inefficiency of the administrative process.10 For example, disposition of the Seven States Area Investigation11 required well over three years; moreover, it ultimately was decided on an extra-record basis.12 The criticism of inefficiency has been expressed forcefully in the Ash Committee Report.13

7. Id. at 939.
8. Id.
9. Id. at 939-48. For a description of the problems of opinion writers for the CAB who must reconcile contradictory policy decisions using identical or similar record data see H. Friendly, THE FEDERAL ADMINISTRATIVE AGENCIES 86-91 (1962).
10. Hector, supra note 6, at 932-38.
12. Hector, supra note 6, at 934.
13. Ash Report, supra note 4, at 5. The report notes: "Overjudicialization encumbers the time and energies of the commissioners and staff, causes undue case backlogs, imposes
Finally, the judicial process of agencies is susceptible to improper outside influences. This may occur because of the failure of the process to develop clear standards possessing precedential value to guide agency action in successive cases and because of a procedural structure which virtually necessitates Board review of the examiner’s decision—a review which rarely is based upon a detailed knowledge of the record. These circumstances create “a void into which attempts to influence are bound to rush; legal vacuums are quite like physical ones in that respect.”

Consequently, as has been noted in regard to the FCC, decisions are reached by employing “spurious criteria, used to justify results otherwise arrived at.”

Several independent agencies have been subject to charges that decisions were reached on the basis of improper ex parte influences. The CAB itself has been involved in several such situations. The most celebrated of these was the Reopened New York-San Francisco Nonstop Service Case, which gave rise to substantive changes in the CAB’s Rules of Practice and Principles of Practice in order to protect the Board’s high costs upon litigants, prevents anticipatory action through rulemaking, deters informal settlements, and precludes coordination of agency policy and priorities with those of the executive branch.”

14. H. Friendly, supra note 9, at 22.
15. Id. at 54.
16. See, e.g., WKAT, Inc. v. FCC, 258 F.2d 418 (D.C. Cir. 1958). See also H. Friendly, supra note 9, which describes vis-a-vis the FCC, “the exposure of a number of boudoir episodes, some having more piquancy and others less, but going, in the aggregate, beyond anything experienced, or, perhaps more accurately, discovered, in other federal regulatory agencies.” Id. at 54. In Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958), the Supreme Court vacated the affirmance by the Court of Appeals for the District of Columbia Circuit of an order allocating a television license. On remand, the court of appeals vacated the FCC’s order and remanded the proceeding to the Commission. 269 F.2d 221 (D.C. Cir. 1959). In WIRL Television Corp. v. United States, 358 U.S. 51 (1958), the Supreme Court vacated the affirmance of an FCC order and remanded the case for the same reasons as the Sangamon case. One week later the Court followed the same procedure for the same reason in WORZ, Inc. v. FCC, 358 U.S. 55 (1958). See Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 (D.C. Cir. 1958).
17. 35 C.A.B. 423 (1962). See Kansas-Oklahoma Local Service Case, 32 C.A.B. 577 (1960), Supplemental Opinion and Order on Reconsideration, 32 C.A.B. 794 (1960) (involving allegations that a Board member had accepted unusual hospitality and was thereby disqualified from participating in the decision); Reopened Kansas-Oklahoma Local Service Case, 38 C.A.B. 63, 175-77 (1963) (applicants castigated but not disqualified for violating the Principles of Practice); cf. Colonial Air., Motions, 9 C.A.B. 273, 274 (1948), where the Board considered whether it had the power to disqualify one of its own members upon motion of a party to a proceeding before it and to relieve a member from further participation at his own request. The Board concluded that it had such power.
judicial character. This Article will examine the rules adopted by the Board in 1961 and determine the extent to which such rules are circumvented by the practices followed in international airline route awards which require Presidential review and approval. Where appropriate, reforms will be suggested.

**The Reopened New York-San Francisco Non-stop Service Case and The Quest for Judicial Integrity**

In the *New York-San Francisco Non-stop Service Case,* the CAB awarded American Airlines the right to provide third carrier non-stop service between New York and San Francisco in competition with the incumbents, TWA and United Airlines. The incumbents filed petitions for reconsideration alleging, *inter alia,* that American and various civic parties, principally San Francisco and the Port of New York Authority, had engaged in *ex parte* activities violative of the CAB's Principles of Practice and Rules of Practice. The CAB, after disposing of other issues raised on reconsideration, scheduled oral argument on the *ex parte* allegations. The petitions filed by the incumbents alleged four kinds of improper *ex parte* activity but stopped short of alleging venality or corruption on the part of the Board, the staff, the examiner, or any party.

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20. The Board summarized the petitioners' allegations as follows:
   The material affixed to the petitions is asserted to show (1) communications, directly to the Board by the mayor and other representatives of the city of San Francisco, (2) similar communications inspired by parties to the proceeding but written by non-parties, and (3) communications addressed to Members of Congress by San Francisco, Port of New York Authority and, through third persons, by American, seeking intervention and the exertion of influence in a manner other than that permitted by rule 14 of the Board's Rules of Practice.
   The letters are said to show further, by their own incompleteness, (4) other contacts made in person or by telephone with Members of the Board or its staff, the extent and significance of which "can be no more than a matter of conjecture." By affidavits and offers of proof, petitioners claim, ability to prove that certain *ex parte* letters to the Board from travel agents, sent directly or through a Member of Congress, were solicited by employees of American.
   Petitioners claim that the alleged *ex parte* communications and efforts to solicit and inspire pressure resulted in violations of the Board's Principles of Practice and Rules of Practice, the legal effect of which is to necessitate vacation of order E-14412, 29 C.A.B. 811, and a hearing *de novo* or, in the alternative, a reopening of the proceeding with a preliminary hearing to...
Rule 2 of the Board's Principles of Practice, as then written, set forth activities constituting improper influence in cases which were to be determined after notice and hearing and upon an evidentiary record. In essence Rule 2(a) made "improper" any "private" communication on the "merits" of a case to the Board by any person unless in a manner provided by law, that is, pursuant to the Board's Rules of Practice. Rule 2(c) prohibited, *inter alia*, any effort to sway the judgment of the Board "by attempting to bring pressure or influence to bear upon the Members of the Board or its staff." 

