The original documents are located in Box C39, folder "Presidential Handwriting, 5/4/1976 (3)" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

May 3, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: EDWARD SCHMULTS

THROUGH: PHIL BUCHEN

FROM: JIM CONNOR JEC

SUBJECT: Guidelines and Procedures for Presidential Review of CAB Decisions

The President reviewed your memorandum of April 15 and approved the following:

Item 3 - Substantive Options as to the Scope of Presidential Review

Option C - Do not limit authority by a definition of foreign policy, but declare intention to exercise review power only on matters which are deemed to be of truly Presidential concern; and direct executive agencies to present to the CAB on the record any views which they may have on regulatory policy.

Item 4 - Procedural Options as to Contacts with White House Staff and matters to be Presented to CAB

Option E - Minimize White House procedures: Bar contact by private parties with the White House staff; require that Executive agencies state their economic and regulatory views in the Board's proceeding and give the Board notice of any intention to make additional recommendations to the President on defense or foreign policy grounds; views of private parties would be conveyed to the President through the departments; in each category exceptions would be permitted as required by foreign policy or defense needs.

Item 5 - Other Section 801 Matters

Option G - Authorize release of the Board's recommended decision

Approved.

Option H - Establish procedures to make judicial review possible in a limited class of cases

Approved

Option I - Issue an Executive Order embodying reforms

No decision was made on this item - The following notation was made in connection with the "pro" and "con" of this matter - "?".

Please follow-up with appropriate action.

cc: Dick Cheney

April 30, 1976

MR PRESIDENT:

Guidelines and Procedures for
Presidential Review of CAB Decisions

Some extensive comments were received as a result of our staffing of the attached memorandum.

Brent Scowcroft agrees that the Presidential review of CAB decisions should be revised and concurs in the consensus which has developed in support of Option C. His further comments are at TAB A.

At Bill Seidman's suggestion CIEP prepared some detailed comments concerning their feelings on this subject. (TAB B.)

Bill Seidman's recommendations are included with other senior staff members' votes on the various issues. His additional comments are at TAB C.

Item 3 - Substantive Options as to the Scope of Presidential Review

Option C - Do not limit your authority by a definition of foreign policy, but declare your intention to exercise your review power only on matters which you deem to be of truly Presidential concern; and direct executive agencies to present to the CAB on the record any views which they may have on regulatory policy.

Favored by Messrs. Marsh, Lynn, Seidman, Cannon and Scowcroft.

Item 4 - Procedural Options as to Contacts with White House Staff and Matters to be Presented to CAB

Option E - Minimize White House procedure. Favored by Jack Marsh

Option F - Make no change - Favored by Bill Seidman

Item 5 - Other Section 801 Matters

Option G - Authorize Release of the Board's recommended decision:

Approved by Messrs. Marsh and Seidman

Option H - Establish procedures to make judicial review possible in a limited class of cases

Approved by Jack Marsh and Bill Seidman

Option I - Issue an Executive Order embodying reforms

Approved by Jack Marsh with change - See TAB D

Disapproved by Bill Seidman

Since the attached memorandum was prepared by Ed Schmults the CAB sent a memorandum which Ed Schmults thinks should be made a part of the package. See TAB E.

Jim Connor

THE WHITE HOUSE

WASHINGTON

April 15, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD C. SCHMULTS

SUBJECT: Guidelines and Procedures for Presidential Review of CAB Decisions

The Presidential power to approve or disapprove CAB decisions in international cases is coming under increasing criticism, and proposals have been made that Congress pass legislation to limit the substantive grounds of review and assure procedural fairness.*/ To address the concerns that have been raised, this memorandum proposes options to improve the Presidential review process by revising the substantive grounds of review and imposing certain procedural requirements.

1. Background

(a) The Presidential Authority to Review CAB Decisions

The President has two kinds of review authority over CAB decisions under Section 801 of the Federal Aviation Act:

-- Under 801(a) Board actions affecting the certificate of an air carrier -- i.e., route awards and mergers -- affecting overseas

*/ On April 6, the Aviation Subcommittee of the Senate Commerce Committee began hearings on the Administration's proposed Aviation Act (S. 2551). The Subcommittee may broaden the hearings to include regulatory reform matters not included in S. 2551 and a review of the President's approval authority over CAB decisions.

or foreign air transportation are subject to the approval of the President. */

-- Under 801(b), if the CAB exercises its power to disapprove an international fare schedule, the President may disapprove that order not later than 10 days following submission to the President. **/

(b) Rationale for the Authority: Legislative History

The Congressional purpose in giving the power of approval to the President in international and overseas cases was in recognition of the President's unique constitutional responsibilities for foreign policy and national defense. It was felt that there were both foreign policy and defense aspects to the choice of routes and carriers, and

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*/ "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof." 49 U.S.C. 1461(a)

**/ "Any order of the Board pursuant to section 1482(j) of this title suspending, rejecting, or canceling a rate, fare, or charge for foreign air transportation, and any order rescinding the effectiveness of any such order, shall be submitted to the President before publication thereof. The President may disapprove any such order when he finds that disapproval is required for reasons of the national defense or the foreign policy of the United States not later than ten days following submission by the Board of any such order to the President." 49 U.S.C. 1461(b)

the setting of rates. The floor debates made specific reference to the importance that foreign nations attached to airline matters. Defense was emphasized in connection with the selection of flight paths and access by foreign carriers to areas near U.S. defense installations, and in the selection of airport sites. The argument was made that such decisions were executive in character and should be left to the President.

As a legal matter, therefore, the review authority under both 801(a) and (b) was intended to preserve the prerogatives of the President in matters of defense and foreign policy, and should be exercised only for those purposes.*/ These criteria are very broad, but they do suggest that Presidential review should not, for the most part, be concerned with errors of fact or law, or with economic questions, that do not arise from some defense or foreign policy concern of the President. At the same time, it is clear that matters of international economic policy frequently will be inextricably interwoven with foreign policy considerations. Thus, it will be often difficult (and sometimes not desirable) to separate "economic questions" from "foreign policy" concerns.

(c) Problems Raised

Over the years, aviation commentators have raised a number of problems with respect to the White House review process:

(1) Substance. There are no guidelines as to the kinds of substantive issues appropriate for consideration by the President. Continuing disagreement arises within the Executive Branch and the White House staff over what issues are relevant. Political and economic factors are often invoked by interested parties, and there have been allegations that the President's power has been abused. The American Bar Association, despite a study conclusion that the

*/ Technically, only 801(b) refers specifically to defense and foreign policy, but the legislative history indicates that this later amendment was expressive of the purpose behind 801(a) as well.

power has not been abused, is on record in favor of a partial withdrawal of this Presidential power,*/ and Senator Magnuson is said to be planning legislation that would bar the President from deciding which airline should receive an award.

(2) Procedures. There are no procedural restrictions governing access by interested parties to members of the White House staff. Many interested parties seek to argue their cases in ex parte contacts with the staff, while others scrupulously avoid any communication with us. This situation is perceived by some to be both unfair and conducive to appearances of impropriety. It is all the more so, the critics assert, in light of the open hearing on the record before the CAB. A similar problem is said to exist in the departments and agencies.

(3) Release of CAB Decision. The CAB is barred by statute from publishing its recommended decision until after submission to the President, and in practice this has been interpreted to mean that the CAB should not publish its decisions until the President acts. However, in fact during the White House staff review, some parties obtain copies of the opinion surreptitiously, while others are unable to address their arguments to the specifics of the Board's decision. A court case is pending which seeks release of the recommended decision of the Board.

(4) Judicial Review. The courts presently will not review Section 801 orders because until the President approves them they are not sufficiently "final" and after the President acts on them, they constitute "political action". In deciding Section 801 cases, however,

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*/ The December 31, 1975, Report of the CAB Advisory Committee on Procedural Reform, with some vigorous dissents, endorsed the ABA's somewhat ambiguous proposal to withdraw the 801 authority "in a manner which will preserve the President's constitutional rights and obligations in the fieldsof national defense and foreign relations while removing domestic political considerations from the decision-making process and assuring availability of judicial review." (p. 24)

the Board engages in complex adjudication of regulatory issues that in all other cases are subject to judicial review. Lacking judicial review, parties -- and departments and agencies -- have alleged legal and factual errors of a kind that would normally be decided by courts as grounds for Presidential disapproval. It is possible that a disclaimer of Presidential interest accompanying approval of a Board decision would encourage the courts to review legal errors by the Board. */

2. The Basic Dilemma

These problems arise because the statute superimposes executive approval on an adjudicative type administrative proceeding. This is unique to the CAB. The issues that come before the Board include questions of the impact of route awards on competing airlines, compatibility of a route award or fare decision with the overall route or fare structure, economic viability of the route and the ability of the carriers to perform. Resolving these questions fairly calls for the full panoply of due process -- hearings with witnesses, a formal record, the right to introduce evidence and a more or less adversary hearing. The White House is not equipped to duplicate or review all of the aspects of such a process. That kind of review is the normal function of the courts, not the executive function of insuring that the decision is compatible with defense and foreign policy objectives of the President.

The temptation has been irresistible, however, for the interested parties and government agencies to reargue many of the same economic issues decided by the Board. When this is done through ex parte contacts at the White House or in the departments and agencies, the procedural safeguards to assure fairness are lacking and appearances of impropriety can arise.

There are no simple solutions to these problems. But it is clear that there has been an increasing tendency to argue here matters that relate primarily to economic and regulatory issues decided by

*/ You attempted to do this in the recent Allegheny decision. Allegheny was not appealed and, thus, there is no court decision confirming or rejecting this approach.

the Board, and which some may view as having only a remote connection to defense or foreign policy objectives as such. Action to improve the Section 801 review process should be viewed by many as a significant "good government" effort on your part; inaction may result in a reduction or loss of your existing power.

The questions raised are thus both substantive and procedural: Substantively, what should be the proper scope of the terms "defense" and "foreign policy"? Procedurally, what changes should be made in the White House review to address the concerns expressed about the perceived "fairness" of the process? The answers to these questions may be interrelated, since a broad substantive review arguably creates a greater need for formal procedures than if substantive issues were largely excluded. We begin, therefore, with the substantive options.

3. Substantive Options as to the Scope of Presidential Review

Option A: A broad, flexible definition as used in the past

Under this option, the scope of the Presidential review of CAB decisions would not be changed. The meaning of "defense" is fairly clear and has not been the subject of controversy. The expansive term is "foreign policy", which has been broadly interpreted to embrace a variety of Presidential policies, including competition, anti-inflation policies, errors of law, regulatory reform, and the financial health of the international U.S. flag carriers.

