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TWO PROPOSALS FOR AMENDMENT OF THE FEDERAL AVIATION ACT OF 1958*

BY DONALD W. MARKHAM†

AFTER MORE than 30 years' experience with the system of regulation first embodied in the Civil Aeronautics Act of 1938 and carried forward, with modifications, in the Federal Aviation Act of 1958, it is probably a bit late to inquire whether the system is working as Congress originally intended it should—although questions on that score are occasionally still raised and debated. But it is certainly not untimely to inquire whether the system as a whole, or particular parts of it, are functioning smoothly and efficiently, and producing sound results. Indeed, such an inquiry should be a continuing process, and one in which Congress, the regulatory agencies and the segments of the public subject to regulation should participate actively.

This article will examine the workings of the system in two limited, but not unimportant, areas and offer suggestions for changes which, it is believed, would produce more sensible, if not more effective, regulation.

I. Power To Decide International Route Cases

The decisional process in the latest Transpacific Route Investigation¹ has not only produced a maelstrom of political controversy and litigation; it has also brought into new and sharper focus long-pending questions as to the wisdom of the statutory scheme for reaching a decision in such cases. The basic question, and the one with which we are primarily concerned, is whether it is wise to confer upon the President, exclusively, the power to decide all² questions affecting international air routes. A brief review

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* This paper was printed without the benefit of editorial changes.
¹ Civil Aeronautics Bd. Doc. No. 16242. Some idea of the shuttlecock progress of the “decision” between the Board and the White House can be gathered from Board Order 69-4-90, dated April 15, 1969, approved by the President April 23, 1969, and Order 69-7-104, dated July 17, 1969, approved by the President July 21, 1969.
There are also unresolved questions as to the precise scope of the President’s power, some of which were raised in litigation arising from the decision in the Transpacific case (Continental Air Lines, Inc. v. Civil Aeronautics Bd., D.C. Cir., No. 22,934) (which was dismissed on the ground that the order appealed from was not final, but without prejudice to refiling upon issuance of a final order). Since such questions may be involved in pending litigation at the time of publication of this article, the author will refrain, in the discussion herein, from expressing any opinion on them.
of the statutory provision conferring the power and the judicial decisions interpreting it, will help to provide perspective on the question and some of its ramifications.

Section 801 of the 1958 Act provides:

The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

Although these provisions were carried forward from the 1938 Act without substantive change, they had, in the intervening 20 years, received a judicial interpretation which, under the usual rules of statutory construction, is presumed to have been acquiesced in by Congress when it re-enacted them. One must concede that the statutory language needed interpretation. Clearly, it required that once the hearing process under section 401 or 402 had been completed and the Board had reached a "decision," that "decision" was to be "submitted to the President before publication thereof" and was "subject to the approval of the President." One might well have assumed that if the President approved the Board's "decision," there was no problem; the "decision" would, then, become final and would be treated like any other final "decision" of the Board. However, if the President disapproved part or all of the Board's "decision," what then? Did his failure to approve simply prevent the Board's "decision" from becoming effective, and, if so, what was the effect where the Board's decision denied an application for a certificate or permit? Or could the President require the Board to change its "decision" or, himself, make a new decision without the Board's participation? And if the President could direct, or make a new decision, to what extent was he limited by the formal record made in the proceeding before the Board? The prospect, in 1938, was that these and other questions as to the meaning of

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3 The author has not overlooked the comment of the Supreme Court, in Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109-10 (1948), that the President's action in such cases "draws vitality from either or both" of two sources: The statutory delegation of congressional power over foreign commerce, and his constitutional power over military and foreign affairs. For the purposes of this article, it is assumed that the statute is effective in delegating substantial power, but no attempt will be made to allocate the President's power between the two sources.


5 As originally enacted in 1938, the section contained a third sentence exempting applications for "grandfather" certificates and permits under sections 401(e) and 402(c). That sentence was dropped in the 1958 Act, along with the underlying "grandfather" provisions, as obsolete.

6 It is questionable whether the usual rules of construction apply in this instance in view of the congressional disclaimers of any intention to adopt administrative or judicial interpretations of those portions of the 1938 Act which were re-enacted in 1958. E.g., H.R. REP. No. 2556, 85th Cong., 2d Sess. 90 (1958).


9 Incorrectly, as it turned out.
section 801 would plague the staffs of both the White House and the new Civil Aeronautics Authority for some time to come.

Somewhat unexpectedly, the first major "break" in solving the problem came, not as a result of a disagreement between the President and the Board, but in a case in which the President had approved a "decision" of the Board. The Board, with the President's approval, had authorized the issuance of temporary certificates of public convenience and necessity for transatlantic service to American Export Airlines. Pan American had petitioned for judicial review of the decision under section 1006(a), but the Board moved to dismiss for lack of jurisdiction. Although conceding that section 1006(a) "would on its face seem to make . . . [the decision] appealable," the Court of Appeals for the Second Circuit concluded that "decisions" subject to the approval of the President under section 801 are not subject to judicial review. The court's reasoning provided answers to two of the questions concerning the meaning of section 801:

It seems clear that in approving or disapproving of certificates of public convenience and necessity the President must frequently act on information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted the certificates. There is nothing in the act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, and not the Board, the ultimate arbiter.

In other words, as that Court construed the statute, it is the President, not the Board, who "decides" cases subject to section 801, and in doing so, the President may rely upon sources of information other than the formal record before the Board.