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The difficulty with these generalized rules was that they provided no clear standards to distinguish attempts "to bring pressure or influence to bear" from legitimate statements by interested political, civic, or other entities pursuant to section 401(g) of the Federal Aviation Act, which provides, *inter alia*, that: "Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate." 22 Indeed, a federal court of appeals recently had upheld the legality of solicitation of congressional participation in oral argument. 23

The question raised by the incumbents was whether communications on the merits which legally could have been effected within the format of the Board's Rules of Practice are flawed by virtue of having been communicated by letters, telegrams, telephone calls, and personal

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21. The Board quoted the applicable sections of Rule 2:

Par. 300.2 Hearing Cases—Improper Influence. It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.


communications. A related problem was whether those communications which importuned the Board to institute an evidentiary hearing (and to expedite it) constituted conduct prohibited by Rule 2 as then worded.

As to this latter question the Board, although it deemed Rule 2 to preclude such communications on an *ex parte* basis, indicated that the rule was sufficiently ambiguous that the appropriate standard of conduct was unclear.\(^\text{24}\) Similarly, because virtually all of the written communications were placed in the correspondence file of the public docket, the Board expressed doubts that they were "private" and stated its intention to hold a rule making proceeding to clarify these questions.\(^\text{25}\)

The Board proceeded to exonerate the Port of New York Authority but to conclude that San Francisco, "motivated by an excess of zeal and a lack of understanding of our procedures, may have violated Rule 2."\(^\text{26}\) The Board held, however, that since the offending material submitted by the city could have been provided through proper channels and since the incumbents had access to it, there had been no violation of due process.\(^\text{27}\) As to solicitation of congressional support and other communications on the merits by influential political figures and as to the attempt to discuss the merits of the case during an *ex parte* presentation to the Board arranged in the guise of discussing "general" aviation needs, the Board censured these tactics but held they did not taint the proceeding nor justify denial of the new service to the public.\(^\text{28}\) Similarly, the Board exonerated American of inspiring San Francisco and the Port of New York Authority to attempt improper influence and of any impropriety in soliciting congressional support. The Board did find that "procedural niceties" were violated by American's solicitation of direct communications by travel agents to the Board but dismissed them as activities "on the part of lower echelon representatives of the carrier who, out of misplaced loyalty, may be expected to attempt to assist their employer's cause by spontaneous suggestions which sometimes slight unknown niceties of practice before the Board."\(^\text{29}\) The Board concluded: "A careful review of the charges, with all fairly pleaded allegations construed in favor of petitioners, has failed to reveal any matter which would warrant vitiation of the pro-

\(^{24}\) 30 C.A.B. at 309, 313.

\(^{25}\) Id. at 313.

\(^{26}\) Id. at 314.

\(^{27}\) Id.

\(^{28}\) Id. at 315-16

\(^{29}\) Id. at 317.
ceeding, reassessment of American's comparative qualifications, or further investigation." 80

The incumbents sought review of the Board's decision in the Court of Appeals for the District of Columbia Circuit. The court adopted the position advocated by the Department of Justice that "the Board was under an independent affirmative duty to ascertain the extent of such violations and to preserve the integrity of its own administrative process by holding a hearing to determine all the relevant facts." 81 Accordingly, the case was remanded to the Board for determination whether "the Board's rules were so violated as to require a setting aside of the order." 82 The court retained jurisdiction pending hearing on this question and a report by the Board to the court.

The Board, under the aegis of a new chairman, ordered full public hearings. The trial examiner issued a detailed Initial Decision which was reviewed carefully by the Board. It was then held that "the record does not establish that either American or San Francisco violated the Rules of Practice in Economic Proceedings." 83 The Board noted, however, that "[t]he real substance of this case related to asserted violations by both American and San Francisco of the Board's Principles of Practice" 84 as they read at the time of the initial proceedings. 85

30. Id. at 319. The decision was by two members of the Board against one dissenting member. The other two members took no part in the decision.


32. Id.


34. Id.

35. In the interval the Board has changed Rule 2(a) (PR-43 effective December 6, 1960, as amended by PR-48 effective May 17, 1961). The Board noted that the revised Rule 2(a) provided:

It is essential in cases to be determined after notice and hearing and upon a record, or any other cases which the Board by order may designate, that the Board's judicial character be recognized and protected. Therefore, from the time of filing of an application or petition which can be granted by the Board only after notice and hearing, or, in case of other matters, from the time of notice by the Board that such matters shall be determined after notice and hearing and upon a record or that its Principles of Practice shall be applicable thereto:

(a) A written or oral communication on any substantive or procedural issue in the case to a Member of the Board or its staff, or to the examiner in the case other than in compliance with the Board's Rule of Practice by any person, either in private or public life, shall be deemed a private communication on the merits. Such communications, unless otherwise provided for by law or published rule are hereby prohibited. Provided, That this prohibition shall not be deemed to apply to informal complaints filed with
A determination whether violations had occurred turned upon three questions: (1) whether the phrase (in the then effective Rule 2) "cases to be determined after notice and hearing and upon a record" prohibited certain conduct only after an application had been set for hearing or whether it covered efforts to obtain a hearing; (2) what "private communication" meant in the normal agency context; and (3) how to apply Rule 2(c) which prohibited attempts to bring pressure or influence to bear on the Board or to sway its judgment by extra-record activities. This latter question involved judgmental determination of the parties' intent.

As to the first question, the Board held that the ambiguity in Rule 2 was such that it would be reasonable to regard a campaign to secure expedited hearing as not proscribed. As to the second matter, it was found that virtually all of the communications had been made public in the correspondence file of the public docket. Finally, although activities such as the solicitation of press coverage and congressional intervention, ex parte civic communications on the merits, and travel agent contacts "technically" violated Rule 2(c), the Board held that these violations did not result in prejudice or deny a fair hearing to other parties. It was concluded that "[t]he violations found are primarily

the Board or to communications with staff members of the Board who are in the course of preparing a case, or for the purpose of determining whether a complaint shall be docketed, or to the usual informal communications between counsel, including discussions to effectuate a stipulation, or to settlement discussion between parties and the Board's enforcement staff, or investigate activities, or to other communications which are deemed proper in proceedings in the Federal courts. Communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits. Any prohibited communication in writing received by the Board or its staff or the examiner in the case, shall be made public by placing it in the correspondence file of the case which is available for inspection and copying during business hours in . . . the Board's Dockets Section, but will not be considered by the Board or the examiner as part of the record for decision.

