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## Admissibility of National Transportation Safety Board Reports in Civil Air Crash Litigation

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# **ADMISSIBILITY OF NATIONAL TRANSPORTATION SAFETY BOARD REPORTS IN CIVIL AIR CRASH LITIGATION**

**ROY TRESS ATWOOD**

## **INTRODUCTION**

[T]he pilot of the DC-3 reported smoke in the cockpit of the aircraft shortly after 5 p.m. and requested radar directions to the nearest airports . . . .

Shortly thereafter, he reported that he was not able to make it to those airports and was going to attempt an off-airport (emergency) landing . . . .

The DC-3 clipped a power line . . . .and skidded through [a] pasture, leaving a trail of flames before striking a grove of trees . . . .

National Transportation Safety Board investigator Tommy McFall of Fort Worth arrived at the crash site shortly before midnight.<sup>1</sup>

**T**ODAY, THE GENERAL public readily recognizes the role of the National Transportation Safety Board (NTSB) in air crash investigation. The shock that accompanies a major tragedy such as the crash of a commercial airliner attracts significant public attention. Much of the publicity following a disaster centers around determining the cause of the crash. Instinctively, people wonder why such a tragedy occurred and who was responsible. Congress has charged the NTSB with the job of determining

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<sup>1</sup> The Dallas Morning News, Jan. 1, 1986, at 14A, col. 1. The accident described led to the death of singer Rick Nelson and members of his group. The plane, owned by Nelson, was enroute to Dallas where the group was to perform at a New Year's Eve celebration.

the probable cause of airplane crashes.<sup>2</sup>

Most airplane crashes lead to litigation. Congress has not defined the NTSB's role in that litigation nearly as well as they have defined the NTSB's role in investigating accidents. Congress originally required that the NTSB not participate at all in civil disputes.<sup>3</sup> Judicial interpretation soon got the NTSB involved, however.<sup>4</sup> That involvement was then defined and limited through regulation.<sup>5</sup> The courts have recognized these regulations, but recent decisions have raised new problems with the role of the NTSB that demand attention.<sup>6</sup>

This comment begins with a review of the NTSB's changing participation in civil litigation emanating from aircraft accidents. Part I outlines early legislation governing aviation accident investigation. Part II looks at the early case law involving accident reports and testimony of investigators. Part III examines the legislative response to these decisions. Part IV highlights some of the current problems that exist in using the results of NTSB investigations as evidence at trial. Finally, Part V contains recommendations on how the NTSB's role can be improved in light of conflicting interests.

## I. EARLY LEGISLATION<sup>7</sup>

Since its initial regulation of air travel, Congress has assigned a governmental body the responsibility of determining and reporting the cause of accidents. The first legislation governing civil aviation in the United States was the Air Commerce Act of 1926 (the Act).<sup>8</sup> The Act

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<sup>2</sup> See *infra* note 26 and accompanying text for discussion.

<sup>3</sup> See *infra* note 27 and accompanying text for discussion.

<sup>4</sup> See *infra* notes 57 and 104 and accompanying text for discussion.

<sup>5</sup> See *infra* notes 105-144 and accompanying text for discussion.

<sup>6</sup> See *infra* notes 145-191 and accompanying text for discussion.

<sup>7</sup> See generally Miller, *Aviation Accident Investigation: Functional and Legal Perspectives*, 46 J. AIR L. & COM. 237, 237-54 (1981) (thorough history of air accident investigation legislation). During his career, Mr. Miller served as the Director of the Bureau of Aviation Safety of the NTSB.

<sup>8</sup> Pub. L. No. 69-254, 44 Stat. 568 (1926) [hereinafter the Act].

called for the Secretary of Air Commerce (the Secretary) to "investigate, record and make public the causes of accidents in civil air navigation."<sup>9</sup>

In 1934, as the air travel industry began to grow, Congress amended the Act to enable the Secretary to improve accident investigation.<sup>10</sup> The amendment empowered the Secretary to hold hearings and subpoena witnesses and documents.<sup>11</sup> The amendment also prohibited using the Secretary's report in litigation arising from the accident investigated.<sup>12</sup> This same prohibition exists today, although, as this comment explains, it has experienced an interesting metamorphosis since its inception in 1934.

In 1937 the Secretary adopted administrative regulations which created the first accident investigation panel.<sup>13</sup> The panel consisted of three employees of the Department of Commerce and two non-employees who acted as advisors.<sup>14</sup> Over the thirty years that followed, this panel evolved into the current NTSB.