Although the Court of Appeals for the District of Columbia Circuit seemed to entertain some doubt as to the correctness of the Pan American decision, and the Court of Appeals for the Fifth Circuit reached a different conclusion, the Supreme Court, in a 5-4 decision, concurred in the two answers given by the Second Circuit. The Court concluded that in cases subject to section 801:

... Congress has completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication

11 Pan American Airways Co. v. Civil Aeronautics Bd., 121 F.2d 810, 813 (2d Cir. 1941).
12 That portion of the "decision" dismissing the application of American Export Lines, Inc., for approval of the acquisition of control of American Export Airlines, Inc., under section 408 was reversed and remanded.
13 Pan American Airways Co. v. Civil Aeronautics Bd., 121 F.2d 810, 814 (2d Cir. 1941).
15 Waterman S.S. Corporation v. Civil Aeronautics Bd., 159 F.2d 828 (5th Cir. 1947).
even can take place. 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. . . . Thus, Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.

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The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. 7

In addition to confirming the two answers given by the Second Circuit, the Supreme Court in the Waterman case answered a third question which had not been involved in the case before the Second Circuit, viz., what happens when the President disapproves the "decision" of the Board? In the Waterman case, the President had disapproved certain portions of the Board's original "decision" and had advised the Board of the changes which he required. The Board had then submitted a revised order and opinion embodying the changes, and the President had approved the revised order. 8 Although the Supreme Court concluded that neither the "decision" of the Board nor the action of the President was subject to judicial review, there was implicit in the Court's reasoning the premise that the President acted within his powers in directing the Board to submit a modified decision for his approval. A similar result was reached in a later case in which the President required the Board not merely to modify, but to reverse, its "decision" (a decision which the President had already approved, but which had not been published at the time the President retracted his approval). 9

Thus, while there may be limits to the President's power still to be marked off in future decisions, 10 it seems clear from the decisions to date that all the power that now exists to decide cases of the type described in section 801 is vested in the President—and the President alone—and that in the exercise of this power, the President has very broad, if not unfettered, discretion. We are brought, then, to the question whether it is wise to concentrate in the hands of the President both the legislative and the executive powers over the system of civil air routes connecting the United States with the other countries of the world. Such a concentration of power has ramifications which require careful and candid appraisal.

One result of vesting the power of decision in the President—and the one which, perhaps, comes most readily to mind—is the legal conclusion, reach-

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8 Supra note 2.


10 Supra note 2.
ed in both the Pan American and the Waterman cases, that the decision is immune from judicial review. Proceeding from the premise that the Board’s function is only advisory and that the President alone decides, the Supreme Court in the Waterman case held that neither the Board’s “decision,” nor the President’s is reviewable by the courts, that without presidential approval, “decisions” of the Board are not “mature,” and after such approval, the decisions become “political” and pass beyond the reach of judicial competence.\(^2\) Although it now appears this immunity from judicial review is not as complete as the “sweeping language” of the Waterman opinion seemed to indicate,\(^2\) it is sufficiently broad to represent a sharp departure from the procedures normally provided for the protection of both public and private interests in regulatory proceedings. There are, of course, other situations in which governmental action is final and cannot be challenged in the courts, but such freedom from judicial scrutiny is the exception rather than the rule under our system of government. And it is even more exceptional in the legislatively constructed systems for the regulation of public-utility and transportation services. Hence, when such exceptions appear, they invite special attention and call for special justification.

As far as can be perceived, the existence of the immunity from judicial review does not constitute an independent argument in favor of continuing the present delegation of power under section 801. There is no evidence that Congress regarded this immunity as one of the advantages of, and hence as a reason for, vesting in the President plenary power to decide cases under section 801. On the contrary, it seems reasonably certain that the immunity exists only as a judicially-established corollary of the interpretation of section 801, adopted in the Pan American and Waterman cases, that the President is the sole repository of such power. If that is so, it would seem that the immunity is justified only to the extent that it is needed to protect the free exercise of the President’s power; and, if the power were to be reassigned or redistributed for other reasons, not only would the immunity provide no argument against that course of action, but the need for the immunity would thereby be lessened or eliminated. Moreover, as will be seen, the existence of the immunity also strengthens some of the arguments for reassignment or redistribution of the power.

Another implication of the present interpretation of section 801 is the seeming waste and futility of a lengthy and expensive administrative proceeding before the Board. The proceeding may—and, in important matters such as the Transpacific case, will—extend over a period of a year or more. It may involve many, if not more of the major airlines, as well as numerous civic parties and other representatives of the public. It repre-

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For a discussion of established and proposed limits on the immunity, see Miller, The Waterman Doctrine Revisited, 54 Geo. L.J. 3 (1965).
sents an investment of thousands of man-hours and perhaps millions of dollars by the parties, not to mention the cost of the Government. And it proceeds through all the intricate steps leading to a “decision” by the Board: Prehearing conference, submission of thousands of pages of prepared testimony and exhibits, extensive hearings, briefs, examiner’s report, exceptions and briefs on exceptions, oral argument and, finally, “decision” by the Board—all for the purpose of providing advice to the President. Such elaborate, time-consuming and expensive machinery for advising the President seems so incongruous that one has difficulty believing that congressional attention was ever really focused upon it (even though, according to the legal presumption, it was aware of it when it re-enacted section 801 and related provisions in 1958).22