35 C.A.B. at 427.

The Board also had amended its Rules of Practice, effective May 17, 1961, to make more specific the proper means of exercising the right of submitting a "protest" or "memorandum" under section 401(c) and (g) of the Act. Rules 302.6, 8, and 14. On December 5, 1961, the Board had issued a notice of proposed rulemaking to set forth standards for determining priorities of hearing. This rule had not become final at the date of decision in the Reopened case but subsequently became Rule 399.60, Standards for determining priorities of hearing. 14 C.F.R. 561 (1972).

37. Id. at 436 n.73.
38. Id. at 435.
technical in nature and their significance diminished by ambiguities in
the Board's Principles of Practice" and that cancellation of the award
to American was not necessary as a deterrent to future violations inasmuch as the Board had changed its Rules and Principles of Practice to preclude such conduct and to recognize and protect the judicial character of the Board.

In modifying its Rules of Practice, the Board recognized that its judicial functions are similar to those of a court; moreover, it has taken emphatic and detailed steps to insure that Board members and their employees "conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff" and to insure that parties conduct themselves in accordance with these strict judicial standards.

THE CHINK IN THE BOARD'S JUDICIAL ARMOR—SECTION 801 OF THE FEDERAL AVIATION ACT

Although some basic problems in its process may not yet have been obviated, it seems clear that since the Reopened New York-San Francisco Case, the Board scrupulously has enforced the new and explicit Principles of Practice, thereby assuring a judicial ambience in its domestic route proceedings. The integrity of the Board's process is diminished, however, in route proceedings involving authority for a United States air carrier to engage in either overseas, international, or territorial operations or authority for a foreign air carrier to serve the United States or a territory thereof, since section 801 of the Federal Aviation Act requires, inter alia, that the Board submit its decision to the President for approval prior to publication.

39. Id. at 438.
40. Id. at 437. The Board reported its findings to the court, which thereupon affirmed the Board's award to American. United Air Lines, Inc. v. CAB, 309 F.2d 238 (D.C. Cir. 1962).

Subsequently, the Board further strengthened its Rules to preclude improper conduct prejudicial to its judicial character by prohibiting gifts and unusual hospitality to the Board or its staff. (PR-75, 28 F.R. 2708, Mar. 20, 1963). Moreover, the Board has permanently disqualified any former Board member or employee from acting in matters in which they personally participated during their government employment. (PR-115, 35 F.R. 18193, Nov. 28, 1970).

42. Some of these problems have been noted by Judge Friendly and Mr. Hector and include the lack of intelligible precedential standards for decision and the delay and evidentiary problems heretofore noted that inhere in the essentially duplicative process of trying a case before the examiner and in effect re-litigating it before the Board.

43. Section 801 provides:
The issuance, denial, transfer, amendment, cancellation, suspension, or revo-
The President's power of approval can be exercised in a fashion that circumvents the judicial safeguards that the Board has devised in its adjudicatory processes. The Board in an international route proceeding follows strictly its Rules and Principles of Practice. After formally instituting the proceeding, it follows the same procedural format employed in a domestic case, successively passing through prehearing conference, exchange of exhibits, rebuttal exhibits, and written testimony pursuant to a schedule established by the examiner. The examiner presides over an evidentiary hearing and upon the close of the record sets a date for briefs and proposed findings. After he issues his Recommended Decision, exceptions are filed thereto and briefs submitted to the Board, which, after hearing oral argument, reaches its decision. At this point the procedure in international cases becomes subject to section 801, and all pretense to judicial treatment of the decision ends. The Board's Rules and Principles of Practice no longer have application. Parties to the proceeding are free to make ex parte presentations to the executive branch, subject only to statutory prohibitions against bribery, graft, and conflicts of interest and the standards of ethical conduct for government officers and employees.

The various Transpacific Route Cases illustrate the consequences of executive revision of Board decisions. Prior to World War II, Pan American Airways was the "chosen instrument" that provided U.S. flag service across the Pacific. In 1946, Northwest Airlines was granted a route across the northern Pacific. Thereafter, the Board denied Pan American's application for a competitive route across the northern
Pacific, but President Eisenhower disagreed with the Board's decision and requested that the case be reopened. The Board reopened the case, but persevered in its denial of the application. Once again, the President requested the Board to reconsider, and again the Board retained its original decision, with which the President at length acquiesced. The President, however, requested a further comprehensive transpacific proceeding which was duly held. The Board at that point granted, together with a domestic mainland-Hawaii route to Western Airlines, Pan American's application for a northern Pacific route but ordered a corresponding award to Northwest over the central Pacific in competition with Pan American. The President, however, decided that no awards should be granted and, although he lacked power over domestic awards, the Board acquiesced in the President's stated desire that no domestic award be granted. Western appealed this decision to the Court of Appeals for the District of Columbia Circuit. Although the court held that the Board had found the domestic award to Western was required by public convenience and necessity, it declined to order the Board to finalize the award but remanded the case to the Board for further proceedings. Again the case was processed in strict accordance with the Board's Rules and Principles of Practice, extensive hearings were held, an examiner's Recommended Decision issued, exceptions filed, and briefs and oral argument presented to the Board. The Board, after due deliberation, produced a decision which was submitted to the President for approval. The case had been divided into domestic (mainland-Hawaii) and international phases (mainland/Hawaii-foreign) in order to forestall the problems encountered in the 1961 decision that led to Western's appeal. Decision in the domestic phase was to be held in abeyance until decision was reached on the international phase, inasmuch as the route patterns in the two phases were deemed to be inextricably interrelated. President Johnson accepted all but one of the Board's awards, a central Pacific route awarded American Airlines to Tokyo via Hawaii, which he voided on the ground that additional service to Japan was not in the national interest. The Board modified

51. Id. at 976-77.
52. Western Air Lines, Inc. v. CAB, 351 F.2d 778, 783-84 (D.C. Cir. 1965).
its decision accordingly the following day\textsuperscript{54} and announced it would allow filing of petitions for reconsideration within 30 days. This period extended beyond the commencement of the term of office of President Nixon who, on January 24, 1969, recalled the decision; the Board then vacated its decision.\textsuperscript{55} Thereafter, the President announced a new and substantially different transpacific route pattern based upon undisclosed new traffic forecasts.\textsuperscript{56} The Board adopted all but one of the President's route patterns, namely, that to the south Pacific.