Pro:

-- A broad, flexible interpretation enables the President to correct many overly restrictive, anti-competitive attitudes of the CAB in international markets. In the context of regulatory reform, it is possible to implement procompetitive international policies under existing authority without waiting for legislative action. It also enables the President to carry out directly other Presidential transportation and economic policies with significant foreign policy overtones.

-- It preserves maximum flexibility to reject decisions on foreign policy grounds, and it leaves the present open-ended scope of foreign policy undiminished.

Con:

-- Critics of the present process assert that it involves the President in a review on the merits of issues better left to the CAB's regulatory expertise and deprives parties of judicial review of issues with no defense or foreign policy significance.

-- Maintenance of the status quo may lead to Congressionally imposed restrictions.

Option B: Issue a definition of defense and foreign policy

Under this option, after appropriate consultation with the government agencies involved, the term "foreign policy" would be defined for Section 801 purposes to include certain matters and exclude others. Thus, an Executive Order could prescribe that foreign policy considerations will include, for example, one or more of the following:

-- Questions of international aviation policy, which can be further defined to include or exclude issues of competition, transportation policy and financial health of the airlines.

-- Anti-inflation objectives.

-- De-regulation objectives.

Pro:

-- The rationale for Presidential consideration of certain issues would be more clearly stated than in the past, thus reducing appearances that the power is being abused.

-- Providing specific criteria would give the parties a basis for presenting their arguments to the President.

Con:

-- Attempting to define in advance what are and are not foreign policy issues cannot be done with precision. */ The State Department points out that attempting to define the elements of "foreign policy" would almost certainly result in a practical limitation of its scope.

-- In practical effect, there might be no change in terms of what arguments the parties would make.

-- Setting specific grounds for Presidential review could stimulate the parties to appeal to the President with greater frequency and create additional pressure for procedural formalities. It could also imply the creation of substantive rights and lead to judicial review of the Presidential action. Justice suggests that if the Supreme Court disagreed with the Presidential definition of "foreign policy" it could lead to judicial review of Presidential decisions.

*/ For example, in the Service to Saipan case, the State Department raised the issue of the desirability of a direct circle route to the Micronesia market as a foreign policy matter, but this is also an issue that the Board must consider. The State Department also argued the prospective impact of Japanese pressure for additional routes to the United States on other airlines, but this is again an issue that must be considered by the Board.

-- If the "foreign policy" definition includes some concept such as "international aviation policy" or "international economic policy", it will be argued that the President can substitute his regulatory policies for those of the CAB in international cases. If it is decided to refrain from what can be alleged to be "regulatory intervention", Option C would appear to be more effective than a definition of "foreign policy."

Option C: Do not limit your authority by a definition of foreign policy, but declare your intention to exercise your review power only on matters which you deem to be of truly Presidential concern; and direct executive agencies to present to the CAB on the record any views which they may have on regulatory policy

A more practical approach than defining "foreign policy", which could result in a contraction of Presidential power, would be to signal your intention to place greater reliance on the CAB process to ascertain facts, decide routine economic questions and, in general, establish regulatory policies. Presidential power would be fully preserved, since the President is the judge of what issues are important enough to rise to the level of a Presidential foreign policy concern. Less important matters can be dismissed on the ground that they don't rise to that level of concern, without saying that the President lacks power to consider them. In some cases, where the executive agencies are concerned that the facts of record on which the Board based its decision are out of date, you can request adequate fact findings as a predicate for your defense or foreign policy judgments.

The major innovation would be to force executive agencies to categorize their views as either (a) so exceptional as to warrant Presidential consideration under Section 801, or (b) as regulatory issues that should be presented to the Board (and on the record, except as confidentiality may be required for reasons of national security). In the past, there has been no mandate to make such

a choice, which has led to the arguing of all agency policies through the Section 801 review, without regard to their level of importance or relationship to Presidential concerns. The essence of this option is to sort out the issues of detail that don't warrant Presidential attention by establishing a test of defense or foreign policy importance rather than a restriction on the extent of the President's powers.

The policy represented by the option would recognize that while the President has sole responsibility for the conduct of foreign policy, Congress has a substantial role in prescribing international economic policy, and it has given the Board regulatory power over international as well as domestic aviation questions. Since the 801 power is a recognition of the Presidential power to conduct foreign policy, it does not diminish that power to suggest that the President need not review those economic and regulatory issues in international aviation cases which have been thoroughly aired before the Board and do not have a material impact on foreign policy.

While it is impractical to set forth, in a hard and fast manner, categories of issues that should not be reargued before you, under this option you would ordinarily refrain from considering issues of competition, inflation, financial health of airlines, the viability of routes, or transportation objectives, which fall within the administrative competence of the Board. While the possibility that such issues could rise to the level of a foreign policy issue in particular cases cannot be excluded, the point is that foreign policy should not be invoked by government agencies and interested parties merely as a rationale for Presidential review of matters better left to CAB expertise. Of course, there will be cases where considerations of international trade or economic policy will be important components of foreign policy and so of Presidential concern. For example, maintaining competitive, financially viable U.S. carriers on specific routes may be a foreign policy objective in itself. And, as the State Department notes, the negotiating costs of proposed Board decisions are a foreign policy concern that can be addressed only in that context.

Since the real problem here may be one of attitude or approach of the Executive Branch agencies in making 801 recommendations, an emphasis on procedural improvements and the function of the Section 801 review process may encourage the agencies to take a more restrictive approach and to view the President's approval power, not as a lever for making regulatory policy across the board in international aviation cases, but as a mechanism to protect his own prerogatives on matters of defense or foreign policy. */

This option would not prevent the Council on International Economic Policy, or the Departments of State, Justice, Commerce or Transportation from injecting substantive policy views on all issues into CAB proceedings, and on grounds including, but not limited to, defense and foreign policy. This may and should be done on the record before the Board. Such substantive policies which are within the purview of the Board should be separated wherever possible from the grounds which should occasion Presidential review under Section 801.

Pro:

-- The President's power to review international aviation matters would not be contracted but, as a practical matter, the scope of Presidential review would be reduced in many cases by encouraging government agencies and interested parties to abide by CAB resolution of the issues. (This does not, of course, mean that such purely executive concerns as foreign policy would be debated before the Board.)

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*/ The mere filing of a protest by a foreign government should not suffice to create a foreign policy reason to disapprove or modify the Board's decision. It should be recognized that private parties lobby foreign governments as well as our own, and that foreign governments are receptive from time to time to the protection of vested interests. The criterion should be not whether the foreign government agrees with the CAB's decision but whether that disagreement is serious enough to cause a foreign policy problem if the decision is allowed to stand.

The reason that the Section 801 power has become a problem to some aviation commentators is that in their view it has been used to review the substance of regulatory issues better left to the CAB. Thus, they argue that the only effective solution is to exclude regulatory issues wherever possible from Presidential review.

-- It would avoid the need for formal procedures (such as those referred to in Option D) to better assure due process within the White House. The Counsel's office believes that this Option fits best with procedural Option E below.

Con:

-- The President's role in determining regulatory policy in international aviation would be reduced. Implementation of an Executive international aviation policy might have to rely on other means than the Section 801 authority.

-- In any particular case, it may be difficult to determine which arguments rise to a level of truly Presidential importance.

-- To the extent that submission of foreign policy views is done in summary form or consists merely of conclusions, it may be unsatisfactory to the parties, leading to further criticisms. There may also be cases in which such limited information will not enable the CAB to make any meaningful analysis that makes a difference in its decisions.

Approve Option ___A: A broad, flexible definition as used in the past.

___B: Issue a restrictive definition of defense and foreign policy.

___C: Do not limit your authority by a definition of foreign policy, but declare your intention to exercise your review power only on matters which you deem to be of truly Presidential concern; and direct executive agencies to present to the CAB on the record any views which they may have on regulatory policy. (Recommended by Counsel to the President, the Departments of State, Justice, Defense, Commerce and Transportation)

___ Comment:

4. Procedural Options as to Contacts with White House Staff and Matters to be Presented to CAB

Option D: Adopt formal procedures for the Presidential review.

Ex parte contacts with White House personnel would be banned. Written comments from the parties would be accepted by the White House staff, but a docket would be established so that copies were available to all interested parties. Oral contacts by private parties would be limited to meetings or hearings to which all interested parties (private and government) would be invited. All written materials submitted by government agencies would be made part of the public record subject to the usual exceptions for national security and proprietary information.

Pro:

-- This would regularize the review process and hopefully limit appearances of impropriety. The arguments for this Option are strongest if substantive Option A or B is selected as it would accommodate a broad substantive review of Board decisions.

Con:

-- The existence of such procedures invites the parties to reargue the same issues already decided by the Board.

-- It would involve the White House staff in a kind of operational activity and level of detail that go beyond its normal functions.

-- In some cases, Defense and foreign policy issues require confidential internal communications rather than on the record presentations and so establishing a docket for communications of the agencies would create more problems than it would solve.

Option E: Minimize White House procedures: Bar contacts by private parties with the White House staff; require that Executive agencies state their economic and regulatory views in the Board's proceeding and give the Board notice of any intention to make additional recommendations to the President on defense or foreign policy grounds; views of private parties would be conveyed to the President through the departments; in each category exceptions would be permitted as required by foreign policy or defense needs

This Option is the procedural counterpart of substantive Option C which would place greater reliance on the CAB regulatory process, thus minimizing the substantive scope of review and the more formal procedures that would be most appropriate under Options A or B. Executive agencies could express substantive views on matters beyond the scope of 801, but on the record before the CAB. Purely economic or regulatory arguments would have to be made initially to the Board. As to matters subject to 801 review, they should indicate whether they will have a recommendation or objection if such an issue is identifiable during the proceeding before the Board. The 801 review process would be limited to

genuine foreign policy and defense issues which normally involve confidential communications rather than formal procedures. To provide some discipline and to improve the Board's role as expert advisor to the President, executive agencies which present a point to the President that they have not made to the Board could be required to explain why the Board was not given an opportunity to consider it. There are, of course, legitimate reasons for agencies to change their views on the basis of new facts or circumstances, or simply upon reconsideration; but to the extent possible, the Board should be given the first opportunity to consider them.

Pro:

-- Ex parte contacts with the White House staff would be eliminated.

-- The President and his staff would be freed from involvement in substantive issues decided by the CAB.

-- Executive participation in formulating international aviation policy would be preserved, but in many cases would be separated from the 801 review. The threat of legislative restriction of the 801 power should also be reduced.