Another aspect of the procedure which adds to the incongruity is the contrast between the form of the proceeding before the Board and the nature of the ultimate decision. The proceeding before the Board is quasi-judicial in form, and the parties, as well as the Board’s personnel participating in the proceeding, are expected to conduct themselves in accordance with the rules and standards applicable in such proceedings. Yet, everyone concerned is aware that the President’s decision will be political in nature—and, it is frequently difficult for the parties, as well as outside observers, to avoid the suspicion that it is “political” in a more partisan sense than the Supreme Court had in mind in the Waterman case. Inevitably, therefore, the proceeding before the Board is colored by the knowledge that, although required by statute as a necessary preliminary, it may prove to be only an empty and meaningless formality, and that the final decision will be made in a different forum where quite different procedures are followed and different considerations govern. The parties to the proceeding before the Board, therefore, if they are realistic, must not only keep one eye focused on activities in the political arena which may affect the ultimate decision, but, on occasion, will feel impelled to take steps to protect and further their interests in that arena. Thus, they are placed in the ambivalent position of attempting to observe quasi-judicial standards of conduct in the proceeding before the Board while, at the same time, endeavoring to protect their flanks politically. It is not a healthy situation, either from the viewpoint of the parties or from that of the public-interest.

The feeling that participation in the proceeding before the Board may prove to be only an elaborate price of play-acting is further heightened by the knowledge that under the Waterman decision, there is likely to be no judicial review of the Board’s “decision.”25 Although the Board’s regulations purport to assure the observance of quasi-judicial procedures, the parties have no real guaranty through judicial review that even their basic

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22 The incongruity is magnified if the President is free to reject the findings of the Board and substitute traffic estimates and other economic data prepared by his own advisers. His power to do so was one of the questions raised in the litigation arising from the recent Transpacific Route Investigation (supra note 2).

25 Supra note 22.
"rights" to procedural due process will be recognized. As the dissenting opinion in the Waterman case commented:

... [N]o matter how substantial and important the questions, they are now beyond judicial review. Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision.25

A final consideration strongly supports the conclusion that the present procedure for deciding cases subject to section 801 needs re-examination and revision. Under the Act, the proceedings before the Board are necessarily directed to the formulation by the Board of a "decision" based on the statutory issues, i.e., the fitness, willingness and ability of the applicant carriers, and the requirements of the public convenience and necessity, or the public interest (depending upon the applicable section). Yet, under the interpretation adopted in the Pan American and Waterman cases, the President, in making the ultimate decision, is not restricted to a consideration of those issues; he is not only free, but expected, to give appropriate consideration to military and foreign affairs, and he need not disclose either the information on which he acts, or presumably, even the basis for his action.26

Thus, 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 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.

There are two alternatives which should be considered.27 One is to accept and incorporate into the statute the interpretation of section 801 which was adopted by the four dissenting Justices in the Waterman case—

25 Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 118 (1948); cf. American Airlines, Inc. v. Civil Aeronautics Bd., 348 F.2d 349 (D.C. Cir. 1965). In the Waterman case, it was charged that certain of the Board's findings were not supported by substantial evidence and that the Board had refused to reopen the case to receive evidence of a material change of conditions.

26 It can be argued that, theoretically, military and foreign-affairs considerations are relevant to public convenience and necessity and the public interest, and that the President, therefore, is applying the statutory standards. But, practically—since the President's decision is unreviewable (with possible exceptions still to be established (supra notes 2 and 19) —, he is free to select and apply his own standards without regard to either statutory or judicial restraints.

27 There is a third alternative which, theoretically, would remove the anomaly in the present procedure, viz., to eliminate the requirement for a proceeding before the Board and the submission of a "decision" by the Board to the President. If it were decided that plenary power to decide such cases should remain in the President, this alternative would have much to commend it, for it would enable the President to obtain any needed information and advice through normal—and, hopefully, more efficient—channels. In the author's opinion, however, perpetuation of the President's power to decide such cases is neither necessary nor wise; hence, the third alternative is not proposed for serious consideration.
and which, in the opinion of many students of the Act, probably represented the original intent of Congress. Under that interpretation, concurrence by the Board and the President would be required to decide a case. Presidential approval could ratify and make effective lawful Board action, but it could not “make valid invalid orders of the Board.” By the same token, presidential disapproval could veto a Board “decision” but could not modify or supplant it. Thus, the Board and the Executive would each act independently to discharge the special responsibilities entrusted to its care and discretion, and their agreement would be required before effective governmental action could be taken in this vital area.

This alternative avoids the principal objections to the present procedure for reaching decisions in section 801 cases. The proceeding before the Board is restored to a position of real significance: It provides the opportunity to be heard and the protection to the parties which quasi-judicial procedures are intended to afford; and it leads to a “decision” by the Board, reached in accordance with statutory standards and surrounded by the safeguards of quasi-judicial procedures, which is an essential ingredient of the final decision. Moreover, since the Board’s “decision,” once it has been ratified by the President, is subject to judicial review, remedies are available for arbitrary or unlawful actions of the Board.

At the same time, this alternative preserves the freedom of exercise and the integrity of presidential power in the area of military and foreign affairs which was regarded as essential by both the majority and the minority in the Waterman case. The President's action in approving a “decision” of the Board would not be subject to judicial review; review would be “restricted to the action of the Board and the Board alone.” And, his disapproval would not only be immune from judicial scrutiny, but would, by depriving it of the requisite finality, insulate the Board's “decision” also from review in the courts.