The Board then instituted a \textit{South Pacific Deferred Phase} proceeding in which it reaffirmed its original award to Continental with modifications intended to bring the award into conformity with the President's criteria.\textsuperscript{57} The President, however, rejected this decision, and the Board ultimately selected another carrier (American) to provide the south Pacific service along the lines of the Presidential criteria.\textsuperscript{58}

Throughout the course of the various \textit{Transpacific} decisions, each Presidential action precipitated outrages of "cronyism," undue influence, and unchecked extra-judicial maneuvering.\textsuperscript{59} Although the criticism in the popular press and trade journals can be fairly characterized as speculative, certain more substantive conclusions can be adduced from the public record. It is clear that the President can overrule Board decisions on grounds other than national security and foreign relations considerations. As has been noted, President Nixon radically altered the Board's \textit{Transpacific} decision of December 19, 1968, on the basis of a new traffic survey or forecast which was extra-record and never disclosed to the parties. When such extra-record economic data become dispositive, the elaborately protected judicial process of the Board is rendered largely nugatory.

The existence or extent of \textit{ex parte} activities by the interested airline parties in the White House and various executive departments throughout the \textit{Transpacific} litigation is at most a matter of speculation and

\textsuperscript{54} Id. Supplemental Opinion, ¶ 21,833 (CAB December 19, 1968).
\textsuperscript{55} Id. ¶ 21,857 (CAB April 14, 1969).
\textsuperscript{56} Id.
\textsuperscript{57} Transpacific Route Investigation (South Pacific Deferred Phase), 2 Av. L. Rep. ¶ 21,868 (CAB July 21, 1969).
\textsuperscript{58} Id. ¶ 21,868.01.
\textsuperscript{59} For a detailed survey of the various press and trade journal commentary and speculation about the true motivation for the various presidential decisions see Note, \textit{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, 529-33 (1970) [hereinafter referred to as NYU Proposal].
surmise. However, in a subsequent Board proceeding, the *American-Western Merger Case*, secret *ex parte* efforts were detected and made a part of the evidentiary record. This proceeding involved the issue of the legality and desirability of American Airlines acquiring the routes of Western Airlines, whose system includes international routes to Canada and Mexico; consequently, the award required section 801 approval by the President. The so-called merger was opposed by numerous carriers whose primary concern was their inability to compete effectively with the larger and more powerful merged carrier that would result if the proposal were approved. In anticipation of the ultimate referral of the decision to the President, the chief executive officers of American and Western made various *ex parte* presentations on the merits of the merger to Assistant Secretary of Transportation Charles Baker, Assistant Attorney General McLaren (as to anti-trust implications), Secretary of the Treasury John Connally and Mr. Peter Flanigan of the White House staff. These presentations were established on the record and are summarized with record citations:

1. Mr. Spater (President of American) denied a meeting between himself, Mr. Taylor (President of Western) and Assistant Secretary Baker during the trip to Washington in connection with the November 5, 1970 *ex parte* presentation to the Board (tr. 270).

2. Mr. Spater at first denied any meetings with government officials other than the Board, Assistant Secretary Baker and Mr. McLaren (tr. 329). Later he had to admit meetings with Secretary of Treasury Connally and Mr. Flanigan of the White House Staff (tr. 429-31, 473).

3. Mr. Spater at first claimed he did not know of any submission of memorandum to the Department of Justice (tr. 326) when in fact an extensive memo in support of the merger had been submitted, which Mr. Spater admitted the following day (tr. 345).

4. When Mr. Spater finally admitted to the submissions to the Departments of Justice and Transportation, he denied knowledge of the submission of memos to any other agency (tr. 350-1), when in fact, as he later admitted, two memoranda had been transmitted to Secretary Connally, with a blind copy of the transmittal to Mr. Spater and only Mr. Spater (CO-R547).

5. Mr. Spater denied categorically (at the hearing) American's willingness to accept *any* restriction on the merger (tr. 241), yet later had to admit that American had by *ex parte* submission indi-

icated a willingness to accept several restrictions (tr. 429, 515, 517-21; CO-R540), which were nowhere mentioned in American's exhibits.61

All of these ex parte presentations were made just prior to and during the CAB hearing. The extent of subsequent presentations, if any, is not known.62 The foregoing description, however, is sufficient to indicate that in international cases, the CAB judicial precautions are nullified by the present statutory scheme which encourages and permits the conduct of a parallel extra-record prosecution of the case directed at the President and his advisers.

Moreover, the problem in international route awards is aggravated by the fact that, with only narrow exceptions, judicial review of such decisions is not available. The Supreme court in Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., held that decisions exclusively within the prerogative of the executive department are "beyond the competence of the courts to adjudicate." 63 Therefore, a CAB order involving international air transportation and subject to Presidential approval under section 801 of the Civil Aeronautics Act of 1938 (now Federal Aviation Act of 1958) is not subject to judicial review. As a result, an aggrieved party is faced with the dilemma that prior to Presidential action, the Board's order is not final and hence not ripe for review, while after Presidential action, the decision is insulated from judicial review because of the exercise of exclusive executive power.64 The minority of the Court in Waterman noted that "no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision." 65 Although this view appears to have been somewhat pessimistic in light of subsequent decisions granting review in certain situations,66 the proposition remains unaltered.

62. For a detailed account of airline ex parte "lobbying" of executive branch officials see Burby, Air Interests Follow Stylized Ritual in Lobbying on American-Western Merger, 4 Nat'l J. 546 (April 1, 1972) and Burby, Lawyers and Air Crews Try to Break Rhythm of American-Western Merger Dance, 4 Nat'l J. 607 (April 8, 1972).
63. 333 U.S. 103, 114 (1948).
64. Id. at 114.
65. Id. at 118.
66. See, e.g., Alaska Airlines, Inc. v. Pan American World Airways, Inc., 321 F.2d 394 (D.C. Cir. 1963), which contains the following dictum: "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
that Board decisions subject to approval of the President, who can
modify them on the basis of extra-record data, are not subject to judi-
cicial review provided the President or the Board have not exceeded their
statutory or constitutional authority.