The death of a colleague in 1935 jolted Congress into action. Senator Bronson M. Cutting was killed when the plane in which he was a passenger crashed enroute from New Mexico, his home state, to Kansas.<sup>15</sup> As a direct result of the accident, Congress eventually passed the Civil Aeronautics Act of 1938 (the 1938 Act).<sup>16</sup> The 1938 Act created the Civil Aeronautics Authority and consolidated all government involvement in aviation within one agency.<sup>17</sup> One of three departments within the Civil Aeronautics Authority was the Air Safety Board.<sup>18</sup> Congress created the board to determine the cause of accidents and recommend ways to avoid similar accidents from occur-

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<sup>9</sup> *Id.*

<sup>10</sup> Pub. L. No. 73-418, 48 Stat. 1113 (1934).

<sup>11</sup> *Id.* § 2(e).

<sup>12</sup> *Id.*

<sup>13</sup> 14 C.F.R. § 91.0-37 (1939).

<sup>14</sup> Miller, *supra* note 7, at 239.

<sup>15</sup> *Id.*

<sup>16</sup> Pub. L. No. 75-706, 52 Stat. 973 (1938)[hereinafter the 1938 Act].

<sup>17</sup> *Id.*

<sup>18</sup> Miller, *supra* note 7, at 240.

ring.<sup>19</sup> Unfortunately, organizational problems abounded under the 1938 Act, and Congress soon passed new provisions in an attempt to cure the problems through reorganizing the agency.<sup>20</sup>

In 1940, Congress created a separate agency, the Civil Aeronautics Board (CAB).<sup>21</sup> The CAB coexisted with the Civil Aeronautics Authority until passage of the Federal Aviation Act of 1958 (the 1958 Act).<sup>22</sup> During this period of time, accident investigation responsibilities rested with the Bureau of Safety.<sup>23</sup>

The 1958 Act created the Federal Aviation Administration (FAA) and redefined the responsibilities of the CAB.<sup>24</sup> The CAB took over accident investigation responsibility which included determining probable cause.<sup>25</sup> Congress mandated that the CAB conduct thorough investigations of the people and machines involved in air accidents and recommend changes that would help pro-

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<sup>19</sup> *Id.* The role of the Air Safety Board was to "investigate accidents and make determinations of probable cause, release its findings to the public, recommend measures to prevent accidents, and make the rules necessary to fulfill all of these functions." *Id.*

<sup>20</sup> *See id.* at 240-41. Miller quoted a Commerce Department memorandum concerning the disorganization as stating:

The chief weakness of our present accident investigation lies in the fact that the investigatory body has no power to change any safety rules. All it can do is to report the probable cause of the accident to the rule-making body and make *recommendations* for changes in the safety rules designed to prevent similar accidents in the future. The rule-making body, the [Civil Aeronautics] Authority, may accept or reject such recommendations.

*Id.* at 241 (quoting Memorandum from Undersecretary of Commerce E. J. Noble to Secretary Hopkins in support of the Aviation Provisions of Reorganization Plans III and IV (April 23, 1940)).

<sup>21</sup> Miller, *supra* note 7, at 241.

<sup>22</sup> Pub. L. No. 85-726, 72 Stat. 731 (1958) [hereinafter the 1958 Act].

<sup>23</sup> Miller, *supra* note 7, at 242-43.

<sup>24</sup> The 1958 Act, *see supra* note 22.

<sup>25</sup> Miller, *supra* note 7, at 244. The legislation separated the fact finding, done by the FAA, from determining the probable cause, done by the CAB, so that the agencies avoided the appearance of protecting each other. *Federal Aviation Act: Hearings on H.R. 12616 Before Subcomm. of the Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 31-32 (1958)* (statement of Gen. E. R. Quesada, Chairman, Airways Modernization Board).

hibit similar incidents from recurring.<sup>26</sup> The CAB received a clear edict: prevent future accidents by finding the cause of those that do occur.