There are, however, potential problems to be faced under this alternative. A deadlock between the Board and the President, while not an inspiring prospect, probably would not result in serious injury to the national interest. If an international route proposal could not meet the standards prescribed by Congress, or would prove damaging to the Nation's foreign relations or military status, its denial could hardly be regarded as a national tragedy. Injury could result, however, from the efforts to resolve a disagreement and avoid a deadlock. Presidential disapproval of a Board “decision” could well give rise to two sets of “pressures” on behalf of the contending parties: One, to persuade the Presi-

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29 Id.
30 Id.
31 The inclusion of the word “denial” in the first sentence of section 801, along with “issuance,” “transfer,” “amendment,” etc., is probably best explained as a lapse on the part of the draftsman. Certainly that is the explanation if the interpretation adopted by the dissent in the Waterman case was the one intended by Congress. For, if the concurrence of the Board and the President were required to take action (such as “issuance,” “transfer,” “amendment,” etc.), failure to concur would necessarily result in no action (i.e., “denial”). It would be ridiculous to require that they must also concur in order to take no action (i.e., “denial”).
dent to withdraw his disapproval, and the other, to persuade the Board to modify or reverse its “decision” on reconsideration. Efforts—including political efforts—to influence presidential action are normal in the functioning of our system of government and therefore represent no threat. But, political and other extra-legal pressures on quasi-judicial agencies threaten the independence of the agencies and the integrity of their decisions—and hence the very raison d'être of the agencies themselves. Such pressures could be especially destructive if, in an excess of zeal, the President himself, or members of his staff, were to exert them upon the Board in an effort to resolve a disagreement over the proper decision in an international route case.

It can, of course, be argued that the threat is not a very serious one, for even if the Board yields to such pressures, its “decision” is still subject to judicial review; and if the new “decision” on reconsideration is not supported by the record or is otherwise unlawful, it can be set aside on appeal; whereas, if it can withstand judicial review, no real harm has been done. The fact remains, however, that it would not be the Board’s decision, and to that extent its independence and integrity would have been undermined and the congressional purpose defeated.

There appears to be no escape from these dangers if international route proposals must receive the approval of both the Board and the President. It 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. Yet, without discounting the dangers inherent in it, this alternative seems distinctly preferable to the procedure under section 801 as presently interpreted.

The second alternative would be to relieve the President of any responsibility for, and to terminate his direct participation in, the decision of cases now subject to section 801, and to rely instead, on his control over international agreements as the appropriate vehicle for executive participation in the development of the international route pattern. Superficially, such a proposal may appear as an attack upon presidential prerogatives, but brief analysis will demonstrate that it neither denies the importance of the President’s function nor seriously impairs its effectiveness. Indeed, except for procedural and psychological differences, it probably does not differ markedly from the first alternative.

The legal framework upon which the international air-route system has been constructed since enactment of the Civil Aeronautics Act of 1938 consists of two types of governmental authorizations: One, the certificates of public convenience and necessity and foreign air carrier permits issued under that Act and its successor, the Federal Aviation Act of 1958; and the other, the bilateral agreements entered into between the

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In order to put this alternative into effect, at least the first sentence, and probably all, of section 801 would be repealed. Although not discussed herein, there is probably even less justification for retaining section 801, as applied to "overseas" air transportation, and "air transportation between places in the same Territory or possession," than there is with respect to international transportation.
United States and each of the other countries served by the air-route system. Although there have been a limited number of situations in which foreign governments have permitted United States carriers to operate into and through their countries without a formal agreement with the United States, and the Civil Aeronautics Board, in turn, has granted foreign air carrier permits to carriers of those countries on grounds of "reciprocity and international comity," in the great majority of cases, executive agreements have been negotiated with the countries connected with the United States by commercial air routes. These agreements not only grant to the carriers the right to operate over, and land in, the territory of the foreign country and provide for such matters as landing fees, customs duties and operating regulations they normally specify the routes to be operated by the carriers of each country, and in some cases, contain general provisions regulating the capacity to be operated and the rates to be charged. They are, therefore, a highly important, if not an indispensable, part of the legal structure supporting our international route system. And since these agreements are constitutionally the exclusive responsibility of the President, his contribution to the development of the international route pattern would be one of great significance, if not overriding control, even in the absence of such a provision as section 801.

Moreover (and quite apart from section 801), Congress has recognized the vital part which international agreements could play in developing an international air-transport system, and has undertaken to assure the necessary coordination between the Board and the Executive Branch. Section 802 requires the Secretary of State to advise and consult with the Board "concerning the negotiations [sic] of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services;" and section 1102 provides that the Board shall exercise its powers and perform its duties "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. . . ." It would appear, therefore, that where foreign-policy considerations have dictated entry into an international agreement affecting air-transportation matters, Congress has recognized

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33 See generally, Calkins, Acquisition of Operating Authority by Foreign Air Carriers: The Role of the CAB, White House, and Department of State, 31 J. Air L. & Com. 61 (1961); Calkins, The Role of the Civil Aeronautics Board in the Grant of Operating Rights in Foreign Air Carriage, 22 J. Air L. & Com. 253 (1951); Lissitzyn, Bilateral Agreements on Air Transport, 30 J. Air L. & Com. 61 (1951).
35 I.e., entered into by the President, through the State Department, without Senate ratification. For a discussion of the legal status of such agreements, see Lissitzyn, The Legal Status of Executive Agreements on Air Transportation, 17 J. Air L. & Com. 436 (1950); Id., Part II, 18 J. Air L. & Com. 12 (1951).
36 Approximately seventy such agreements are presently in effect. See 3 Av. Cas. 22,801 et seq.
37 Forms of agreements and copies of the annexes and schedules attached to specific agreements are contained in 3 Av. Cas. 22,811 et seq.
the President’s role as the dominant one, and has directed the Board to conform its actions to the requirements of the agreement.