Con:

-- As to 801 issues of foreign policy and defense, their discussion typically requires confidential communications which makes it difficult for the State Department to explain its views on the record. This disadvantage should be more apparent than real, however, since the statements required by Defense and State to the CAB on 801 matters could be limited to their conclusions and so much of their reasoning as does not require confidentiality. As long as the Board knows what that objection is, it can frame its recommended decision either to avoid that objection or, in the alternative, to state what its decision would be if

the President agrees with the Departmental view or what the Board would recommend if he disagrees. Exceptions would be allowed for cases in which foreign policy embarrassment could result from disclosure of the sole fact that the State Department has made a recommendation, though executive agencies should be informed, subject to normal classification safeguards.

-- Some parties will complain that they are denied access to the President on foreign policy issues, though legitimate exceptions would be possible.

Option F: Make no change

Pro:

-- Preserves maximum access by all parties.

Con:

-- Presents an appearance of unfairness.

Decision:

Approve Option ___D: Adopt formal procedures for the Presidential review.

___E: Minimize White House procedures: Bar contacts by private parties with the White House staff; require that Executive agencies state their economic and regulatory views in the Board's proceeding, and give the Board notice of any intention to make additional recommendations to the President on defense or foreign policy grounds; private parties' views would be conveyed to the President through the departments; exceptions would

be permitted as required by foreign policy or defense needs. (Recommended by Counsel to the President and the Departments of State, Justice, Defense, Commerce and Transportation)

___F: Make no change

___ Comment

5. Other Section 801 Matters

Option G: Authorize release of the Board's recommended decision

As noted on page 4, paragraph (3) above, after sending its recommended decision to the President, the Board has followed the practice of not making the decision public until the President acts. However, in fact, the decision is often leaked to the parties prior to action by the President. In unusual cases, there may be a defense or foreign policy reason for withholding all or part of a Board decision. A screening process that would give the President an opportunity to object to release within 5 days should accommodate this requirement.

Pro:

-- There is no need for confidentiality other than possible defense or foreign policy reasons, which are accommodated by a 5-day notice and opportunity for you to prevent release.

-- There is a lawsuit pending to compel release which could be rendered moot by your action.

Con:

-- Making the CAB decision available to the parties may result in more appeals to the President. This, however, already happens despite the lack of formal release.

Approve _____ (Recommended by Counsel to the President, and the Departments of State, Defense, Justice, Commerce and Transportation)

Disapprove _____

Option H: Establish procedures to make judicial review possible in a limited class of cases

As indicated earlier, the purpose of barring judicial review of Section 801 cases is that courts should not pass on questions of foreign and defense policy. The point is sound where Presidential approval or disapproval is based on such policies. However, in Section 801 cases where the President "routinely" approves CAB decisions and believes there are no material foreign policy or defense issues involved, one can argue that there is no apparent reason for depriving the parties of the opportunity for judicial review of errors by the CAB. This would also relieve the President of the dilemma of having to decide alleged errors of law or approving an order that would likely be overturned by a court were judicial review available. But there is some doubt as to the power of the President to confer, by Executive Order or otherwise, jurisdiction upon the courts even in this limited class of cases since all depends upon the willingness of the courts to accept the invitation for review which might be provided; the Department of Justice believes, however, that there is a good chance the invitation would be accepted.

The only category of cases in which this issue arises is "routine" approvals which are not based on any substantive defense or foreign policy objective. Disapprovals would always be based on some Presidential decision and thus should not be subject to judicial review. In the case of approvals, assuming the absence of some defense or foreign policy basis of approval regardless of possible legal error, you could indicate in your approval that no defense or foreign policy purpose would be thwarted by subjecting the Board's decision to judicial review. (You did that in a recent Allegheny decision, but no party appealed and so there is no judicial decision on this approach.)

Under this option, as part of a restructuring of the Section 801 review process, and to assist you in deciding whether or not to express "no objection" to judicial review of the CAB aspects of a case, you would

request in an Executive Order that the executive agencies identify any purely legal errors in the CAB proceedings and state whether there are any foreign policy or defense objections to judicial review.

Pro:

-- The reason for barring judicial review in international cases is that Presidential decisions on matters of defense and foreign policy are not reviewable. If the President does not make any defense or foreign policy decision, but simply has no objection to the order, the reason for barring judicial review does not apply.

-- Preserves the parties' rights and avoids argument of legal errors during the Presidential review process.

-- Increasing access to the courts is a significant and concrete element of reform that would add credence to your action as good government; omission of this element could attract criticism for not doing the whole job.

Con:

-- This step might lead to much broader judicial review which could diminish Presidential power in Section 801 matters. The Department of Justice cautions that the courts might carry this to the point of reviewing all orders that relate to domestic carriers (though recent judicial and legislative attitudes indicate there may be a similar risk if you do not seek to render at least some orders reviewable). Justice regards this as an acceptable risk.

-- The question of judicial review can be handled on a case-by-case basis (as you did in Allegheny) without a specific pronouncement now.

-- Once the President begins to "select" which party can seek judicial review and which party cannot, a whole new area of controversy may be introduced into the Section 801 process. Those who now claim that the

present bar to judicial review is arbitrary may assert that you are being "selectively" arbitrary in permitting judicial review in some cases but not in others.

Approve _____ (Recommended by Counsel to the President and the Departments of State, Justice and Commerce)

Disapprove _____ (Recommended by the Department of Transportation)

Option I: Issue an Executive Order embodying reforms

There is presently no published guideline on conduct of the Presidential review under Section 801. If you decide to make significant substantive or procedural changes, an Executive Order would be an effective way of stating your policy. An illustrative draft embodying the recommended Options C, E, and G and a section which assumes that you wish to address the question of judicial review is attached. Since the issuance of an Executive Order involves a separate clearance procedure, an Order would be processed and submitted to you following your decisions herein.

Pro:

-- If you decide to make a substantial change such as proposed in Options C and E, an Executive Order would be an affirmative statement of your intention to improve what some view as an unfair process and serve as a guideline for conduct by government agencies and private parties.

Con:

-- If you decide to make no substantial change, issuing an Order would serve no clear purpose.

Approve _____ (Recommended by Counsel to the President, the Departments of State, Defense, Justice, Commerce and Transportation)

Disapprove _____

* * *

In addition to the options presented above, there have been recommendations that the Chairman of the CAB be included in the White House review process and that the internal staffing procedure be reviewed and revised. The former may be desirable on particular occasions, and can always be done on a discretionary basis. However, it does not appear desirable to bind yourself at this time to such a procedure by any formal action. Likewise, internal staffing arrangements can be reviewed following your decisions on the Section 801 process and they need not be included in an Executive Order.

There has also been a recommendation by the Department of Transportation that a 90-day time limit for the President's decision be imposed. While it is true that delay has been a problem, the Counsel to the President believes this is largely a symptom of the substantive and procedural problems discussed above, and that it would be undesirable for the President to impose a time limit on himself. Such a provision would also risk subjecting the Presidential decision process to judicial review.

We have also omitted from the listing of Options a proposal that the President abstain from reviewing the Board's decision on the choice of carrier. No agency supported this Option and it lacks any persuasive rationale since the selection of a carrier will in some instances involve foreign policy considerations.

PROPOSED
EXECUTIVE ORDER

FOR ILLUSTRATIVE
PURPOSES ONLY

EXECUTIVE ORDER

PRESIDENTIAL APPROVAL OF DECISIONS BY THE CIVIL AERONAUTICS BOARD PURSUANT TO SECTION 801 OF THE FEDERAL AVIATION ACT

By virtue of the authority vested in me by the Constitution and laws of the United States, including Section 801 of the Federal Aviation Act as amended (49 U.S.C. 1461 ("Section 801")), it is ordered that:

Section 1. If within 5 business days after receipt of copies of a recommended decision of the Civil Aeronautics Board ("The Board") submitted to the President under Section 801, the Secretary of State, the Secretary of Defense, or the Assistant to the President for National Security Affairs does not furnish to the Chairman of the Board a letter objecting to the release of such decision, the Board is authorized to release the text thereof. If objection is raised to part but not all of a recommended decision, only that part as to which a defense or foreign policy objection to disclosure has been raised shall be withheld. A lack of objection to release of a recommended decision implies nothing with respect to possible defense or foreign policy objections to the content thereof.

Section 2. Orders involving foreign and overseas air transportation certificates of U. S. carriers that are subject to the approval of the President are not subject to judicial review when the President approves or disapproves an order for reasons of defense or foreign policy. All disapprovals necessarily are based on such a Presidential decision, but approval by the President does not necessarily imply the existence of any defense or foreign policy reason. For the purpose of assuring whatever opportunity is available under the law for judicial review of the proceedings before, and order of, the Board, departments and agencies which make recommendations to the President pursuant to the Section 801 approval process should state separately any alleged legal errors and indicate whether there is any defense or foreign policy reason why, if the order is approved, the President should not state in his approval that no defense or foreign policy purpose would be thwarted by subjecting the Board's proceedings and order to judicial review.

Section 3. In order to improve the process whereby recommendations are made to the President for review under Section 801, the following guidelines should be observed in making recommendations for Presidential action under Section 801.

Recommendations by departments and agencies to the President in connection with decisions of the Board whichare subject to approval by the President under Section 801 shall state specifically what foreign policy or defense objectives form the basis for such recommendations. Recommendations by departments and agencies with respect to regulatory matters, other than those involving considerations of defense or foreign policy (including international negotiations costs) which are the subject of recommendations to the President under Section 801, shall be made to the Board, on the public record, in accordance with the procedures of the Board. While some issues will inevitably involve both questions of regulatory policy and foreign policy, departments and agencies should make a conscientious effort to present as much of their views on regulatory matters on the record in proceedings before the Board, and raise only matters of defense or foreign policy that are of uniquely Presidential concern in the course of the review under Section 801. Changed factual conditions following the closing of the Board record may provide the basis for a recommendation that the case be returned for new fact findings as a basis for the President's review.

Section 4. Departments and agencies which intend to make recommendations to the President on matters of defense or foreign policy for purposes of Section 801 and have such intentions while the matter is pending before the Board, shall, consistent with the confidentiality required for reasons of defense or foreign policy, make the existence of such intentions and the conclusions to be recommended known to the Board in the course of its proceedings. The requirements of defense or foreign policy may, in appropriate cases, require that the existence of a defense or foreign policy recommendation remain confidential. Any recommendation made to the President by a department or agency in the course of the Section 801 approval process that has not previously been conveyed to the Board shall be so identified, together with an explanation as to why the Board was not notified. No provision of this Executive Order is intended to prevent any agency for good reason from changing its position and conveying such changed position to the President.