Section 701(e) of the 1958 Act unequivocally set forth the role that CAB reports were to play in civil litigation. That section stated that litigants could not attempt to admit CAB reports into evidence in any suit arising out of any accident mentioned in the report.<sup>27</sup> Congress' intent in including section 701(e) was not clear. The section actually began as an amendment to the 1938 Act.<sup>28</sup> As noted in 1950 by John W. Simpson, an attorney with the Bureau of Law, Civil Aeronautics Board, "The exact scope and purpose of [the amendment] are at the present time the subject of great uncertainty . . ."<sup>29</sup> Little legislative history accompanied passage of this section.<sup>30</sup> Apparently though, Congress wanted to insure that CAB reports would not supplant the role of judge and jury in

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<sup>26</sup> Miller, *supra* note 7, at 244. The 1958 Act required the CAB to make recommendations to the FAA Administrator that, in its opinion, would tend to prevent similar accidents in the future; to conduct special studies pertaining to the prevention of accidents; and to preserve and otherwise examine aircraft parts and property involved in an accident and, in the case of fatal accidents, to have autopsies conducted.

*Id.*

<sup>27</sup> The 1958 Act, *supra* note 22, § 701(e) (codified in 49 U.S.C. app. § 1441(e) (1982)). The Section reads:

No part of any report or reports of . . . the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

*Id.*

<sup>28</sup> The 1938 Act, *see supra* note 16, § 701(e); *see also* Simpson, *Use of Aircraft Accident Investigation in Actions for Damages*, 17 J. AIR L. & COM. 283 (1950).

<sup>29</sup> Simpson, *supra* note 28, at 283.

<sup>30</sup> *See id.* at 284 n.3.

The only legislative history on this section is a statement by Mr. Henry Allen Johnston of the Committee on Aeronautics, Association of the Bar, New York, N.Y., to the effect that accident investigation records could not be used for any purpose in any litigation. Since there is no evidence that Congress, or even the Subcommittee, did or did not agree with his statement, it would seem to have little or no probative value in determining the intent of Congress.

*Id.*

determining the cause of accidents and encourage accurate and unencumbered investigation by keeping the CAB separated from liability determination.<sup>31</sup> The CAB adopted regulations proscribing investigators from testifying so as to avoid having the reports brought into litigation through expert testimony. With no clear congressional intent, the judiciary freely lent its interpretation to the seemingly plain language of section 701(e).

## II. EARLY CASE LAW<sup>32</sup>

As the aviation industry grew and prospered, the number of accidents increased, as did the number of deaths and injuries resulting from each accident. Large scale law suits ensued and attorneys naturally sought to use CAB reports when they supported their claim or defense. Beginning in 1951, the courts attacked the prohibition set forth in section 701(e). The first case in a series that spanned twenty years was *Universal Airline, Inc. v. Eastern Air Lines, Inc.*<sup>33</sup>

### A. *Universal Airline, Inc. v. Eastern Air Lines, Inc.*

In 1951, Universal Airline appealed the district court decision in a suit arising from a mid-air collision between a Universal DC-3 and an Eastern DC-4.<sup>34</sup> Universal Airline sued Eastern for damages, alleging that the negli-

<sup>31</sup> 1 L. KREINDLER, AVIATION ACCIDENT LAW § 18.01[2] (1971).

<sup>32</sup> For a discussion of these cases see Dombroff & Hatfield, *Documentation for Aircraft Accident Litigation*, TRIAL, Aug. 1984, at 70, 71; Papadakis, *Admissibility of Aircraft Accident Reports: An Update*, 18 S. TEX. L.J. 519, 521 (1977); Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297, 315-19 (1972); Welch & Faulk, *The Use of Aviation Accident Reports By Civil Litigants: The Historical Development of 49 U.S.C. [sic app.] Section 1441(e)*, 9 PEPPERDINE L. REV. 583, 586-91 (1982).

<sup>33</sup> 188 F.2d 993 (D.C. Cir. 1951).

<sup>34</sup> *Id.* at 995-96. The two planes involved were both headed from Newark, New Jersey to Miami, Florida. The Universal plane took off fifteen minutes before the Eastern plane, but travelled fifty miles per hour slower. Each plane received instructions to follow the same flight path at the same altitude. Air traffic control informed the Eastern aircraft pilot of the Universal aircraft's presence. The collision occurred as the Eastern plane overtook the Universal plane. Eastern claimed that the Universal plane was off course. *Id.*

gence of Eastern's pilots caused the accident.<sup>35</sup> The district court entered judgment on a verdict against Universal and in favor of Eastern on its counterclaim.<sup>36</sup> Among other claims of error on appeal, Universal pled it was error to require testimony from the CAB investigator assigned to the accident and to compel disclosure of the CAB report.<sup>37</sup> The CAB supported Universal's position on these points and filed a brief on its behalf.<sup>38</sup>

The CAB stated in its brief that section 701(e) precluded all testimony from investigators of the accident giving rise to the litigation.<sup>39</sup> The CAB gave five reasons for this policy: the CAB's congressional mandate to investigate accidents for the purpose of preventing future accidents; the belief that witnesses would not disclose facts completely and honestly without a guarantee of confidentiality; the fact that an individual investigator's opinions might differ from the ultimate CAB opinions as to the accident's cause; the influence that investigators might have on determining the civil liabilities of parties involved in the accident; and the drain on CAB resources that would result if investigators spent their time testifying in civil damage suits.<sup>40</sup> The court found the reasoning sound but

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<sup>35</sup> *Id.* at 996.