This alternative, then, like the first, would restore the Board’s function in this area to one of dignity and significance, while, at the same time, according to the President not only full recognition of his responsibility for military and foreign affairs, but effective means of discharging such responsibilities. The choice between the two alternatives, therefore, is difficult one; it turns on two questions.

The first is whether the second alternative is subject to the same objection as the first, viz., the danger of improper pressures upon the Board in the event of a disagreement with the President. In the author’s opinion, the answer is rather clearly “No,” or at least, “Not to the same extent.” It must, of course, be recognized that the possibility of disagreement would still exist, even though the Board’s decision was no longer subject to direct approval by the President. But since the disagreement would not take the blunt form of a presidential veto, and presumably would not receive the same publicity, there would be less incentive, and perhaps less opportunity, to rally political forces to the support of the contenders. More likely, the disagreement would become apparent only through the unwillingness of the President to negotiate a bilateral (or an amendment to a bilateral) agreement needed to carry out a decision of the Board. Such a situation would obviously be far less explosive than the direct confrontation arising from a presidential veto, and while more time might be required, the chances for an eventual and amicable accommodation of views would seem to be considerably greater.

However, the disagreement might develop in another type of situation—where, for example, the President’s objection rested on military considerations which would not, as a rule, be covered by an international agreement, or where efforts to negotiate a bilateral agreement (or an amendment to one) had been unsuccessful and the President feared that the Board’s decision might further complicate negotiations. In that type of situation, there would undoubtedly be a temptation for the President to make his views known to the Board—and in such a way, perhaps, as to constitute “pressure” on the Board. Even if he did so, however, it is doubtful that the “pressure” would be as great, or the effect as destructive, as in a case where the Board and the President were in open disagreement (as a result of a presidential veto) and all interested parties had marshalled their forces in an attempt to persuade one or the other to back down.

A situation of the type just considered also raises the second question on which the choice between the two alternatives seems to turn: Does the second alternative provide the President a fully effective procedure for exercising his prerogatives where negotiation of an international agreement is either inappropriate or impossible? Obviously, the President’s

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40 It would be naive to regard this situation as novel, for one of the perennial problems facing both administrative agencies and executive departments is the propriety of, and the procedure for, communicating the views of the latter without becoming formal parties to proceedings before the former.
role in such a situation would no longer be the dominant one; he could, as previously noted, make his views known to the Board, but (short of applying overwhelming "pressure") he could not control or override the Board's decision. The question remains, however, as to whether the President should have control in such a situation; if the situation did not warrant, or permit, a national commitment through an international agreement, should the President's views be given legal priority over the Board's conclusions? Or, should the President's views in such a situation be accorded a status similar to those of other government departments and agencies, i.e., as considerations to be weighed by the Board in reaching its conclusions? A generalized answer is not easy, for the problem in one specific case might be regarded quite differently than in another case.

It seems likely, however, that the problem, although difficult to answer, would arise only rarely. The highly-developed pattern of bilaterals already in existence suggests that international differences can usually be resolved in this area, even though the negotiations may be difficult and prolonged in some cases. Also, it seems unlikely that there could be many situations where military considerations, which the President regards as decisive in an international route case, would be both ignored by the Board and impossible to provide for in bilateral agreements. Nevertheless, it must be conceded that under the second alternative, at least a possibility exists that the President would not be able to make effective his views on military or foreign affairs in particular international-route decisions.

It would appear, therefore, that the answer to the first question favors the second alternative, while the second question—to the extent that it can be answered—probably points the other way. But while the choice between them may be a narrow one, it seems quite clear that either alternative is preferable to the present situation under the Waterman interpretation of section 801.

II. Jurisdiction Over Airline Equipment Financing

There is a second, and entirely unrelated, area in which administration of the Act has produced anomalous—and probably, largely unanticipated—results. This area includes the purchase, financing and disposal of airline equipment—principally aircraft and related engines, spare parts and so forth. Since such transactions are becoming increasingly complex and involve larger and larger amounts of capital, the question whether the Civil Aeronautics Board has, or should have, regulatory control over them merits attention.

Section 408 of the Federal Aviation Act provides, in part, as follows:

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

* * *

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;
(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier. ... 41

These provisions, which were carried forward from the 1938 Act without substantive change, were, like many other provisions of the Act, derived from regulatory statutes applicable to surface carriers. 42 But it is noteworthy that, in this case, the borrowed principle was, in the process of incorporation into the new Act, enlarged to apply not only to intercarrier transactions (as was true under the surface-carrier statutes), but to a much broader range of transactions.

Although the administration of section 408 has produced a number of problems which might well justify a re-examination of legislative purposes, the primary concern in this paper is the applicability of the subsections quoted above to equipment transactions between air carriers and persons engaged in a phase of aeronautics otherwise than as air carriers. A comparison of two transactions can serve as an introduction to the problem:

The purchase by an airline of a new fleet of aircraft from the manufacturer has, apparently, never been regarded as subject to section 408 (a) (3); but if the airline leases a single airplane from an individual or a corporation, even though the lessor is not engaged in any other "aeronautical" activities, that transaction will probably be held to be within the scope of that subsection. A second comparison may further illustrate the problem: If an airline were to purchase a new fleet of aircraft from the manufacturer under a conditional sales contract and to pay the purchase price in installments to the manufacturer, the transaction would probably be regarded as outside the scope of section 408 (a) (3); but if an alternative method of financing were employed and title passed to a financial institution or leasing company, which then leased the aircraft to the airline, the transaction would be within section 408 (a) (3). Before inquiring whether these conclusions can be reconciled, either with the language of the statute or with the legislative purposes, some of the decisions interpreting the provision should be reviewed.