Thus, when Continental Airlines sought to challenge, inter alia, Presi-
dential reliance upon an undisclosed extra-record traffic survey or
forecast as the basis for changing the Board's Transpacific decision of
December 19, 1968, the court dismissed Continental's petition on the
ground that it challenged an order not yet final and hence not ripe for
review. Moreover, it is unlikely that Continental's theory would have
prevailed in any event, inasmuch as courts have held that lapses in pro-
cedural due process, unlike acts exceeding statutory authority, do not
constitute grounds for reviewing a section 801 decision. For whatever

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." In Pan American World Airways, Inc. v. CAB, 392 F.2d 483 (D.C. Cir. 1968), the court noted: "Though Waterman has not been overruled by the Supreme Court, its apparently sweeping contours have been eroded by recent Circuit Court opinions." In Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), 392 F.2d at 492 n.11. The court then cited the following cases as "precursors" of the American and Pan American decisions: Trans World Airlines, Inc. v. CAB, 184 F.2d 66 (2d Cir. 1950), cert. denied, 340 U.S. 941 (1951), ("where the court in following Waterman, was careful to point out that 'the President and the Board acted within their legal powers in making the order,' 184 F.2d at 71, leaving open the question of what the court would have done had the Board acted beyond its lawful authority"); Pan American-Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir. 1964), cert. denied, 380 U.S. 934 (1965); and British Overseas Airways Corp. v. CAB, 304 F.2d 952 (D.C. Cir. 1962). 392 F.2d at 492 n.11. For a general discussion of this "erosion" see Miller, The Waterman Doctrine Revisited, 54 Geo. L.J. 5 (1965).


69. In United States Overseas Airlines, Inc. v. CAB, 222 F.2d 303 (D.C. Cir. 1955), the court stated: "It has thus been settled, in so far as this court is concerned, that, despite claims of procedural irregularity, under the Waterman opinion and decision the court has no jurisdiction to review orders of the Civil Aeronautics Board in matters which by statute are for the determination of the President." Id. at 304. Subsequently, in American Airlines, Inc. v. CAB, 348 F.2d 349 (D.C. Cir. 1965), Judge Burger, although noting that the court has power to review the issue of whether the Board exceeded its statutory power in reaching a decision submitted to the President for approval, clearly indicated that "allegations of denial of procedural due process as a predicate for review of action vested by Congress in the President . . . [are] like [those] that the action is unsupported by substantial evidence. . . . They thus encounter the difficulty, recognized in Waterman, that the President must be free to consider broad 'evidentiary' policy factors not involved, and indeed not relevant, in Board proceedings and that the
Survey of the history of *de facto* Presidential power under the aegis of section 801 indicates that such power as exercised far exceeds the original intent of Congress. In the first place, the President did not seek this power, but rather it was the brainchild of the Departments of Navy, State, and War, who jointly advocated such review as essential to national defense and foreign relations considerations. The following summary of these national defense considerations is less than impressive.

If it were not for [Presidential review], the Army and Navy would have no opportunity to come into the picture at all nor would the State Department. Now, where the President has control, he can refer the matter to the State, War and Navy Departments before he reaches a decision. You can see the necessity of the President, from an international defense standpoint, having an opportunity to review the question as to whether . . . a certificate of convenience and necessity shall be issued to an American-flag line flying through our Territory for the reason that they carry foreign passengers. We do not want foreign passengers flying over our fortifications in our Territory so that they can observe them.

In flying to foreign countries, from a national defense and international relations standpoint, it is very important that the President, the War Department, and the Navy Department as well as the State Department, have something to say about where our air bases will be established in foreign countries.

Even in terms of 1938 conditions, the first reason noted above lacks persuasiveness. The ability of foreign espionage agents to fly over defense installations in the United States is scarcely germane to possession of section 801 power by the President to approve CAB route orders to United States carriers. As to the establishment of air bases in foreign countries, whatever the circumstances may have been in 1938, virtually all commercial airports served by United States flag carriers in foreign

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President must be free to exercise unreviewable discretion as to the weight to be given to such extrajudicial factors." *Id.* at 352. No court has focused on a situation in which the extra-judicial factors are in fact traffic data and material that are the kind of evidence involved in and relevant to determination of Board proceedings.


71. *Id.* at 38.
countries have long since been established. Moreover, it is difficult to appreciate any matter related to national security that is served by retaining present section 801 powers insofar as they relate to the selection of carriers. How the selection of American Airlines, for example, over Continental to serve the south Pacific route attains national defense significance has never been explained. Both operate virtually identical jet equipment, both proposed comparable service, and both were solvent carriers found by the Board to be "fit, willing and able" to provide the service. As will be discussed in more detail, valid consideration can be taken of any national defense and foreign relations interests which may be affected by a CAB decision without the plenary grant of power embodied in section 801.

It is thus clear that partly as a result of *Waterman* and other judicial legislation and partly as a result of Presidential initiative, *de facto* Presidential power now far exceeds the review of Board decisions which may be necessary to protect national defense and foreign relations considerations. The Senate Commerce Committee in 1957 recognized the expansive effect of *Waterman*, stating:

Although originally intended merely as a means for Executive review, granting powers to be used only in exceptional cases, section 801 has had the unforeseen but perhaps inevitable effect of transferring from the Board to the White House ultimate responsibility in every respect for the disposition of cases within its purview.

The broad extent to which the President's authority under this section has come to be construed is significantly set forth by the Supreme Court in its decision in the case of *Chicago and Southern Air Lines v. Waterman Steamship Corp.* (333 U.S. 103). The Court therein held that a Board order covered by section 801 is not a final disposition of the matter, but a mere 'recommendation' to the President. Noting, in fact, that the Board altogether ceases to function as an arm of the Congress in such cases, and becomes virtually an organ of the executive branch, the Court states: "Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions, and limitations of the order (49 U.S.C. 601). Thus, Presidential control is not limited to a negative but is a positive and detailed control, unparalleled in the history of American administrative bodies."
The practical result of this total shifting of authority has been to subject the President directly to all the burdens and pressures of air commerce regulation. Thus, he is called upon in every section 801 case to pass final judgment on the fitness, willingness, and ability of air carriers to perform the service in question—these being the fundamental statutory criteria for the issuance of any certificate. In the great majority of instances, including those covered by section 801, the decision called for must be based entirely on economic or technical considerations having no practical bearing whatsoever on national defense policy or the conduct of foreign relations.72