<sup>36</sup> *Id.* at 995.

<sup>37</sup> *Id.* at 997, 1000.

<sup>38</sup> *Id.* at 997. The CAB stated in their brief that the decision of the court concerning the issues presented "would establish a precedent, not only of interest to it, but of great importance to the public." *Id.*

<sup>39</sup> *Id.* at 997-98.

<sup>40</sup> *Id.* at 998. The court summarized the CAB's policy reasons for precluding all testimony from investigators as follows:

(1) the obviously correct concept that the [CAB] had been instructed by Congress to investigate aircraft accidents solely for the purpose of gaining the information necessary to prevent the recurrence of similar accidents, and not for the purpose of securing evidence or providing witnesses for the benefit of parties to private litigation,

(2) the belief that the refusal to release information encouraged frank disclosures on the part of the persons involved and that such disclosures were in the public interest,

(3) the obvious undesirability of releasing a particular investigator's conclusion which might differ from the subsequent final determination by the [CAB] of the cause of the accident,



stated that the parties must view the 1938 Act in light of the "governmental function of administering justice, the judicial power, and the established practice and precedents of our system of jurisprudence."<sup>41</sup>

The court held that it was not error to compel the testimony of the investigator in this case.<sup>42</sup> The CAB regulations contained provisions for deposing investigators as to the facts surrounding the accident. The court found this significant because the CAB admitted in their brief that the nature of accident investigation meant the investigators were the only people privy to certain information following the accident.<sup>43</sup> For example, only the investigators may view the wreckage and remove parts for laboratory analysis.<sup>44</sup> The court stated that when deposition testimony was unavailable or insufficient, a judge could compel the investigator to testify at trial.<sup>45</sup> The opinion did not specify whether judges should restrict the testimony to facts or the testimony could include the investigator's own opinions as to the cause of the accident as well.

The court did find it was error to force the CAB to produce the report of the accident or to compel testimony on ultimate findings given in the report because it contained "hearsay based upon hearsay" in the form of statements taken by investigators from witnesses at the scene and

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(4) the fact that the conclusions of its investigators often subsequently embodied in the [CAB's] reports would, as a practical matter, influence the determination of the civil liabilities of the parties involved if testified to in damage suits, contrary to the plain purpose and intent if not the letter of section 701(e) of the [1938] Act [as amended], and

(5) the number of accidents involving aircraft was such as to require the full time of its experts in investigating them and the public interest dictated that the time of these experts not be consumed by appearance in courts to give testimony in private damage suits.

*Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 999-1000.

<sup>43</sup> *Id.* at 999.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1000.

from recordings of CAB conducted hearings.<sup>46</sup> The court held the testimony and report evidence inadmissible because it would "tend to usurp the function of the jury."<sup>47</sup>

The decision made a definite inroad into use of evidence obtained through CAB investigations. While litigants could not admit reports into evidence, judges could compel investigators to testify. In *Universal Airline*, at least, the interests of the private litigants outweighed the concerns put forth by the CAB.

#### B. *Lobel v. American Airlines, Inc.*<sup>48</sup>

Eight months after the *Universal Airline* decision, the Court of Appeals for the Second Circuit decided *Lobel v. American Airlines, Inc.* and completely changed the role accident reports would play in litigation. In a classic example of judicial activism, the Second Circuit ignored the language of section 701(e) and decided *Lobel* on the basis of the limited legislative history regarding the section.<sup>49</sup>

Mr. Lobel, a passenger on an American Airlines flight that crashed, sued to recover for his injuries.<sup>50</sup> The jury returned a verdict in the plaintiff's favor and American appealed.<sup>51</sup> At the trial, the court admitted into evidence the CAB report filed by the accident investigator.<sup>52</sup> American claimed that the court erred by admitting the report because it contained the investigator's observations about the plane wreckage.<sup>53</sup> The district court judge clearly contravened section 701(e) by admitting the report.