In applying the "lease" provisions of subsections (a) (2) and (3), the Civil Aeronautics Board has, with rare exceptions, given them a literal but broad construction. In a long series of cases involving either ordinary leases of aircraft by one airline to another, or the interchange of equipment operated in through service over the routes of two or more carriers, the Board repeatedly asserted jurisdiction, even though the leased aircraft

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42 Section 5(4) (a) of Interstate Commerce Act [49 U.S.C. § 5(4) (a)], at the time of enactment of the Civil Aeronautics Act, provided: "It shall be lawful, with the approval and authorization of the commission, . . . for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another . . . ."

Section 213 of the Motor Carrier Act [Interstate Commerce Act, 72 Stat. 812, 49 U.S.C. § 313 (a) (1964)] contained a similarly worded provision applicable to motor carriers (which were not also carriers by railroad).
represents less than one percent of the lessor's total assets. Even such a small proportion of its "properties" has been regarded as a "substantial part" within the meaning of section 408 (a) (2). Moreover, in a decision having far-reaching implications, the Board held that in the case of a lease by a person engaged in a phase of aeronautics otherwise than as an air carrier, the question whether the leased property represents a "substantial part" of the lessor's "properties" is to be determined by looking only at the lessor's aeronautical properties, not his total properties. Thus, if the lessor is a wealthy individual, a bank or a company which is not engaged in other aviation activities, a single airplane which it leases to an air carrier may represent a "substantial part"—indeed, the sum total—of its aeronautical properties.

Moreover, it is perfectly clear that in the Board's view, anyone who leases an aircraft to an air carrier becomes, ipso facto, a person engaged in a phase of aeronautics within the meaning of section 408 (a) (3), regardless of the nature or extent of his other business interests or activities. It would seem to follow, therefore, that virtually any lease of equipment to an air carrier by a non-air carrier will fall within subsection (a) (3), as the Board construes it.

Since that subsection, by its terms, applies equally to purchases and leases, one would expect to find a line of cases in which the Board has taken an equally expansive view of its jurisdiction over equipment purchases by air carriers. In fact, if one were asked to give examples of the types of transactions to which the subsection would apply if given a literal construction, one of those which would come most readily to mind would be the purchase of aircraft by an air carrier from the manufacturer.

Moreover, in a case in which one of the parties to an interchange agreement excepted to the Examiner's finding that less than one percent of its assets was a "substantial part" of its "properties" for the purposes of jurisdiction under subsection (a) (2), the Board sidestepped the issue by holding that it had jurisdiction over the lease by the other party (which covered a much higher proportion of its assets) and that its jurisdiction extended to the entire agreement (Continental Air Lines, Inc.-United Air Lines, Inc., Interchange of Equipment, 17 C.A.B. 635 (1953)).

The Board argued that "... if it were necessary to prove that a substantial portion of the total properties of aeronautical financiers is involved, it would be necessary to examine their financial status in detail. Such an intrusion into their affairs would certainly tend to discourage such persons from entering into financing arrangements with air carriers." Id. p. 586, n.10.

E.g., Delta Air Lines, Inc., and Pan American World Airlines, Inc., Interchange Agreement, 40 C.A.B. 339 (1964); Braniff Airways-Pan American World Airways, Interchange Agreement, 36 C.A.B. 176 (1962); Eastern-American Agreement, 34 C.A.B. 828 (1961); Delta Air Lines, Inc.-American Airlines, Inc., Interchange of Equipment, 10 C.A.B. 757 (1949). The Board's decisions are not completely consistent on the point, however. In National-Caribbean-Atlantic Control Case, 6 C.A.B. 671 (1946), the Board held that an agreement to lease not more than three aircraft, two of which would represent approximately one percent of the lessor's assets, was not within section 408 (a) (2); in Northwest Airlines, Exemption, 24 C.A.B. 844 (1957), it held that one DC-4 was not a "substantial part" of Northwest's "properties"; and in Capital Airlines, Lease Agreements, 32 C.A.B. 1368 (1961), it disclaimed jurisdiction over a lease of aircraft and related ground equipment representing 1.7 percent of the lessor's assets.

Moreover, in a case in which one of the parties to an interchange agreement excepted to the Examiner's finding that less than one percent of its assets was a "substantial part" of its "properties" for the purposes of jurisdiction under section 408 (a) (2), the Board sidestepped the issue by holding that it had jurisdiction over the lease by the other party (which covered a much higher proportion of its assets) and that its jurisdiction extended to the entire agreement (Continental Air Lines, Inc.-United Air Lines, Inc., Interchange of Equipment, 17 C.A.B. 635 (1953)).
Yet, apparently, the statute has never been regarded as applicable to such transactions, and no explanation is to be found in the published reports. There can be little doubt that a manufacturer of commercial aircraft is a person engaged in a phase of aeronautics; and, it would seem probable that at least some of their sales to air carriers would have involved a "substantial part" of the manufacturer's "properties" under the interpretation placed upon those terms in the "lease" cases. But so far as we have discovered, the question has never been formally presented to, or decided by, the Civil Aeronautics Board—a rather clear indication that neither the Board nor the parties to such transactions have ever regarded the statute as applicable.