As an example, the Committee hypothesized a case involving a determination as to which of two equally qualified carriers should be certified to fly a given international route. It was noted that after a full hearing and a finding by the Board, the disappointed applicant could renew his efforts at the White House even without framing his appeal in terms of a national security or foreign policy issue. Of most concern to the Committee, however, was the unavailability of judicial review in such cases. Adverting to the harm to administrative and judicial procedures resulting under such circumstances, the Committee noted: “Matters of an economic or regulatory nature which the Board, acting under the aegis of the Congress, is alone competent to decide and for which it alone is adequately staffed and ordered have somehow unwittingly become delegated to the Executive.” 73

Senate bill 1423 in the 85th Congress, which resulted from these hearings, would have amended section 801, inter alia, “by restricting the President's power to overrule CAB certification actions to foreign air transportation cases involving national defense or foreign policy” and by requiring the President “to submit to Congress a report of any instance in which he overrules a Board order as contrary to the interests of defense or foreign policy.” 74

Subsequent developments have reinforced the Senate committee's conclusion as to the “harm to sound administrative and judicial procedures” that arises from unreviewable Presidential power to determine international route awards. First, it has been confirmed that the Presi-

73. Id. at 3.
74. Id. at 1, 3. S. 1423 passed the Senate (104 Cong. Rec. 5137 (1957)) but was not acted upon by the House.
dent in reaching his decisions goes beyond foreign policy and national defense considerations and employs extra-record analyses relating to traffic and economic data despite the availability of comparable record data compiled under judicial safeguards by the CAB during the hearing process. Moreover, the *American-Western Merger* proceeding established that parties make extensive extra-record substantive submissions to Presidential advisers which presumably are the source of some of the analyses relied upon by the President in reaching his final, unreviewable decision.

Accordingly it now appears desirable, if not necessary, to reassess the proper extent of Presidential power over international route awards. Two questions require consideration. First, is there any need for Presidential review and approval of CAB action at the licensing stage in order to protect national security and foreign relations considerations? Alternatively, can these executive branch responsibilities be handled adequately in another fashion? Second, is there any legal basis or reason for Presidential consideration of economic matters delegated by Congress to the CAB, such as fitness, traffic forecasts, and economic operating results?

Congress clearly intended that section 801 interject the President into the licensing process that is otherwise delegated to the CAB and which must be conducted in accordance with judicial standards. This anomalous dual delegation, however, was made subject to judicial review by section 1006(a) of the Act except as to “any order in respect of any foreign air carrier subject to the approval of the President.” However, the Court of Appeals for the Second Circuit in 1941 ignored the plain wording of section 1006(a) and in effect judicially amended the statute by holding that review of orders authorizing issuance to American carriers of international routes is “so dependent upon considerations resting in Executive discretion that it cannot be regarded as authorized by Section 1006(a).” Subsequently, the Court of Appeals for the Fifth Circuit in *Chicago & Southern Air Lines v. Waterman*

75. “Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, 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.” Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1006(a), 72 Stat. 731 (emphasis supplied). Substantially the same language obtains in 49 U.S.C. § 1486(a) (1970).

76. Pan American World Airways Co. v. CAB, 121 F.2d 810, 814 (2d Cir. 1941).
Steamship Corp. emphasized the express language of section 1006(a) in holding such decisions reviewable. The Supreme Court reversed this decision and upheld the view of the Court of Appeals for the Second Circuit that despite the clear language of section 1006(a), "an exemption is to be implied." Thus, Presidential decisions involving American carriers of international routes are excepted from judicial review. Thus, with their section 801 decisions insulated from judicial review except in cases where the CAB clearly exceeded its statutory power, successive Presidents have expanded the scope of their participation.

The judicial interpretation of sections 801 and 1006(a) appears to have been influenced by the constitutional powers of the President with respect to national security and foreign relations. For example, the Court of Appeals for the Second Circuit found it "incredible that in enacting Section 1006(a) Congress intended to permit review of . . . cases . . . where the constitutional authority of the President to negotiate with foreign nations" is involved. The Supreme Court in Waterman also referred to the ability of Congress to delegate "very large grants of its power over foreign commerce" to the President and to the President's powers as "commander-in-chief and as the Nation's organ in foreign affairs," and concluded that the President's order "draws vitality from either or both sources."

**PROPOSED SOLUTIONS**

Various commentators have recognized the need to change the present international air route licensing procedure and have suggested various alternatives. The Markham analysis points out that "the present procedure for deciding cases subject to Section 801 needs re-examination and revision . . . the decisional process under Section 801 is an anomaly. A full-scale quasi-judicial proceeding must be conducted before the Board, but it does not serve the traditional purposes of such a procedure: To protect the basic 'rights' of the parties and to produce a decision, on the merits, in accordance with lawful standards and procedures. On the other hand, the actual decision-making authority is vested in a different branch of the Government—the President—who may act as a matter of executive discretion on different information and

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77. 159 F.2d 828 (5th Cir. 1947).
78. 333 U.S. 102, 106-09 (1948).
79. 121 F.2d at 814.
80. 333 U.S. at 109.
81. Id. at 110.
different grounds, and largely or entirely free of judicial scrutiny. Surely, a sounder procedure for reaching decisions in this important class of cases can be devised."  

One approach considered by Markham is to adopt the procedure suggested by the minority of the Court in Waterman, whereby concurrence by the Board and the President would be required to decide a case, but the most the President could do would be to veto a Board decision and not modify or supplant it. The Board decision would be subject to judicial review, but the reasons for Presidential veto would not. According to Markham such a procedure would protect the integrity of the Board’s judicial process and would preserve “the freedom of exercise and the integrity of presidential power in the area of military and foreign affairs . . . .”

There are two evident difficulties with this procedure—one of which Markham recognized. First, problems could arise if the President exercised his veto but the Board adhered to its decision. Markham notes that “[i]t is certainly impractical, and perhaps constitutionally impossible, to provide a procedure for overriding the President’s ‘veto’ in such a situation; and to give the President the power to override a contrary Board ‘decision’ would simply reinstate the existing procedure.” The only amelioration Markham suggests is that if, as he appears to contemplate, the Board yields, at least the decision would be subject to judicial review. This view, however, assumes a willingness on the part of the courts to conduct the very kind of review they have refused repeatedly to undertake. If the only safeguard against Presidential pressure on the Board is judicial review, it is evident that, absent a reversal of a long line of judicial decisions, such review of Presidential discretion would not be likely.