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<sup>46</sup> *Id.* The court stated, "the conclusions or opinions of the administrative agencies or boards or any testimony reflecting directly or indirectly the ultimate views or findings of the agency or board are generally held inadmissible. . . ." *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 192 F.2d 217 (2d Cir. 1951).

<sup>49</sup> *Id.* at 220. The limited legislative history provided that Congress intended section 701(e) to prevent usurping the jury's function by introducing the facts and cause as found by the CAB investigators. See *supra* note 31 and accompanying text.

<sup>50</sup> *Lobel*, 192 F.2d at 218-19. The plane crashed "because the engines stopped functioning properly." *Id.* at 219.

<sup>51</sup> *Id.* at 219.

<sup>52</sup> *Id.* at 220.

<sup>53</sup> *Id.*

The court of appeals cited *Universal Airline* as standing for the proposition that section 701(e) prevented introduction of only the CAB finding as to probable cause.<sup>54</sup> In actuality, *Universal Airline* stated simply that CAB reports were not admissible, with no reference to whether the report contained any opinion as to probable cause.<sup>55</sup> The court reviewed the report and found that it contained only observations, with "no opinions or conclusions about possible causes of the accident or defendant's negligence."<sup>56</sup> Apparently, the *Lobel* court felt that none of the reasons for excluding reports given in *Universal Airline* applied to this particular report. The court admitted the report because the content of the report was within the scope of questions which the attorneys could have asked the investigator at deposition.<sup>57</sup>

The *Lobel* decision opened the door for litigants to offer CAB reports into evidence, with the court bearing the burden of determining whether the report contained conclusions as to probable cause. Six years later, in a strange twist, the Court of Appeals for the Second Circuit actually used conclusions contained in a report to decide liability in a case.

### C. Israel v. United States<sup>58</sup>

In 1957, the Second Circuit essentially rendered section 701(e) meaningless, albeit in a specific factual setting. In *Israel* the court admitted the report of the CAB into evidence.<sup>59</sup> The report clearly contained statements con-

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<sup>54</sup> *Id.*

<sup>55</sup> See *supra* notes 46-47 and accompanying text for a discussion of the *Universal Airline* holding.

<sup>56</sup> *Lobel*, 192 F.2d at 220.

<sup>57</sup> *Id.*

<sup>58</sup> 247 F.2d 426 (2d Cir. 1957).

<sup>59</sup> *Id.* at 429. Israel piloted a private plane that crashed at an emergency airfield maintained by the United States. Israel landed at the field to purchase fuel and crashed attempting to take-off. *Id.* at 427. He alleged that the grass was too tall and that there were holes in the runway which kept him from acquiring sufficient speed to get off the ground. *Id.* at 428. The government claimed he was unfamil-

cerning the probable cause of the accident.<sup>60</sup>

In a footnote, the court stated that the report included inadmissible conclusions as to probable causes of the accident.<sup>61</sup> The court held that the government failed to object to admitting the evidence at trial, however, and could not raise admissibility of the evidence as error on appeal. The holding ignored the fact that the evidence was statutorily barred.<sup>62</sup> Based on the trial evidence, including the report, the court reversed the lower court's finding of fault.<sup>63</sup>

#### D. *Berguido v. Eastern Air Lines, Inc.*<sup>64</sup>

In 1963, the Court of Appeals for the Third Circuit took another step away from the absolute prohibition on use of reports contained in section 701(e) (cited as section 1441(e) after codification of the 1958 Act). *Berguido*, a wrongful death suit, resulted from the crash of an Eastern flight that no one survived.<sup>65</sup> The jury returned a verdict in favor of the plaintiff and Eastern appealed.<sup>66</sup>

At trial, counsel for *Berguido* introduced the depositions of the lead investigators of the accident.<sup>67</sup> Through the depositions, *Berguido* succeeded in exposing the jury

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iar with the plane and applied the brakes while traveling down the runway. *Id.* at 429 n.1

<sup>60</sup> *Id.* at 429. The court quoted from the report: "[T]he field is also rough and would tend to cause an aircraft to bounce on the take-off run and lose lift." *Id.*

<sup>61</sup> *Id.* at 429 n.2. "It would seem that those statements of the investigator (Wilson) in the CAB accident report that contained references to probable causes of the accident were inadmissible as evidence in this litigation. . . . This provision [section 701(e)] has been construed rather narrowly, however." *Id.*

<sup>62</sup> *Id.* at 429.