Further evidence of the Board's attitude toward such transactions is to be found in two cases in which the Board disclaimed jurisdiction over agreements by air carriers to "turn in" used aircraft against new aircraft being purchased from the manufacturer. The Board described the transaction in the earlier case as "essentially a purchase of aircraft from a manufacturer for which partial payment is to be made in the form of used equipment rather than in cash or by other means and, as such, is not a sale of a substantial part of . . . [the air carrier’s] properties within the meaning of section 408." The Board's attention, it will be noted, was directed exclusively to the question whether the purchase by the manufacturer of the used aircraft fell within subsection 408(a)(2); it did not even mention the question whether the purchase by the air carrier of the new aircraft was subject to subsection (a)(3)! The clear implication was that the latter phase of the transaction was admittedly beyond its jurisdiction.

Not only is the unexplained distinction in the treatment of purchases and leases under the statute puzzling in itself; it has anomalous implications. If (as was true in a number of the decided cases) a lease is employed solely as a device for financing the acquisition of new aircraft by an air carrier, section 408 will be held to apply. But since a sale by the manufacturer to the air carrier is apparently beyond the scope of the statute, as the Board interprets it, other methods of financing could presumably be employed without the necessity of regulatory approval: If the aircraft were sold under a conditional sales contract, for example, or if the air carrier were to borrow a portion of the purchase price under a chattel mortgage on the new aircraft, the Board's jurisdiction would not attach. Such dissimilarity in results seems to attribute undue importance

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Contrast Charlotte-Eastern Agreement, Disclaimer, 37 C.A.B. 716 (1962), in which the Board refused to disclaim jurisdiction over the sale by an air carrier of surplus aircraft representing less than 1.3 percent of its assets to a person engaged in a phase of aeronautics.
to the form of the financing employed and suggests the need for a re-
examination of more basic objectives.

As noted earlier, it is probably futile, at least from a technical legal
standpoint, to inquire whether the Board’s construction of these provisions
is consistent with Congress’ original intent. Nevertheless, there is some
indication in the legislative history that the language found in sections
408(a)(2) and (3) was originally aimed at quite a different target than
the equipment-lease transactions involved in the cases discussed above.

Section 5(4)(a)51 of the Interstate Commerce Act, in which the lan-
guage originally appeared, was directed to the so-called “railroad con-
solidation” problem.52 It permitted, with the approval of the Interstate
Commerce Commission, “two or more carriers to consolidate or merge
their properties, or any part thereof, into one corporation for the owner-
ship, management, and operation of the properties theretofore in separate
ownership.” It also permitted one carrier, or two or more carriers jointly,
to acquire control of another carrier or the establishment of common con-
trol over two or more carriers by a noncarrier. And as noted earlier,53
it permitted a carrier, or two or more carriers jointly, “to purchase, lease
or contract to operate the properties, or any part thereof, of another.”

There should be no mystery as to the reason for the inclusion of this
last-mentioned provision in a section dealing with “railroad consolidations.”
A purchase of assets is one of the standard methods of combining the
operations of two corporations; it was, therefore, a legal device which
could be used to effect “railroad consolidations” in lieu of a (technical)
consolidation, merger or acquisition of control.54 Moreover, long-term
leases of railroad lines, or of entire railroad systems—for periods ranging
up to 99, or even 999, years—were commonly employed as a device for
transferring control over railroad operations.55 And a contract to operate
a railroad, or a railroad line could also be used to transfer operating con-
trol from one carrier to another. Thus, if the “purchase-lease” clause
is read in conjunction with the balance of the section, it will be seen that
it forms an integral part of it; it is not only consistent with the basic pur-
pose of this section—i.e., to regulate combinations of carriers—but is
necessary to carry out that purpose and prevent evasion by the use of
consolidation techniques not elsewhere described in the section.

50 It would be interesting to see how the Board would treat a case in which the manufacturer,
as a financing device, itself leased the aircraft to the air carrier until the purchase price had been
paid.
52 For a general discussion of the legislative treatment of the problem, see III-A SHARFMAN,
THE INTERSTATE COMMERCE COMMISSION 494 et seq. (1935).
53 See supra note 42.
54 In this connection, it should be remembered that, as far as federal law was concerned, a
railroad did not need a certificate of public convenience and necessity to operate as a carrier; as
a result, a transfer of the physical “properties” making up a railroad line or system carried with
it the right to operate over the line or system.
55 In Palmer v. Connecticut Ry. & Ltg. Co., 311 U.S. 544, 555 n.6 (1941), the Supreme
Court noted: “Nearly forty thousand miles of road are leased by Class I railroads from 292 lessors.
Class I roads operate over 93 per cent of all railroad mileage. Leased property represents over 15
per cent of this total. Over four billion dollars is invested in railroad property under lease.”
The question remains whether the clause should be construed so as to apply not only to transactions involving a transfer of control over carrier operations, but to any purchase or lease of property which falls within the literal meaning of the language. Should it, for example, be applied to the interchange of equipment required for the operation of through passenger trains over the lines of two or more railroads, or the interchange of freight cars between railroads? The Interstate Commerce Commission does not think so; it has never regarded the provision as applicable to "sales or leases of . . . equipment which do not effect control of two or more carriers in a common interest." In other words, the Commission has construed the "purchase-lease" clause in the light of the basic purpose of the section and has declined to extend it to cover transactions which do not involve any consolidation of carrier operations or control.