Section 5. Persons within the Executive Office of the President shall follow a policy of (a) refusing to discuss matters relating to the disposition of a case subject to the approval of the President under Section 801 with any interested private party, or an attorney

or agent for any such party, prior to the President's decision; and (b) referring any written communication from an interested private party, or an attorney or agent for any such party, to the appropriate department or agency. Exceptions to this policy may be made when the head of an appropriate department or agency finds that direct written or oral communication between a private party and a person within the Executive Office of the President is needed for reasons of defense or foreign policy.

Section 6. Departments and agencies which make recommendations to the President pursuant to the Section 801 approval process shall (a) establish public dockets for all written communications (other than those requiring confidential treatment because of defense or foreign policy concerns) between their officers and employees and private parties in connection with the consideration of such recommendations and (b) prescribe such other procedures governing oral and written communications as they deem appropriate.

Section 7. The guidelines set forth in Sections 1 through 5 of this Executive Order are intended solely for the internal guidance of the departments and agencies to facilitate the Presidential review process, and not to confer rights on any private parties.

Section 8. To provide for a transition period, Sections 1, 2, 5 and 6 shall apply only to those recommended decisions of the Board submitted to the President 30 days after the effective date hereof and Sections 3 and 4 shall apply only to proceedings docketed at the Board 30 days after the effective date hereof.

THE WHITE HOUSE

THE WHITE HOUSE

WASHINGTON

April 16, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: ED SCHMULTS

SUBJECT: Memorandum to the President on Guidance and Procedures for Presidential Review of CAB Decisions dated April 15, 1976

When the above memorandum is submitted to the President, I believe it should be accompanied by the attached letter from Chairman Robson of the CAB. Speaking for the CAB, Chairman Robson states that the "procedures surrounding Executive Branch review of international aviation decisions have been persistently criticized as overly clandestine, subject to unseen influences, and open to second guessing by Executive agencies on economic arguments which neither the Board nor the parties have had a fair opportunity to consider or rebut in the hearing process." Chairman Robson states that the reforms proposed by the memorandum would be a vast improvement in the Presidential review process and advises that the Board strongly urges that the President approve such reforms.

Attachment

THE CHAIRMAN
OF THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

April 15, 1976

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

The Board is advised that there are under consideration a number of proposed reforms relating to procedures for international aviation decisions which are reviewable by the President under various provisions of the Federal Aviation Act. We understand that among the reforms under consideration are the following:

1. Steps to better assure that review of CAB recommended international aviation decisions will be directed to foreign policy and national security considerations.

2. Procedures to permit publication of CAB recommended decisions at or about the time the Board submits the decision to the President for review, instead of withholding publication until after the President has acted, as has been the practice.

3. Procedures under which communications to the Executive Branch from outside private parties which relate to international cases under review by the Executive Branch would be required to be made public through the maintenance of public dockets or some similar device.

4. Requirements for Executive Branch agencies to make economic or aviation policy arguments as formal participants in CAB proceedings rather than after the decisions have been submitted to the President for his review.

Mr. President, the procedures surrounding Executive Branch review of international aviation decisions have been persistently criticized as overly clandestine, subject to unseen influences, and open to second guessing by Executive agencies on economic arguments which neither the Board nor the parties have had a fair opportunity to consider or rebut in the hearing process.

We believe that reforms along the lines we understand are under consideration would mark a vast improvement in the system under which international aviation decisions are reviewed by the Executive and that these reforms can be accomplished without compromise of the President's legitimate interest in foreign policy and national security considerations in these matters. Accordingly, the Board strongly urges that you approve such reforms. We stand ready to provide any assistance we can in their implementation.

Respectfully yours,

John E. Robson

John E. Robson
Chairman

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: April 17, 1976 Time:

FOR ACTION:
✓ Jim Cannon
✓ Jim Lynn
✓ Jack Marsh
✓ Max Friedersdorf
FROM THE STAFF SECRETARY

cc (for information):
✓ Bill Seidman
✓ Brent Scowcroft
✓ Mike Dunn

DUE: Date: Wednesday, April 21 Time: 10 A.M.

SUBJECT:

Edward Schmults Memo 4/15/76
re Guidelines & Procedures for
Presidential Review of CAB Decisions

ACTION REQUESTED:

____ For Necessary Action
____ Prepare Agenda and Brief
X For Your Comments
X For Your Recommendations
____ Draft Reply
____ Draft Remarks

REMARKS:

Friedersdorf - no comments
Lynn - no objections per Dennis
C/EP - see comments
Seidman - see comments
Cannon - option C
Marsh - see comments

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

April 21, 1976

MEMORANDUM FOR JAMES E. CONNOR

FROM: L. WILLIAM SEIDMAN

SUBJECT: Comments on Edward Schmults' April 15, 1976 Memorandum regarding Guidelines and Procedures for Presidential Review of CAB Decisions

I recommend that in addressing the issue of defining the scope of Presidential review of CAB decisions that the President not limit his authority by a definition of foreign policy, but declare his intention to exercise his review power only on matters which he considers of truly Presidential concern and that he direct executive agencies to present to the CAB on the record any views which they may have on regulatory policy. (Option C). This position retains the President's flexibility while meeting most of the legitimate concerns that have arisen regarding the scope of the President's involvement in reviewing CAB decisions

I recommend that we not change our current procedures regarding contacts by private parties with the White House staff. Totally barring contacts by private parties with the White House staff seems unnecessary and unduly restrictive. The problem of excessive contacts by private parties with members of the White House staff could be substantially reduced if the process whereby recommendations for Presidential review of CAB decisions were significantly expedited. (Option F)

Since the President's role is to review defense and foreign policy considerations it seems appropriate that the preparation of recommendations be undertaken through the NSC/EPB during a period of no longer than 20 or 30 days.

I recommend authorizing release of the Board's recommended decision. (Option G)

I recommend not establishing procedures to make judicial review possible in a limited class of cases. (Option H - Disapprove)

In accordance with my above recommendations I see not reason to issue an Executive Order on the conduct of Presidential review under Section 801. (Option I - Disapprove)

COUNCIL ON INTERNATIONAL ECONOMIC POLICY
WASHINGTON, D.C. 20500

April 21, 1976

MEMORANDUM FOR JAMES E. CONNOR

FROM: W. STEPHEN PIPER

SUBJECT: Comments on Edward Schmults' April 15, 1976 Memo re Guidelines and Procedures for Presidential Review of CAB Decisions

Subsequent to my earlier memorandum today on this subject, Mr. Seidman requested that CIEP comment separately. Mike Dunn, in his absence, has asked that I forward CIEP's comments on Ed Schmults' April 15 memorandum for the President directly to you.

While that memorandum represents a valuable examination of means to improve the review process itself and public appreciation of the President's actions on international CAB cases, some revisions should be made before it is submitted for the President's decision.

Suggestions for Improvement

It is argued persuasively on page 3 that the President's review authority is and should be limited to foreign policy and defense considerations. I agree. However, there is too much of an effort to separate regulatory matters (to be heard before the CAB) and foreign policy matters (to be weighed in the 801 review process); see for example the last paragraph on page 9, the second paragraph on page 11, and page 3 of the proposed Executive Order. International economic policy and trading relationships are an inherent aspect of foreign policy; exchange of international air routes, balance of benefits deriving from exchanged route authority, the competitiveness of U.S. vis-a-vis foreign carriers, and hence the viability of the U.S. international air route system are important components of this aspect of U.S. foreign policy. Thus, the last paragraph on page 10 goes too far in limiting appropriate matters of interest for Presidential review.

The second paragraph on page 10 also tries to separate international economic policy from foreign policy by stating, inappropriately, that the "Congress has a substantial role in prescribing international economic policy," while "the President has sole responsibility for the conduct of foreign policy."

A fundamental concern, not addressed in the memorandum, is the quality of the 801 case decision memoranda that are prepared for the President. The present coordination process should be modified to assure that it focuses on the key issues and provides solid recommendations to the President in a timely manner. Such discussion should be in paragraphs 1(c) or 2 on pages 3-5.

The options fail to come to grips with the basic problem of implementation. Who decides or how do we decide in specific cases what is or is not a proper foreign policy concern, or what rises to a sufficient level of significance to warrant Presidential modification of a Board position.

There may be no way of an a priori resolution. Nonetheless, it should be recognized as a major problem, regardless of the election of options A, B, or C.

In fact, this is the major difficulty with the present procedures.

Since reviews should be founded upon foreign policy and national defense considerations, the final Presidential decision memorandum might usefully be reviewed by an agency having foreign or defense responsibilities in the Executive Office. This staffing procedure, routine in other matters, would provide a double-check that foreign policy/national defense arguments are appropriately presented to the President.

The draft Executive Order might be revised to provide for this procedure, the comment in the first paragraph of page 21 notwithstanding. Adoption and announcement of such a procedure would help to mollify the complaints that the President is acting on 801 cases for reasons other than foreign policy or national defense.

The public release of CAB decisions, after review for foreign policy sensitivity, is good. However, Option G (and Section 1 of the proposed Executive Order) should be limited to 801(a) cases. The 801(b) cases must be handled within 10 calendar days (5-8 business days), so that no benefit derives from their public release after 5 business days. We should save the time required to screen them for foreign policy sensitivity.

While I have no comment on the legal precedent question raised by Option H, I doubt we should invite the reviewing agencies (here and in Section 2 of the proposed Executive Order) to advise the President on possible legal errors. Better, I believe, to leave legal review to the parties and the courts, than to have agency findings as to possible legal errors used as ammunition in court suits. Certainly, if a case has a glaring legal deficiency, the appropriate review agencies will, as is now the case, call this to the President's attention, without the explicit direction to comment on possible legal errors.

Section 4 and the corresponding parts of Option E (which I otherwise favor) should be dropped. As stated above, the regulatory and foreign policy matters are not easily separable. We should not place the burden of trying to maintain such a distinction upon the departments and the Board. The desired result of the section will, I believe, be achieved by Section 3.

Additional specific comments are attached.

cc: L. William Seidman
J. M. Dunn
William F. Gorog

Specific Comments Regarding
Guidelines and Procedures for
Presidential Review of CAB Decisions

1. Re footnote on page 1, some witnesses have already testified in the Senate hearings in favor of revising the authority and process for the Presidential reviews pursuant to Section 801.

On April 13, Edward J. Driscoll, President of the National Air Carrier Association, said:

. Congress should specify that Presidential review of international CAB cases be limited to considerations of foreign policy and national defense.