<sup>63</sup> *Id.* at 430-31.

<sup>64</sup> 317 F.2d 628 (3d Cir. 1963).

<sup>65</sup> *Id.* at 630. The plane attempted to land in poor weather conditions at Imeson Airport in Jacksonville, Florida. Evidence showed that the plane came in at excessive speed below authorized minimum altitude. Investigators hypothesized that the crew, attempting to land before the tower closed the airport due to poor visibility, tried to get below the cloud cover in order to see the runway. The plane crashed approximately three quarters of a mile from the end of the runway in a wooded area. *Id.* at 629-30.

<sup>66</sup> *Id.* at 630.

<sup>67</sup> *Id.* at 631.

to contents of the CAB report.<sup>68</sup> On appeal, Eastern urged that section 1441(e) and *Lobel*, in which the court only admitted testimony as to observations of the investigator, precluded this use of the deposition.<sup>69</sup> The facts submitted through the depositions were calculations not made by the deponent and, thus, not the deponent's observations.<sup>70</sup> The court held that Eastern did not properly interpret section 1441(e) or *Lobel*, stating that section 1441(e) seemingly struck a balance between the desires of the CAB to encourage complete and honest disclosure from parties involved and the desires of civil litigants to have access to all accident information.<sup>71</sup> The court found the testimony admissible under 1441(e) because it did not include the ultimate probable cause determination.<sup>72</sup>

The court went on to find the testimony inadmissible on hearsay grounds.<sup>73</sup> The calculations involved assumptions that the judges felt opposing counsel should have available for challenge through cross-examination.<sup>74</sup> The Federal Rules of Evidence later altered this aspect of the decision.<sup>75</sup> The decision has had a lasting effect. Other courts have followed *Berguido* and admitted the factual

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<sup>68</sup> *Id.* Counsel exposed the jury to the aircraft's angle and rate of descent. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* An investigator determined the angle and rate of descent through calculations based in part on the damage done to the trees and the marks on the ground where the plane crashed. *Id.*

<sup>71</sup> *Id.* at 631-32.

The fundamental policy underlying 1441(e) appears to be a compromise between the interests of those who would adopt a policy of absolute privilege in order to secure full and frank disclosure as to the probable cause and thus help prevent future accidents and the countervailing policy of making available all accident information to litigants in a civil suit.

*Id.* Neither Congress nor the CAB had previously indicated any intent to balance competing interests. See *supra* notes 11-31 describing the history of section 1441(e). The only hint of compromise is in Congress allowing litigants to use testimony of investigators taken at depositions. See *Lobel*, 192 F.2d at 220.

<sup>72</sup> *Berguido*, 317 F.2d at 632.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See *infra* notes 135-139 and accompanying text for a discussion of the effect of the Federal Rules of Evidence.

content of accident investigation reports through testimony even when the person testifying did not observe the facts admitted.

E. Fidelity & Casualty Co. of New York v. Frank<sup>76</sup>

The search for a definitive rule on admitting parts of CAB reports did not end with the decision in *Berguido*, however. The confusion that existed is best exemplified by the way the district court in Connecticut handled the *Frank* case. The court decided the admissibility issue in 1963, and then again in 1964.<sup>77</sup>

The plaintiffs in the *Frank* case sought to introduce accident reports completed by various sub-committees of the CAB.<sup>78</sup> They claimed that section 1441(e) barred only the report of the CAB and not the sub-committee reports.<sup>79</sup> The court held that any report could be admitted as long as the conclusion or opinions offered did not "lie within or close to the ambit of the ultimate question in the case."<sup>80</sup>

The following year, the court rendered a supplemental decision.<sup>81</sup> Relying on *Israel* and *Berguido*, the court altered the test for admissibility.<sup>82</sup> "A more workable and better rule is entirely to exclude all evaluation, opinion and conclusion evidence."<sup>83</sup> The court then outlined what it might admit as fact and what it would strike as opinion by taking examples directly from the actual CAB

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<sup>76</sup> 214 F. Supp. 803 (D. Conn. 1963), *modified sub nom.* Fidelity & Casualty Co. of New York v. Occidental Life Ins. Co. of California, 227 F. Supp. 948 (D. Conn. 1964).