Is there any reason why the "purchase-lease" clause should be given a broader interpretation in the Civil Aeronautics and Federal Aviation Acts than it receives under the Interstate Commerce Act? To be sure, as used in sections 408 (a) (2) and (3), the clause applies not just to transactions between carriers, but also to transactions between carriers and certain other types of enterprises. However, a corresponding change was made in the entire section which, as incorporated into the Civil Aeronautics Act and the Federal Aviation Act, regulates consolidations, mergers and acquisitions of control involving other designated types of businesses, as well as air carriers. It would appear, therefore, that the function of the "purchase-lease" clause remains the same as in the earlier statutes: To cover possible methods of combining the operations of, or control over, two or more businesses of the types described and to supplement the other clauses in order to carry out the basic purpose of the section.

To apply the clause, as the Civil Aeronautics Board does in the "lease" cases reviewed earlier, to transactions which do not involve any transfer of operating authority or control, impliedly attributes to Congress a purpose broader than, or in addition to, the regulation of consolidations, mergers and acquisitions of control. But there is, apparently, no explanation to be found in the legislative history as to what that purpose might be, nor has the Civil Aeronautics Board offered one of its own. A cynic might read into some of the Board's decisions in the "lease" cases a determination to acquire, through interpretation of this section, some of the jurisdiction over airline financing which Congress has withheld in more express terms; but one cannot very well credit the Board with such

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57 It might be argued that a stronger case for literal application of the "purchase-lease" clause can be made where operating rights do not "follow" the physical "properties," but must be acquired separately, in the form of certificates of public convenience and necessity, and where the regulatory agency has jurisdiction, separate from the "purchase-lease" clause, over the transfer of such certificates. Nevertheless, the Interstate Commerce Commission makes no distinction, in the application of the "purchase-lease" clause between railroads, which do not require certificates to operate, and motor carriers and water carriers, which do.
58 Which now includes the Motor Carrier Act, in Part II.
59 The Interstate Commerce Commission has authority over the issuance of certain types of securities by railroads and motor carriers, Interstate Commerce Act, 24 Stat. 386 (1887), as amended.
deviousness unless some rational explanation can be offered for the Board’s failure to construe the “purchase” provision as liberally as it does the “lease” provision, and thereby acquire jurisdiction over additional types of financing. Unfortunately, satisfactory explanations of the Board’s approach are missing and are virtually impossible to supply. Perhaps the decisions in the “lease” cases can be explained by assuming that the Board simply applied the statute literally (without bothering to inquire what Congress’ underlying purpose might have been) and, in the tradition popularly attributed to all “bureaucrats,” resolved all doubts in favor of its own jurisdiction. But if so, why has not the Board applied the “purchase” provision in the same manner? One can speculate indefinitely with no better results.

There is much to be said in favor of limiting sections 408 (a) (2) and (3) to transactions which fall within the general purpose of the section—in other words, transactions which involved some transfer of control or consolidation of operations. However, since it is unlikely that the Board will, at this stage, take the initiative in adopting such a construction, a clarifying amendment will probably be required. Such an amendment should receive early and serious consideration by Congress.


The Board’s handling of these cases, procedurally, is also mystifying. In some, it exercises its jurisdiction under section 408 [e.g., Resort Air Lines, Inc. (North Carolina), Interlocking Relationships, 23 C.A.B. 143 (1956); Seaboard & Western Airlines, Inc., and Air-World Leases, Inc., Approval of Certain Sale-Lease Agreements, 22 C.A.B. 477 (1955)]; in others it grants an exemption from section 408 under section 416(b) [e.g., Order 68-7-53, dated July 12, 1968; Order E-26302, dated Mar. 12, 1968; Northwest Airlines, Exemption, 24 C.A.B. 844 (1957)]; and in still others, it elects to act under section 412, rather than section 408 [e.g., South Pacific-Pan American Agreements, 39 C.A.B. 840 (1961); Eastern-American Agreement, 34 C.A.B. 828 (1961)].

To confuse the procedural situation still further, the Board has adopted a general regulation (14 C.F.R. Part 299) which exempts certain aircraft purchases and leases from sections 408 (a) (2) and (1).

64 Only one such case has arisen since 1938, so far as we have discovered. In South Pacific-Pan American Agreements, 39 C.A.B. 840 (1963), the parties used a technique which is common in the motor-carrier field and entered into a temporary lease of South Pacific’s operating rights, pending disposition of the applications for approval of the permanent transfer of the certificate and sale of other assets. Curiously, the Board exempted the lease from section 408 (a) (2), and approved it instead under section 412.

In another case, involving a sale and leaseback of air-carrier aircraft (as part of a transaction to finance the purchase of new equipment), the Board noted that the lease contained various restrictive provisions of the type customarily found in financial agreements and commented:

The problem of possible control of Seaboard by Airborne thus raised by the restrictive provisions is similar to that posed by financing transactions in general . . . .

For this reason, in the absence of a full exploration of the control implications of the restrictive conditions employed by lending institutions in financing air carrier equipment programs or in providing carriers with needed capital, the Board will not assert jurisdiction over the possible control relationship in this instance. Our action should not be construed as a finding that a control relationship cannot be predicated upon said restrictions.