. Congress should define foreign policy considerations.

. CAB decisions in international cases should be made public before the President reviews them.

. Time limits should be established for the President's review.

The House Aviation Subcommittee will begin hearings next month.

2. Re para(b) on page 2, the Congress did not give this approval power to the President; execution of foreign policy is his power inherently under the Constitution. Therefore the first sentence might be rewritten to read: "In enacting Section 801, the Congress recognized the President's unique..."

3. Re para(3) on page 4, it should not be inferred that copies of the Board's decision are leaked from the Executive Branch. Many leaks come from the CAB. Most often leaks are not copies of the Board decision, but rather a generalized oral summary of it. Thus, no party knows the specifics of a Board decision. We agree that the most fair solution is for all parties to have equal, accurate knowledge.

The leaking and the ex parte pressures cited in para (2) only become onerous when the Presidential review process is prolonged.

4. Re top of page 5, a paragraph (5) might be added to note the criticism raised against delays in the Presidential review process. While all 801(b) cases are handled within 10 days -- as required by the statute -- and many very routine 801(a) cases take about 2-3 weeks, it is not unusual for contentious cases to endure long delays. (We do not refer to cases where delays are consciously imposed for foreign policy reasons -- as part of the USG bargaining strategy.)

   The President has stated his desire to speed up the regulatory process -- such reform could begin in the Executive Office by example.

   One witness in Senate testimony on S.2551 last week called for amendment of 801(a) to provide a 30-day Presidential review period.

5. Re last para on page 5, we agree that "there has been an increasing tendency to argue here matters that relate primarily to economic and regulatory issues..." This is because the Executive Office review process has not focused sufficiently on foreign policy considerations. Option C, discussed below, will not itself reverse this tendency. The key here is in the drafting of the Presidential decision memorandum on the individual CAB cases.

6. The footnote on page 7 unfairly criticizes State, by taking State's argument out of context. The foreign policy matter raised by State (and other departments) was the competitiveness of U.S. carriers vis-a-vis foreign carriers (here JAL). The circle route would have placed U.S. carrier(s) on an equal competitive footing. The Board's decision would have allowed JAL an advantage. The impact of Japanese pressure for other routes is a foreign policy matter properly of concern to State and the President, and less important in the rank of CAB issues.

7. Re first point on page 9, this "con" is artificial. The alleged argument can be made more easily under Options A and C, than here under Option B. The wording also infers that international economic and aviation policy is an inherent component of foreign policy. As foreign governments accord economic and aviation matters great significance in their foreign policies, we cannot separate them from ours.

8. Re page 11, para 2, we would delete CIEP from this list, and suggest the addition of Defense.

9. Re page 12, con, it is said on page 3 that the review authority is (should be) limited to foreign policy and defense considerations. It is inaccurate to say that option C would reduce the President's role in international regulatory policy, as it implies (falsely) that 801 is an appropriate vehicle for policy implementation. (Policy implementation should be through the Congress to modify the law or through the Board to modify the implementation of the law.)

The key "cons" on option C are that it invites considerations tangential to foreign policy and does not address the practical matter of how the decision is to be made regarding whether a case, position, or argument rises to a level of truly Presidential importance.

10. Option D on page 13, would be unworkable. As drafted, it would ban contacts between White House personnel and Executive Branch departments who are parties to CAB cases. It does not distinguish between USG personnel and civic parties. Departmental correspondence to the President is not usually made a part of the public record.

11. Re the last para on page 14, it would be cumbersome, if not unworkable, for Executive agencies to indicate to the Board which arguments in a case would give rise to their subsequently making foreign policy recommendations to the President. We would delete:

. from option E, the phrase "give the Board notice of any intention to make additional recommendations to the President on defense or foreign policy grounds."

. the last full sentence of page 14.

. section 4 of the proposed Executive Order.

COUNCIL ON INTERNATIONAL ECONOMIC POLICY
WASHINGTON, D.C. 20500

April 21, 1976

MEMORANDUM FOR JAMES E. CONNOR

FROM: W. STEPHEN PIPER

SUBJECT: Comments on Edward Schmults' April 15, 1976 Memo re Guidelines and Procedures for Presidential Review of CAB Decisions

In J.M. Dunn's absence, the response forwarded by Mr. Seidman will serve as CIEP's response as well.

cc: J.M. Dunn
Roger Porter

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

2267

April 28, 1976

MEMORANDUM FOR: JAMES CONNOR

FROM: BRENT SCOWCROFT

SUBJECT: Edward Schmults' Memo on Guidelines and Procedures for Presidential Review of CAB Decisions

I agree that the Presidential review of CAB decisions should be revised and concur in the consensus which has developed in support of Option C. It would have been useful to have some criteria for determining cases "of truly Presidential concern." Since none emerged from this review, we will have to rely upon this declaration of intent to filter out many of the reargued kinds of cases which have heretofore reached the President.

I have a few general comments and have attached a separate page with minor notations.

Option E Versus Option F

The proposed Option E could be read to preclude officials from foreign embassies from discussing aviation problems with me unless recommended in writing by the Secretary of State. Such restriction would be undesirable and impracticable. Barring White House contacts with other private parties may also be politically unrealistic. I therefore support Option F and the provisions of the Executive Order to ensure that there are no barriers to White House contacts.

Public Disclosure Process

The inclusion of ten-day rate cases (Section 801 (b)) in the proposed five-day public disclosure process poses a problem. Since such cases must be acted upon by the President within ten days, the imposition of an additional screening for public disclosure at the midpoint of that period creates an unnecessarily cumbersome administrative burden without providing any substantial benefit to the timely public dissemination of information on the proceedings.

Format

Given the length and complexity of the draft memorandum, an Executive Summary might be useful for the President.

•

Attached is a page of suggested changes in the text.

Comments on Draft Memorandum from Mr. Schmults to the President of April 15, 1976 concerning Presidential Review of CAB Decisions

Page 2, para (b) -- Congress did not give the power of approval to the President, but drafted legislation which recognized his constitutional authority.

Page 4, para (3) -- The second sentence is somewhat misleading since most leaks involve oral summaries (which are often inaccurate) rather than copies of the opinion. Accurate information provided to all parties would obviously be the equitable solution. The likelihood of leaks, however, is related to the length of time a case is under review; improved procedures for timely treatment could reduce many leakage problems and would be consistent with regulatory reform.

Page 8 -- The footnote to the first "con" does not accurately express State's position in the Saipan case and should be revised or dropped. The issue was the competitiveness of US carriers vs JAL and the negotiating price of introducing a new US carrier.

Page 14 -- Delete:

a) from the definition of Option E the phrase "give the Board notice....foreign policy grounds."

b) last full sentence on the page: "As to matters....before the Board."

Page 16, para (1) -- Foreign policy "embarrassment" is not the issue. The resultant weakening of negotiating positions is the key problem in disclosure.

Proposed Executive Order

Section 1 -- should treat cases under Section 801(a) only -- not ten day cases.

Section 4 -- The following sentence, suggested by State Department, should be inserted after the second sentence of this section: "No provision of this Executive Order is intended to prevent any agency which has not notified the Board of its intention to make recommendations to the President from making such recommendations for good reason or to prevent any agency for good reason from changing its position and conveying such changed position to the President."

THE WHITE HOUSE

ACTION MEMORANDUM — WASHINGTON — LOG NO.: APR 19 1976

due: 4/21 10:00

Date: April 17, 1976 — Time:

FOR ACTION: — cc (for information):

Jim Cannon
Jim Lynn
Jack Marsh
Max Friedersdorf
Bill Seidman
Brent Scowcroft
Mike Dunn

FROM THE STAFF SECRETARY

DUE: Date: Wednesday, April 21 — Time: 10 A.M.

SUBJECT:

Edward Schmults Memo 4/15/76
re Guidelines & Procedures for
Presidential Review of CAB Decisions

ACTION REQUESTED:

___ For Necessary Action — X For Your Recommendations

___ Prepare Agenda and Brief — ___ Draft Reply

X For Your Comments — ___ Draft Remarks

REMARKS:

Option C pg 13 I

Option E pg 16, however, I think it should be modified slightly to limit contacts only on a pending case and also permit White House staff to refer to Counsel's Office any contacts they receive on a pending case.

Approve "I" see change I, pg 5 of Ex order

Option G "approve"

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

FOR ILLUSTRATIVE
PURPOSES ONLY

EXECUTIVE ORDER

PRESIDENTIAL APPROVAL OF DECISIONS BY THE CIVIL AERONAUTICS BOARD PURSUANT TO SECTION 801 OF THE FEDERAL AVIATION ACT

By virtue of the authority vested in me by the Constitution and laws of the United States, including Section 801 of the Federal Aviation Act as amended (49 U.S.C. 1461 ("Section 801")), it is ordered that:

Section 1. If within 5 business days after receipt of copies of a recommended decision of the Civil Aeronautics Board ("The Board") submitted to the President under Section 801, the Secretary of State, the Secretary of Defense, or the Assistant to the President for National Security Affairs does not furnish to the Chairman of the Board a letter objecting to the release of such decision, the Board is authorized to release the text thereof. If objection is raised to part but not all of a recommended decision, only that part as to which a defense or foreign policy objection to disclosure has been raised shall be withheld. A lack of objection to release of a recommended decision implies nothing with respect to possible defense or foreign policy objections to the content thereof.

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Section 3. In order to improve the process whereby recommendations are made to the President for review under Section 801, the following guidelines should be observed in making recommendations for Presidential action under Section 801.

Recommendations by departments and agencies to the President in connection with decisions of the Board which are subject to approval by the President under Section 801 shall state specifically what foreign policy or defense objectives form the basis for such recommendations. Recommendations by departments and agencies with respect to regulatory matters, other than those involving considerations of defense or foreign policy (including international negotiations costs) which are the subject of recommendations to the President under Section 801, shall be made to the Board, on the public record, in accordance with the procedures of the Board. While some issues will inevitably involve both questions of regulatory policy and foreign policy, departments and agencies should make a conscientious effort to present as much of their views on regulatory matters on the record in proceedings before the Board, and raise only matters of defense or foreign policy that are of uniquely Presidential concern in the course of the review under Section 801. Changed factual conditions following the closing of the Board record may provide the basis for a recommendation that the case be returned for new fact findings as a basis for the President's review.

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or agent for any such party, prior to the President's decision; on a matter relating to the above and (b) referring any written communication from an interested private party, or an attorney or agent for any such party, to the appropriate department or agency. Exceptions to this policy may be made when the head of an appropriate department or agency finds that direct written or oral communication between a private party and a person within the Executive Office of the President is needed for reasons of defense or foreign policy.