A second difficulty with the Markham proposal is that the mere act of veto can undermine the integrity of Board decision. For example, route proceedings frequently involve an incumbent carrier opposing authorization of competition. Such a carrier would be inclined to mount an extra-judicial campaign in the executive branch to persuade the President to veto additional competitive awards, and the Board and the applicants for competitive rights would be powerless to override such a veto.

83. Id. at 598.
84. Id. at 599.
85. Id.
An alternative approach suggested by Markham would be to repeal section 801 and remove Presidential participation from the licensing function altogether. The President would still be able to make an input in the post-licensing phase by virtue of section 802, which empowers the Secretary of State to "advise . . . and consult with the . . . Board . . . concerning the negotiation of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services." Moreover, section 1102 provides:

In exercising and performing their powers and duties under this Act, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty or liability imposed by any foreign country.

Markham recognizes that this system would not remove the possibility of disagreement, perhaps even deadlock, but appears to believe that since "the disagreement would not take the blunt form of a presidential veto," it would be more negotiable.

Two flaws are evident in this approach. First, the Board, having embodied its decision in a final legal order, would have no flexibility to negotiate away any significant substantive part of its decision without engaging in the cumbersome and dubious expedient of setting aside the order and reopening the proceeding to fashion a new decision on the merits. Furthermore, there is little dispute that the President should have some voice in the ultimate result at least as to national security and foreign relations considerations. To postpone this input until after the licensing is concluded would create the risk either of having to revamp the Board's decision or of rendering the Presidential input a polite fiction.

The proposed amendment of section 801 which passed the Senate in 1957 and would have provided a kind of Congressional review of Presidential action in case of veto has already been mentioned. Such a

86. Id. at 600.
88. Markham, supra note 82, at 601.
89. See note 74 supra & accompanying text.
system would not preclude deadlock and has the additional potential disadvantage of exacerbating executive-legislative relations, thereby raising constitutional controversies. Moreover, it is probable that Congress would be beset with *ex parte* presentations no less destructive to the judicial integrity of international air route proceedings than those now directed to the executive branch.

Furthermore, if Congress were to agree with the President but the Board remained firm, it is by no means clear that Congress would possess power to override the Board without enacting further legislation. Thus, deadlock would amount to veto. On the other hand, if Congress were to agree with the Board, it would be equally powerless to override the President's veto without taking legislative action. Ad hoc legislative action on a case-by-case basis would be prohibitively cumbersome and time consuming.

A final approach which has been suggested is the NYU proposal, which would amend section 801 to confine the President to matters of route selection but would exclude the President from carrier selection—the aspect of the decision which presumably generates most *ex parte* presentations. Under this approach the President would also have the powers heretofore noted under sections 802 and 1102 of the Act.

It is submitted that this proposal, like the others suggested, does not solve the problem. First, by the very act of structuring the route awards, the President could continue to control to a great extent carrier selection. President Nixon's letter to the Board disapproving the award to Continental of a south Pacific route did not mention carriers by name. Instead, the President's letter called for a route that would provide single-plane service between various east coast and midwest coterminals, on the one hand, and points in the south Pacific on the other. When the Board re-structured its award to Continental to meet these route criteria (by permitting Continental to serve the eastern and midwest coterminals on flights serving the south Pacific route), the President nonetheless disapproved the award to Continental, thereby forcing the Board either to award the route to one of the two remaining applicants who could meet these criteria or abort the case.

Thus, under the NYU proposal skillful airline advocates would still have strong incentive to make *ex parte* presentations to the executive branch in an effort to obtain route selection criteria which only their clients could meet. The NYU proposal concedes that the proposed

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90. See NYU Proposal, *supra* note 59, at 536.
amendment would not "completely prevent competing airlines from appealing to the White House in an attempt to influence the President's route structure decision; nor does it preclude the possibility that route selection in a given instance might predetermine the Board's choice of carrier(s)." 91

CONCLUSION

The only apparent way to insure the integrity of the Board's judicial process in international air route cases while assuring the President an opportunity to apply national security and foreign relations considerations is to devise a system which includes the following:

1) repeal of section 801 in its entirety;

2) substitution, therefor, of a system whereby appropriate spokesmen from the executive branch participate as parties in the licensing proceeding and present foreign relations and national security factors in an evidentiary format subject to cross-examination and rebuttal; 92

3) continuation of post-licensing controls over bilateral agreements as they have operated in the past, that is, the Board would remain subject to sections 802 and 1102 of the Act.

Under this approach, since ex parte presentations to the President would no longer have any effect, these incursions on the judicial integrity of international route proceedings would be precluded. Furthermore, the legitimate concerns of the executive branch would be fully and responsibly presented on the record, and the Board would have before it all of the relevant decisional ingredients on which to base its final order, including national security and foreign relations considerations. A similar procedure was in fact adopted in the consolidated Pacific Islands Local Service Investigation—TransPacific Route Investigation (Pacific Islands Deferred Phase), 93 in which the President, by letter dated July 16, 1970, requested the Board to reopen the record to receive additional information concerning issues in the case not theretofore presented to the Board.

In the event that some foreign relations or national security factors required secret handling, the Board's Rules of Practice provide for exec-

91. Id. at 537-8.
92. CAB Rule 15 provides for such intervention. CAB Rules of Practice § 302.15 (PR-70 as amended by PR-100 effective December 1, 1966). The Department of Justice, Department of Transportation, Department of State, and other executive departments have participated as party intervenors in various CAB proceedings pursuant to this Rule.
93. CAB Order 71-7-174 (July 27, 1971).
utive sessions and confidential treatment upon an appropriate showing by any party and specifically a government party. In fact, most of

94. Rule 302.39 provides:

Objections to public disclosure of information.

(a) Information contained in paper to be filed. Any person who objects to the public disclosure of any information contained in any paper filed in any proceeding, or in any application, report, or other document filed pursuant to the provisions of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order of the Board thereunder, shall segregate, or request the segregation of, such information into a separate paper and shall file it, or request that it be filed, with the examiner or the person conducting the hearing or proceeding, as the case may be, or with the person with whom said application, report, or document is required to be filed, separately in a sealed envelope, bearing the caption of the enclosed paper and the notation ‘Classified or Confidential Treatment Requested Under § 302.39.’ At the time of filing such paper, or when the objection is made by a person not himself filing the paper, application, report or other document, within five (5) days after the filing of such paper, the objecting party shall file a motion to withhold the information from public disclosure, in accordance with the procedure outlined in paragraph (d) of this section, or in accordance with the procedure outlined in paragraph (c) of this section if objection is made by a Government department or a representative thereof. Notwithstanding any other provision of this section, copies of the filed paper and of the motion need not be served upon any other party unless so ordered by the Board.