<sup>77</sup> *Id.*

<sup>78</sup> 214 F. Supp. at 805. The suit involved the insurer of a passenger killed in a plane crash and the passenger's beneficiary. *Id.*

<sup>79</sup> *Id.* The CAB report is a compilation of the reports of subcommittees assigned to investigate each aspect of the crash. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Fidelity & Casualty Co. of New York v. Occidental Life Ins. Co. of California, 227 F. Supp. 948 (D. Conn. 1964).

<sup>82</sup> *Id.* at 949. In the court's opinion, the test proved "to be more confusing than helpful." *Id.*

<sup>83</sup> *Id.*

reports the plaintiff offered.<sup>84</sup>

F. American Airlines, Inc. v. United States<sup>85</sup>

After the *Frank* decision, the test for admissibility seemed well delineated. However, confusion persisted as other courts declined to follow the Connecticut district court's lead and the test continued to change. In 1969, the Court of Appeals for the Fifth Circuit specifically took exception to the *Frank* test.

American Airlines appealed a district court decision finding that neither the Weather Bureau nor the air traffic controller acted negligently in handling a flight that ended in tragedy.<sup>86</sup> On appeal, American challenged the government's introduction of two exhibits.<sup>87</sup> The government introduced a graph showing the altitude of the aircraft that crashed and an explanation of the flight recorder read-out.<sup>88</sup> American contended that the documents contained opinions of the investigators who prepared the documents.<sup>89</sup> The court described the test as

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<sup>84</sup> *Id.* at 949-50. As an example, the court found the following parts of the report to be objectionable as "evaluation, opinion or conclusion evidence":

Page 14: "A survey of the wreckage indicated that the aircraft had broken up in the air and had fallen to the ground in several large pieces. The forward section of the fuselage had broken free of the remaining portion of the fuselage at a point just aft of the lavatory section and fell to the ground right-side up with little forward motion." Page 14: "The cockpit section of the aircraft suffered extreme impact damage."

Page 16: There might be deleted from the last paragraph of § 2 as conclusory the words, "The time of the accident was taken from. . ." and "Inspection revealed that the clock had stopped on impact and offers the most reliable time for the occurrence of the accident" leaving as factual the words "the captain's instrument panel clock . . . was found in the cockpit section of the wreckage broken free of its mount on the panel."

*Id.*

<sup>85</sup> 418 F.2d 180 (5th Cir. 1969).

<sup>86</sup> *Id.* at 183. The American Airlines Boeing 727 crashed on approach to Greater Cincinnati Airport in a thunderstorm. The crash killed fifty-eight of the sixty-two people aboard. *Id.*

<sup>87</sup> *Id.* at 196.

<sup>88</sup> *Id.* The evidence indicated that the pilot, who was being tested for an up-graded classification, failed to follow the missed approach procedures. *Id.*

<sup>89</sup> *Id.*

not whether the reports contained any opinions, but rather whether the reports contained "official agency opinion."<sup>90</sup> The court then stated, "Because of the uncertainty which the *Frank* rule would introduce in sorting fact from opinion, it would be better to exclude opinion testimony only when it embraces the probable cause of the accident or the negligence of the defendant."<sup>91</sup> Thus, the *Frank* test did not live long and the probable cause test put forth in *Berguido* seemed to return to favor.

#### G. *Falk v. United States*<sup>92</sup>

The same court that decided *Frank* in 1963 and 1964 decided *Falk* in 1971. The issue in *Falk* was whether the plaintiff, during a deposition, could compel the chief investigator from the CAB to give his opinion as to the cause of the accident.<sup>93</sup> The court found it significant that the investigator worked for the defendant, the United States.<sup>94</sup> The court held that it should treat the United States like any other litigant and, because "taking of opinion testimony in pre-trial depositions is a judicially sanctioned practice," the investigator must cooperate.<sup>95</sup> The court stated that the defendant could object to the testimony if the plaintiff attempted to admit it at trial.<sup>96</sup> However, the decision meant parties could at least obtain an investigator's testimony as to probable cause, and then take their chances with the trial court.

#### H. *Kline v. Martin*<sup>97</sup>

In 1972, a Virginia district court qualified the *Falk* deci-

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<sup>90</sup> *Id.* In stating the test, the court relied on *Berguido*. *Id.*

<sup>91</sup> *Id.* The court stated that deriving the facts reported required complex evaluation. The factual inquiry into the aircraft's "altitude, speed, heading, and vertical acceleration" necessarily contained some opinion. *Id.*

<sup>92</sup> 53 F.R.D. 113 (D. Conn. 1971).

<sup>93</sup> *Id.* at 114.