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Section 7. The guidelines set forth in Sections 1 through 5 of this Executive Order are intended solely for the internal guidance of the departments and agencies to facilitate the Presidential review process, and not to confer rights on any private parties.

Section 8. To provide for a transition period, Sections 1, 2, 5 and 6 shall apply only to those recommended decisions of the Board submitted to the President 30 days after the effective date hereof and Sections 3 and 4 shall apply only to proceedings docketed at the Board 30 days after the effective date hereof.

THE WHITE HOUSE

THE WHITE HOUSE

WASHINGTON

April 16, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: ED SCHMULTS

SUBJECT: Memorandum to the President on Guidance and Procedures for Presidential Review of CAB Decisions dated April 15, 1976

When the above memorandum is submitted to the President, I believe it should be accompanied by the attached letter from Chairman Robson of the CAB. Speaking for the CAB, Chairman Robson states that the "procedures surrounding Executive Branch review of international aviation decisions have been persistently criticized as overly clandestine, subject to unseen influences, and open to second guessing by Executive agencies on economic arguments which neither the Board nor the parties have had a fair opportunity to consider or rebut in the hearing process." Chairman Robson states that the reforms proposed by the memorandum would be a vast improvement in the Presidential review process and advises that the Board strongly urges that the President approve such reforms.

Attachment

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

IN REPLY REFER TO:

April 15, 1976

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

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1. Steps to better assure that review of CAB recommended international aviation decisions will be directed to foreign policy and national security considerations.

2. Procedures to permit publication of CAB recommended decisions at or about the time the Board submits the decision to the President for review, instead of withholding publication until after the President has acted, as has been the practice.

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Mr. President, the procedures surrounding Executive Branch review of international aviation decisions have been persistently criticized as overly clandestine, subject to unseen influences, and open to second guessing by Executive agencies on economic arguments which neither the Board nor the parties have had a fair opportunity to consider or rebut in the hearing process.

We believe that reforms along the lines we understand are under consideration would mark a vast improvement in the system under which international aviation decisions are reviewed by the Executive and that these reforms can be accomplished without compromise of the President's legitimate interest in foreign policy and national security considerations in these matters. Accordingly, the Board strongly urges that you approve such reforms. We stand ready to provide any assistance we can in their implementation.

Respectfully yours,

(Signed) John E. Robson

John E. Robson
Chairman

THE CHAIRMAN
OF THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

OFFICIAL BUSINESS

POSTAGE AND FEES PAID
CIVIL AERONAUTICS BOARD

The President

The White House

Washington, D. C. 20500

THE WHITE HOUSE

WASHINGTON

April 20, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: MAX FRIEDERSDORF

SUBJECT: Edward Schmults memo 4/15/76
re: Guidelines & Procedures for
Presidential Review of CAB Decisions

The Office of Legislative Affairs has reviewed subject memorandum and offers no comment.

THE WHITE HOUSE

WASHINGTON

April 23, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: JIM CAVANAUGH

SUBJECT: Comments on Schmults Memo of 4/15/76 on Guidelines and Procedures for Presidential Review of CAB Decisions

We concur with Ed Schmults' memo on guidelines and procedures for Presidential review of CAB decisions and support Option C.

original returned to Cannaugh 4/23

THE WHITE HOUSE

WASHINGTON

April 23, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: JIM CANNON

SUBJECT: Comments: Schmults Memo of 4/15/76 on Guidelines and Procedures for Presidential Review of CAB Decisions

The President is empowered to review CAB decisions only when those decisions relate to international routes or fare schedules. Although this process does not directly raise domestic issues, the credibility of the Presidential decision-making process which Schmults' thoughtful memorandum addresses, cuts across the domestic/international line.

Several brief comments are in order:

1. Option C (Declaration of Presidential intention to exercise review power only on matters which the President deems of truly Presidential concern, etc.) appears to be the most desirable option. However, it may beg the ultimate question in that it does not set forth the standards by which to determine what is "truly Presidential" nor how that determination is made. It states only: "The President is the judge of what issues are important enough to rise to the level of a Presidential foreign policy concern." To the extent possible, a specific method should be spelled out so that the Presidential review process is less subject to attack as arbitrary and capricious.

   An example of why a more detailed process would be helpful is found in the last paragraph on page 10. The first sentence states that the President would ordinarily refrain from considering economic issues. The third sentence states that there will be economic issues which will raise important foreign policy considerations.

2. Option H (Judicial Review of CAB decisions in a limited class of cases) fails to provide for a final

decision-making process in a case where the court reverses a CAB decision, but there are no foreign policy considerations.

RECOMMENDATION

Due to the sensitive nature of these issues and decisions, I recommend that a revised memorandum be drawn up to address the questions presented.

old material

THE WHITE HOUSE
WASHINGTON

Jim -

You said you wanted to review this package.

I informed Mr. Schmults office that they were to add the comments from the Departments before the item could be staffed. I asked when they asked for the staffing back from the Departments and I was told March 10 --- I said I felt that was not enough time if the matter was to go - fully staffed - to the President no later than March 12.

Trudy 3/4/76

X6611

THE WHITE HOUSE
WASHINGTON

Jim -

This is a disaster --

I told Jane that --- when they do a memo they are to get the comments from the Depts. before it comes here -- and we get the staff comments.

So many pages --- it is not fair to the President.

Schmults & Treadway by comments by 3/10 — I told Jane this is too late x

THE WHITE HOUSE

WASHINGTON

March 3, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: ED SCHMULTS

SUBJECT: Proposed Guidelines and Procedures for Presidential Review of CAB Decisions

Attached is a draft Presidential decision memorandum concerning possible changes in the manner in which orders of the Civil Aeronautics Board that require Presidential approval under Section 801 of the Federal Aviation Act are processed within the White House.

The matter is one of considerable urgency, both because of a pending court action (concerning release of CAB decisions before action by the President) and because a decision on the recommended reforms should be made before a major new CAB case comes to the White House, which could be at the end of this month. The recommended decision would involve the processing of an executive order following action on this decision memorandum, which adds to the time pressure. For these reasons, the memorandum should go to the President no later than Friday, March 12.

Since the issues involved and the proposed executive order affect a number of Executive Agencies outside the White House, I am submitting copies for clearance simultaneously to The Departments of State, Defense, Justice, Transportation and Commerce.

cc: The Attorney General (Attention: Messrs. Scalia and Kauper)
The Secretary of State (Attention: Robert Ingersoll)
The Secretary of Defense (Attention: Len Niederlehner)
The Secretary of Commerce
The Secretary of Transportation (Attention: John Barnum)

REVISED DRAFT 3/3/76

MEMORANDUM FOR THE PRESIDENT

FROM: EDWARD C. SCHMULTS

SUBJECT: Guidelines and Procedures for Presidential Review of CAB Decisions

The Presidential power to approve or disapprove CAB decisions in international cases is coming under increasing criticism, and proposals have been made that Congress pass legislation to limit the substantive grounds of review and assure procedural fairness. */ To address the concerns that have been raised, this memorandum proposes options to improve the Presidential review process by revising the substantive grounds of review and imposing certain procedural requirements.

1. Background

(a) The Presidential Authority to Review CAB Decisions

The President has two kinds of review authority over CAB decisions under Section 801 of the Federal Aviation Act:

-- Under 801(a) Board actions affecting the certificate of an air carrier -- i.e., route awards and mergers -- affecting overseas

*/ The Aviation Subcommittee of the Senate Commerce Committee will begin hearings on the Administration's proposed Aviation Act (S. 2551) on April 6. The Subcommittee may broaden the hearings to include regulatory reform matters not included in S. 2551 and a review of the President's approval authority over CAB decisions.

or foreign air transportation are subject to the approval of the President. */

-- Under 801(b), if the CAB exercises its power to disapprove an international fare schedule, the President may disapprove that order not later than 10 days following submission to the President. **/

(b) Rationale for the Authority: Legislative History

The Congressional purpose in giving the power of approval to the President in international and overseas cases was in recognition of the President's unique constitutional responsibilities for foreign policy and national defense. It was felt that there were both foreign policy and defense aspects to the choice of routes and carriers, and

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*/ "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof." 49 U.S.C. 1461(a)

**/ "Any order of the Board pursuant to section 1482(j) of this title suspending, rejecting, or canceling a rate, fare, or charge for foreign air transportation, and any order rescinding the effectiveness of any such order, shall be submitted to the President before publication thereof. The President may disapprove any such order when he finds that disapproval is required for reasons of the national defense or the foreign policy of the United States not later than ten days following submission by the Board of any such order to the President." 49 U.S.C. 1461(b)

the setting of rates. The floor debates made specific reference to the importance that foreign nations attached to airline matters. Defense was emphasized in connection with the selection of flight paths and access by foreign carriers to areas near U.S. defense installations, and in the selection of airport sites. The argument was made that such decisions were executive in character and should be left to the President.

As a legal matter, therefore, the review authority under both 801(a) and (b) was intended to preserve the prerogatives of the President in matters of defense and foreign policy, and should be exercised only for those purposes. These criteria are very broad, but they do suggest that Presidential review should not, for the most part, be concerned with errors of fact or law, or with economic questions, that do not arise from some defense or foreign policy concern of the President. At the same time, it is often difficult (and sometimes not desirable) to separate "economic questions" from "foreign policy" concerns.

(c) Problems Raised

Over the years, aviation commentators have raised a number of problems with respect to the White House review process:

(1) Substance. There are no guidelines as to the kinds of substantive issues appropriate for consideration by the President. Continuing disagreement arises within the Executive Branch and the White House staff over what issues are relevant. Political and economic factors are often invoked by interested parties, and there have been allegations that the President's power has been abused. The American Bar Association, despite a study conclusion that the power has not been abused, is on record in favor of a partial withdrawal of this Presidential power,*/ and Senator Magnuson is said

*/ The December 31, 1975, Report of the CAB Advisory Committee on Procedural Reform, with some vigorous dissents, endorsed the ABA's somewhat ambiguous proposal to withdraw the 801 authority "in a manner which will preserve the President's constitutional rights and obligations in the fields of national defense and foreign relations while removing domestic political considerations from the decision-making process and assuring availability of judicial review." (p. 24)

to be planning legislation that would bar the President from deciding which airline should receive an award.