(b) Information contained in oral testimony. Any person who objects to the public disclosure of any information sought to be elicited from a witness or deponent on oral examination shall, before such information is disclosed, make his objection known. Upon such objection duly made, the witness or deponent shall be compelled to disclose such information only in the presence of the examiner or the person before whom the deposition is being taken, as the case may be, the official stenographer and such attorneys for and lay representative of each party as the examiner or the person before whom the deposition is being taken, as the case may be, shall designate, and after all present have been sworn to secrecy. The transcript of testimony containing such information shall be segregated and filed in a sealed envelope, bearing the title and docket number of the proceeding, and the notation ‘Classified or Confidential Treatment Requested Under § 302.39 Testimony Given by (name of witness or deponent).’ Within five (5) days after such testimony is given, the objecting person shall file a motion, except as hereinafter provided in paragraph (c) of this section, in accordance with the procedure outlined in paragraph (d) of this section, to withhold the information from public disclosure. Notwithstanding any other provision of this section, copies of the segregated portion of the transcript and of the motion need not be served upon any other party unless so ordered by the Board.

(c) Objection by Government departments or representative thereof. In the case of objection to the public disclosure of any information filed by or elicited from any United States Government department, or representative thereof, under paragraph (a) or (b) of this section, the department
the submissions made by the various executive branch parties in the reopened portion of the *Pacific Islands* case were treated on a confidential basis:

Upon representations of the Departments of the Interior, State and Defense, to the effect that the evidence they wished to present related to matters of national security which should be withheld from public disclosure, the examiner conducted the prehearing conference and all sessions of the supplemental hearing in executive session pursuant to Rule 39 of the Board's Rules of Practice. The examiner's supplemental recommended decision was also accorded confidential treatment. We shall continue to accord confidential treatment to the record of the prehearing conference held on August 5, 1970, the hearings held on September 9 and 10, those portions of the supplemental recommended decision not attached to this opinion, and other filings. Disclosure of this information at this time would adversely affect the interests of the United States and is not required in the interest of the public.95

Although such classified matters, to which applicant parties would not have access, might prove dispositive in exceptional cases, such critical data at least would have been considered by five Board members of proven judicial integrity, and the decision would have been reached in a protected judicial atmosphere.

The Board in the *Pacific Islands* case stressed the importance of having such executive branch submissions at the licensing proceeding:

The participation by Federal agencies in Board cases relevant to their areas of responsibility is of vital importance to the public interest. . . . In many cases (a full) record can only be assured by the participation of Federal Agencies which have information and viewpoints not available to or expressed by the private parties appearing before the Board. Agency participation is also a matter

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95. CAB Order 71-7-174, at 4, n.6 (July 27, 1971).
of fairness to the parties whose economic interests are at stake, since it would provide the only practical and proper forum for testing those agency allegations which might be of decisional significance by presentation of further information, opposing views, and arguments, and by appropriate cross-examination.\(^6\)

Subsequently, in the *Service to Saipan Case*,\(^7\) Continental Air Lines, pursuant to the above quoted view of the Board, sought by petition to designate as parties to the proceeding the Departments of Commerce, Defense, Interior, Justice, State, and Transportation. The Board thereupon held:

>We do not believe as a general proposition that it would be appropriate for us to compel other Federal agencies to participate in Board proceedings. Their participation should remain a matter within their discretion. However, as we stated in the *Pacific Islands* case, there are particular reasons why Federal agencies should exercise their discretion to participate in Board proceedings in which subsequent Presidential action will be required pursuant to section 801 of the Federal Aviation Act. If such agencies have evidence and views with respect to the issues in such proceedings, fairness to the parties involved, to the Board, and to the public at large requires the presentation of that evidence and those views in the forum provided by the Board, so that they may be publicly scrutinized. Otherwise, if an agency’s involvement in the case is limited to presentation of views to the President only after the Board has submitted its decision to the President, the Board and the parties will have no appropriate occasion to consider those views, even though they might be critical to the ultimate disposition of the case. Presentation of an agency’s views to the Board will permit a more-informed decision by the Board, and hence a better decision for the President’s review. We recognize, of course, that in some cases there may be information which is appropriate for the President alone to hear, but these cases will be few.\(^8\)

It is thus evident that executive branch participation in international route cases, if desired, should be confined to submission on the record in the licensing proceedings. Whatever may have been the case in the

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96. *Id.* at 5-6.
97. CAB Order 72-10-81 (October 25, 1972).
98. *Id.* at 2.
past, there no longer appears to be any justification for retention by
the President of the powers granted by section 801. Executive branch
interests can be presented fully at the agency licensing stage of the
process, and there is no valid basis on which to assume that the Board
would not accord due weight to the foreign relations and national
security factors presented to it either in open hearing or in executive
session. Moreover, in the post-licensing, implementation phase of the
international air route process, the Board would be subject to the pro-
visions of sections 802 and 1102 of the Act. Finally, any party, includ-
ing the President either directly or through an executive department,
could obtain judicial review of any Board decision.

Significantly, in the *Pacific Islands* case, the President requested that
new authority to Okinawa be made temporary for a five year period
because the Reversion Agreement whereby Okinawa is being returned
to Japanese sovereignty specified that after five years landing rights in
Okinawa would become chargeable to the United States in determining
a fair overall schedule balance under the U.S.-Japanese Bilateral Avi-
ation Agreement. The Board promptly adopted this suggestion. There is thus no valid basis to retain in the President power which, as
numerous cases have shown, presents the potential for undercutting the
judicial integrity of the Board's administrative process.

The foregoing proposal would insure the determination of the rights
of all the parties under judicial standards and bring the determination
of international airline route awards into conformity with the tradi-
tional notion that it is one of the primary functions of the judiciary to
guarantee that other organs of government act within the bounds of
legal and constitutional requirements. At the same time, the Board
would have before it the most complete possible information upon
which to base its decision, and the President would be afforded the
opportunity to contribute the foreign relations and national security
input which he uniquely is able to provide.

Dockets 17353, 16242.
100. CAB Order 71-7-174 (July 27, 1971).