(2) Procedures. There are no procedural restrictions governing access by interested parties to members of the White House staff. Many interested parties seek to argue their cases in ex parte contacts with the staff, while others scrupulously avoid any communication with us. This situation is perceived by some to be both unfair and conducive to appearances of impropriety. It is all the more so, the critics assert, in light of the open hearing on the record before the CAB. A similar problem is said to exist in the departments and agencies.

(3) Release of CAB Decision. The CAB is barred by statute from publishing its recommended decision until after submission to the President, but in practice the Board's decision continues to be withheld following submission until after the President has acted. As a result, during the White House staff review, some parties obtain copies of the opinion surreptitiously, while others are unable to address their arguments to the specifics of the Board's decision.

(4) Judicial Review. The courts presently will not review Section 801 orders because until the President approves them they are not sufficiently "final" and after the President acts on them, they constitute "political action". In deciding Section 801 cases, however, the Board engages in complex adjudication of regulatory issues that in all other cases are subject to judicial review. Lacking judicial review, parties -- and departments and agencies -- have alleged legal and factual errors of a kind that would normally be decided by courts as grounds for Presidential disapproval. It is possible that a disclaimer of Presidential interest accompanying approval of a Board decision will operate to preserve judicial review with respect to errors by the Board.*/

2. The Basic Dilemma

These problems arise because the statute superimposes executive approval on an adjudicative type administrative proceeding. This is

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*/ You attempted to do this in the recent Allegheny decision. There is as yet no court decision confirming or rejecting this approach.

unique to the CAB. The issues that come before the Board include questions of the impact of route awards on competing airlines, compatibility of a route award or fare decision with the overall route or fare structure, economic viability of the route and the ability of the carriers to perform. Resolving these questions fairly calls for the full panoply of due process -- hearings with witnesses, a formal record, the right to introduce evidence and a more or less adversary hearing. Neither the White House nor the Executive Branch generally is equipped to duplicate or review all of the aspects of such a process. That kind of review is the normal function of the courts, not the executive function of insuring that the decision is compatible with defense and foreign policy objectives of the President.

The temptation has been irresistible, however, for the interested parties and government agencies to reargue many of the same economic issues decided by the Board. When this is done through ex parte contacts at the White House or in the departments and agencies, the procedural safeguards to assure fairness are lacking and appearances of impropriety can arise.

There are no simple solutions to these problems. But it is clear that there has been an increasing tendency to argue here matters that relate primarily to economic and regulatory issues decided by the Board, and which some may view as having only a remote connection to defense or foreign policy objectives as such. Action to improve the Section 801 review process should be viewed by many as a significant "good government" effort on your part; inaction may result in a reduction or loss of your existing power.

The questions raised are thus both substantive and procedural: Substantively; what should be the proper scope of the terms "defense" and "foreign policy"? Procedurally, what changes should be made in the White House review to address the concerns expressed about the perceived "fairness" of the process? The answers to these questions may be interrelated, since a broad substantive review arguably creates a greater need for formal procedures than if substantive issues were largely excluded. We begin, therefore, with the substantive options.

3. Substantive Options as to the Scope of Presidential Review

Option A: A broad, flexible definition as used in the past

Under this option, the scope of the Presidential review of CAB decisions would not be changed. The meaning of "defense" is fairly clear and has not been the subject of controversy. The expansive term is "foreign policy", which has been broadly interpreted to embrace a variety of Presidential policies, including competition, anti-inflation policies, errors of law, regulatory reform, and the financial health of the international U.S. flag carriers.

Pro:

-- A broad, flexible interpretation enables the President to correct many overly restrictive, anti-competitive attitudes of the CAB in international markets. In the context of regulatory reform, it is possible to implement procompetitive international policies under existing authority without waiting for legislative action. It also enables the President to carry out directly other Presidential transportation and economic policies with significant foreign policy overtones.

Con:

-- Critics of the present process assert that it involves the President in a review on the merits of issues better left to the CAB's regulatory expertise and deprives parties of judicial review on issues with no defense or foreign policy significance.

Option B: Issue a definition of defense and foreign policy

(1) Under this option, after appropriate consultation with the government agencies involved, the term "foreign policy" would be defined for Section 801 purposes to include certain matters and exclude others. Thus, an Executive Order could prescribe that foreign policy considerations will include, for example, one or more of the following:

-- Questions of international aviation policy, which can be further defined to include or exclude issues of competition, transportation policy and financial health of the airlines.

-- Anti-inflation objectives.

-- De-regulation objectives.

Pro:

-- The rationale for Presidential consideration of certain issues would be more clearly stated than in the past, thus reducing appearances that the power is being abused.

-- Providing specific criteria would give the parties a basis for presenting their arguments to the President.

Con:

-- In practical effect, there would be no change in terms of what arguments the parties can make. Attempting to define in advance what are and are not foreign policy issues cannot be done with precision.*/

-- Setting specific grounds for Presidential review could stimulate the parties to appeal to the President with greater frequency and create

*/ For example, in the Service to Saipan case, the State Department raised the issue of the desirability of a direct circle route to the Micronesia market as a foreign policy matter, but this is also an issue that the Board must consider. The State Department also argued the prospective impact of Japanese pressure for additional routes to the United States on other airlines, but this is again an issue that must be considered by the Board.

additional pressure for procedural formalities. It could also imply the creation of substantive rights and lead to judicial review of the Presidential action.

-- If the "foreign policy" definition includes some concept such as "international aviation policy" or "international economic policy", it will be argued that the President can substitute his regulatory policies for those of the CAB in international cases. If it is decided to refrain from what can be alleged to be "regulatory intervention", Option C would appear to be more effective than a definition of "foreign policy."

(2) A variant on this option would be to specify in the "foreign policy" definition that the President would not in his review choose one carrier over another. Newspapers have reported an interest in legislation to bar Presidential power to so choose.

Pro:

-- The potential for appearances of impropriety is great when the Board is reversed on the selection of a particular carrier.

-- Accepting this limitation could reduce pressure for legislation.

Con:

-- Decisions on matters other than carrier selection per se can have just as much impact on a carrier, such as whether or not to establish or continue a route. The "reform" would be more apparent than real.

-- Genuine foreign policy problems can involve the selection of a carrier.

-- Other reforms could be equally or more effective in deterring legislation.

Option C: Do not limit your authority by a definition of foreign policy, but declare your intention to exercise your review power only on matters which you deem to be of truly Presidential concern; and direct executive agencies to present to the CAB on the record any views which they may have on regulatory policy.

A more practical approach than defining "foreign policy", which could result in a contraction of Presidential power, would be to signal your intention to place greater reliance on the CAB process to ascertain facts, decide routine economic questions and, in general, establish regulatory policies. Presidential power would be fully preserved, since the President is the judge of what issues are important enough to rise to the level of a Presidential foreign policy concern. Less important matters can be dismissed on the ground that they don't rise to that level of concern, without saying that the President lacks power to consider them. In some cases, where the Executive agencies are concerned that the facts of record on which the Board based its decision are out of date, you can request adequate fact findings as a predicate for your defense or foreign policy judgments.

The major innovation would be to force executive agencies to categorize their views as either (a) so exceptional as to warrant Presidential consideration under Section 801, or (b) as regulatory issues that should be presented to the Board (and on the record, except as confidentiality may be required for reasons of national security). In the past, there has been no mandate to make such a choice, which has led to the arguing of all agency policies through the Section 801 review, without regard to their level of importance or relationship to Presidential concerns. The essence of this option is to sort out the issues of detail that don't warrant Presidential attention by establishing a test of defense or foreign policy importance rather than a restriction on the extent of the President's powers.

The policy represented by the option would recognize that while the President has sole responsibility for the conduct of foreign policy, Congress has a substantial role in prescribing international economic policy, and it has given the Board regulatory power over international as well as domestic aviation questions. Since the 801 power is a recognition of the Presidential power to conduct foreign policy, it does not diminish that power to suggest that the President need not review those economic and regulatory issues in international aviation cases which have been thoroughly aired before the Board and do not have a material impact on foreign policy.

While it is impractical to set forth, in a hard and fast manner, categories of issues that should not be reargued before you, under this option you would ordinarily refrain from considering issues of competition, inflation, financial health of airlines, the viability of routes, or transportation objectives, which fall within the administrative competence of the Board. While the possibility that such issues could rise to the level of a foreign policy issue in particular cases cannot be excluded, the point is that foreign policy should not be invoked by government agencies and interested parties merely as a rationale for Presidential review of matters better left to CAB expertise. Of course, there will be cases where considerations of international trade or economic policy will be important components of foreign policy and so of Presidential concern. For example, maintaining competitive, financially viable U.S. carriers on specific routes may be a foreign policy objective in itself.

Since the real problem here may be one of attitude or approach of the Executive Branch agencies in making 801 recommendations, an emphasis on procedural improvements and the function of the Section 801 review process may encourage the agencies to take a more restrictive approach and to view the President's approval power, not as a lever for making regulatory policy across the board in international aviation cases, but as a mechanism to protect his own prerogatives on matters of defense or foreign policy.*/

*/ The mere filing of a protest by a foreign government should not suffice to create a foreign policy reason to disapprove or modify the Board's decision. It should be recognized that private parties lobby foreign governments as well as our own, and that foreign governments are receptive from time to time to the protection of vested interests. The criterion should be not whether the foreign government agrees with the CAB's decision but whether that disagreement is serious enough to cause a foreign policy problem if the decision is allowed to stand.

This option would not prevent the Council on International Economic Policy, or the Departments of State, Justice, Commerce or Transportation from injecting substantive policy views on all issues into CAB proceedings, and on grounds including, but not limited to, defense and foreign policy. This may and should be done on the record before the Board. Such substantive policies which are within the purview of the Board should be separated wherever possible from the grounds which should occasion Presidential review under Section 801.

Pro:

-- The President's power to review international aviation matters would not be contracted but, as a practical matter, the scope of Presidential review would be reduced in many cases by encouraging government agencies and interested parties to abide by CAB resolution of the issues.

-- The reason that the Section 801 power has become a problem to some aviation commentators is that in their view it has been used to review the substance of regulatory issues better left to the CAB. Thus, they argue that the only effective solution is to exclude regulatory issues wherever possible from Presidential review.

-- It would avoid the need for formal procedures to better assure due process within the White House (Procedural Option D). It is the logical counterpart of procedural Option E below.

Con:

-- The President's role in determining regulatory policy in international aviation would be reduced. Implementation of an Executive international aviation policy might have to rely on other means than the Section 801 authority.

-- In any particular case, it may be difficult to determine which arguments rise to a level of truly Presidential importance.

Decision:

Approve Option ___A: A broad, flexible definition as used in the past.

___B: __ (1) Issue a restrictive definition of defense and foreign policy.
__ (2) Abstain from the choice of a carrier.

___C: Do not limit your authority by a definition of foreign policy, but declare your intention to exercise your review power only on matters which you deem to be of truly Presidential concern; and direct executive agencies to present to the CAB on the record any views which they may have on regulatory policy. (Recommended by Counsel to the President, _____ _____)

___ Comment:

4. Procedural Options as to Contacts with White House Staff and Matters to be Presented to CAB

Option D: Adopt formal procedures for the Presidential review.

Ex parte contacts with White House personnel would be banned. Written comments from the parties would be accepted by the White House staff, but a docket would be established so that copies were available to all interested parties. Oral contacts by private parties would be limited to meetings or hearings to which all interested parties (private and government) would be invited. All written materials submitted by government agencies would be made part of the public record subject to the usual exceptions for national security and proprietary information.

Pro:

-- This would regularize the review process and hopefully limit appearances of impropriety. It would be the logical procedural counterpart of substantive Options A or B.

Con:

-- The existence of such procedures invites the parties to reargue the same issues already decided by the Board.

-- It would involve the White House staff in a kind of operational activity and level of detail that go beyond its normal functions.

-- In some cases, Defense and foreign policy issues require confidential internal communications rather than on the record presentations and so establishing a docket for communications of the agencies would create more problems than it would solve.

Option E: Bar contacts by private parties with the White House staff; require that Executive agencies state their economic and regulatory views in the Board's proceeding and give the Board notice of any intention to make additional recommendations to the President on defense or foreign policy grounds; views of private parties would be conveyed to the President through the departments; in each category exceptions would be permitted as required by foreign policy or defense needs.

This Option is the procedural counterpart of substantive Option C which would place greater reliance on the CAB regulatory process. Executive agencies could express substantive views on matters beyond the scope of 801, but on the record before the CAB. Purely economic or regulatory arguments would have to be made initially to the Board. As to matters subject to 801 review, they should indicate whether they will have a recommendation or objection if

such an issue is identifiable during the proceeding before the Board. The 801 review process would be limited to genuine foreign policy and defense issues which normally involve confidential communications rather than formal procedures. To provide some discipline and to improve the Board's role as expert advisor to the President, executive agencies which present a point to the President that they have not made to the Board could be required to explain why the Board was not given an opportunity to consider it. There are, of course, legitimate reasons for agencies to change their views on the basis of new facts or circumstances, or simply upon reconsideration; but to the extent possible, the Board should be given the first opportunity to consider them.

Pro:

-- Ex parte contacts with the White House staff would be eliminated.

-- The President and his staff would be freed from involvement in substantive issues decided by the CAB.

-- Executive participation in formulating international aviation policy would be preserved, but separated from the more limited purpose of the 801 review. The threat of legislative restriction of the 801 power should also be reduced.

Con:

-- As to 801 issues of foreign policy and defense, their discussion typically requires confidential communications which makes it difficult for the State Department to explain its views on the record. However, the statements required by Defense and State to the CAB on 801 matters could be limited to their conclusions and so much of their reasoning as does not require confidentiality. As long as the Board knows what that objection is, it can frame its recommended decision either to avoid that objection or, in the alternative, to state what its decision would be if the President agrees with the Departmental view or

what the Board would recommend if he disagrees. Exceptions would be allowed for cases in which foreign policy embarrassment could result from disclosure of the sole fact that the State Department has made a recommendation, though Executive agencies should be informed, subject to normal classification safeguards.

-- Some parties will complain that they are denied access to the President on foreign policy issues, though legitimate exceptions would be possible.

Option F: Make no change

Pro:

-- Preserves maximum access by all parties.

Con:

-- Presents an appearance of unfairness.

Decision:

Approve Option ___D: Adopt formal procedures for the Presidential review

___E: Bar contacts by private parties with the White House staff; require that Executive agencies state their economic and regulatory views in the Board's proceeding, and give the Board notice of any intention to make additional recommendations to the President on defense or foreign policy grounds; private parties' views would be conveyed to the President through the departments; exceptions would be permitted as required by foreign policy or defense needs (Recommended by Counsel to the President, _____ _____)

___F: Make no change

___ Comment

5. Other Section 801 Matters

Option G: Authorize release of the Board's recommended decision

As noted on page 4, paragraph (3) above, the Board has followed the practice of withholding its recommended decisions after sending them to the President until he acts on them. The decisions are often leaked to the parties, and are eventually published after the President acts. In unusual cases, there may be a defense or foreign policy reason for withholding all or part of a Board decision. A screening process that would give the President an opportunity to object to release within 5 days should accommodate this requirement.

Pro:

-- There is no need for confidentiality other than possible defense or foreign policy reasons, which are accommodated by a 5-day notice and opportunity for you to prevent release.

-- There is a lawsuit pending to compel release which could be rendered moot by your action.

Con:

-- Making the CAB decision available to the parties may result in more appeals to the President. This, however, already happens despite the lack of formal release.

Approve _____ (Recommended by Counsel to the President)

Disapprove _____

Option H: Preserve judicial review except where expressly stated otherwise

The purpose of barring judicial review is that courts should not pass on questions of foreign and defense policy. On issues where the President does not make such a decision, there is no apparent reason for depriving the parties of the opportunity for judicial review. There are some legal doubts as to your authority to resolve this by Executive Order, but the Department of Justice believes that there is a good case in favor of such authority.

Pro:

-- Preserves the parties' rights and avoids argument of legal errors during the Presidential review process.

-- Increasing access to the courts is a significant and concrete element of reform that would add credence to your action as good government; omission of this element could attract criticism for not doing the whole job.

Con:

-- The Department of Justice cautions that the courts might carry this to the point of reviewing all orders that relate to domestic carriers.

Approve _____ (Recommended by Counsel to the President)

Disapprove _____

Option I: Issue an Executive Order embodying reforms

There is presently no published guideline on conduct of the Presidential review under Section 801. If you decide to make significant substantive or procedural changes, an Executive Order would be an effective way of stating your policy. An illustrative draft embodying the recommended Options C, E, G and H is attached. Since the issuance of an Executive Order involves a

more extensive clearance procedure than this decision memorandum, an Order would be processed and submitted to you following your decisions herein.

Pro:

-- If you decide to make a substantial change such as proposed in Options C and E, an Executive Order would be an affirmative statement of your intention to improve what some view as an unfair process and serve as a guideline for conduct by government agencies and private parties.

Con:

-- If you decide to make no substantial change, issuing an Order would serve no clear purpose.

Approve _____ (Recommended by Counsel to the President)

Disapprove _____

In addition to the options presented above, there have been recommendations that the Chairman of the CAB be included in the White House review process and that the internal staffing procedure be reviewed and revised. The former may be desirable on particular occasions, and can always be done on a discretionary basis. However, it does not appear desirable to bind yourself at this time to such a procedure by any formal action. Likewise, internal staffing arrangements can be reviewed following your decisions on the Section 801 process and they need not be included in an Executive Order.

DRAFT

EXECUTIVE ORDER

PRESIDENTIAL APPROVAL OF DECISIONS BY THE CIVIL AERONAUTICS BOARD PURSUANT TO SECTION 801 OF THE FEDERAL AVIATION ACT

By virtue of the authority vested in me by the Constitution and laws of the United States, including Section 801 of the Federal Aviation Act as amended (49 U.S.C. 1461 (Section 801)), it is ordered that:

Section 1. Recommendations by Federal departments and agencies to the President in connection with decisions of the Civil Aeronautics Board (Board) which are subject to approval by the President under Section 801 shall state specifically what foreign policy or defense objectives form the basis for such recommendations. Issues that relate primarily to economic or regulatory policy, as such, should ordinarily not be the basis for recommended approval or disapproval under Section 801. Recommendations by departments and agencies with respect to economic and regulatory matters, other than considerations of defense and foreign policy matters which are the subject of recommendations to the President under Section 801, shall be made to the Board, on the public record, in accordance with

the procedures of the Board. While some issues will inevitably involve both questions of regulatory policy and foreign policy, executive agencies should make a conscientious effort to present as much of their views as possible in economic and regulatory terms on the record in proceedings before the Board, and raise only exceptional matters of defense or foreign policy that are of uniquely Presidential concern in the course of the limited review under Section 801. Changed factual conditions following the closing of the Board record may provide the basis for a recommendation that the case be returned for new fact findings as a basis for the President's review.

Section 2. Departments and agencies which intend to make recommendations to the President on matters of defense or foreign policy for purposes of Section 801 shall, consistent with the confidentiality required for reasons of defense or foreign policy, make the existence of such intentions and the conclusions to be recommended known to the Board in the course of its proceedings. The requirements of defense or foreign policy may, in appropriate cases, require that the existence of a defense or foreign policy recommendation remain confidential. Any recommendation made to the President by a department or agency in the course of the Section 801 approval

process that has not previously been conveyed to the Board shall be so identified, together with an explanation as to why the Board was not notified. No provision of this Executive Order is intended to prevent any agency for good reason from changing its position and conveying such changed position to the President.

Section 3. No person within the Executive Office of the President shall discuss matters relating to the disposition of a case subject to the approval of the President under Section 801 with any interested private party prior to the President's decision; and any written communication from interested private parties shall be referred to the appropriate department or agency. Exceptions to this prohibition may be made when the head of an appropriate department or agency finds that direct written or oral communication between a private party and a person within the Executive Office of the President is needed for reasons of defense or foreign policy. Departments and agencies which make recommendations to the President pursuant to the Section 801 approval process shall establish public dockets for all written communications between their officers and employees and private parties in connection with the consideration of such recommendations and shall prescribe such other procedures governing oral and written communications as they deem appropriate.

Section 4. If within 5 business days after receipt of copies of a recommended decision of the Board submitted to the President under Section 801, the President does not furnish to the Chairman of the Board a letter objecting to release of such decision, the Board is authorized to release the text thereof. The President will ask for the views of the Departments of State and Defense, and the Assistant to the President for National Security Affairs as to whether foreign policy or defense considerations require that such decision not be released. If objection is raised to part but not all of a document, only that part as to which a defense or foreign policy objection to disclosure has been raised shall be withheld. A lack of objection to release of a document implies nothing with respect to possible defense or foreign policy objections to the content of the order.

Section 5. Approval by the President of a decision of the Board pursuant to Section 801 is not intended to deprive any party of an opportunity to obtain judicial review of the Board's decision, unless expressly stated to the contrary.

THE WHITE HOUSE