<sup>94</sup> *Id.* at 115.

<sup>95</sup> *Id.* The court also relied on 49 U.S.C. app. § 1654(e) (1982), which made the reports public documents and open to inspection. *Id.* at 114-15.

<sup>96</sup> *Id.* at 115.

<sup>97</sup> 345 F. Supp. 31 (E.D. Va. 1972).



sion somewhat. *Kline* presented a situation nearly identical to that in *Falk*. The crash investigators refused to testify at deposition to any matters involving opinion.<sup>98</sup> The court held that by refusing to testify the investigators "cut off the primary avenue to the truth."<sup>99</sup> Relying on the decision in *American Airlines*, which called for excluding opinion testimony only when it pertained to the probable cause of the accident,<sup>100</sup> the court required the investigators "to testify even if it involve[d] their opinions, so long as the opinion [was] not as to the ultimate conclusion of cause of the accident."<sup>101</sup> While the *Kline* decision did limit the complete freedom to depose the investigator afforded the plaintiff in *Falk*, the defendant in *Kline* was not the government as it was in *Falk*.<sup>102</sup>

By 1972, the courts lifted the blanket prohibition on using accident reports at trial. Courts, relying on *Berguido*,<sup>103</sup> held that only that part of the report containing the probable cause of the accident was objectionable.<sup>104</sup> After *Kline* and *Falk*, litigants could compel investigators to testify at depositions to at least some opinion, if not opinion as to the probable cause. The changes that occurred regarding the use of accident reports and investigator opinion combined with the confusion existing between courts meant the time had come for legislative and regulatory response. That time arrived shortly after the Virginia district court rendered the *Kline* decision.

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<sup>98</sup> *Id.* at 32. The suit involved a passenger in an airplane that crashed in a remote area of Alaska whose decedents filed a wrongful death action. *Id.*

<sup>99</sup> *Id.* at 33.

<sup>100</sup> *Id.* at 32; see *supra* notes 85-91 and accompanying text for a discussion of the *American Airlines* case.

<sup>101</sup> *Kline*, 345 F. Supp. at 33.

<sup>102</sup> See *supra* notes 92-96 and accompanying text for a discussion of the *Falk* decision.

<sup>103</sup> See *supra* notes 64-75 and accompanying text for a discussion of the *Berguido* case.

<sup>104</sup> See *supra* notes 76-91 and accompanying text for a discussion of two decisions finding objectionable only the part of a report containing the probable cause.

### III. LEGISLATIVE AND AGENCY RESPONSE TO THE JUDICIARY

#### A. *Statutory Changes*

As the airline industry continued to grow, Congress continued to reorganize the regulatory agencies responsible for control of aviation. The NTSB actually came into existence in 1966 through the Department of Transportation Act of 1966.<sup>105</sup> The Bureau of Safety, formerly under the CAB, became the Bureau of Aviation Safety under the NTSB.<sup>106</sup> However, these changes had little substantive effect on the accident investigation function.<sup>107</sup>

The last substantive change in accident investigation came in 1974 with the Independent Safety Board Act of 1974 (the 1974 Act).<sup>108</sup> This Act made the NTSB an independent agency as of April 1, 1975.<sup>109</sup> Congress intended the 1974 Act to separate the NTSB from the FAA and the Department of Transportation.<sup>110</sup> Under the old organizational scheme the NTSB often ultimately investigated its sister, the FAA. To avoid conflict, Congress split the agencies, removing all constraints from thorough and accurate accident investigation.<sup>111</sup>

The 1974 Act maintained much of the accident investigation procedures and policies of the earlier acts. Section 1441(a) of the 1974 Act defined the responsibilities of the NTSB as: regulating accident reporting; investigating accidents and filing a report of the facts and the probable cause; recommending ways to prevent similar accidents; allowing public access to reports; and conducting special studies to improve air safety.<sup>112</sup> Section 1441(e) did not change from the way it appeared in the early legisla-

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<sup>105</sup> Pub. L. No. 89-670, 80 Stat. 935 (1966).

<sup>106</sup> *Id.*; see also Miller, *supra* note 7, at 245-49 for a discussion of the events surrounding the legislative changes.

<sup>107</sup> Miller, *supra* note 7, at 246.

<sup>108</sup> 49 U.S.C. app. § 1901 (1982) [hereinafter the 1974 Act].

<sup>109</sup> *Id.* § 1902.

<sup>110</sup> Miller, *supra* note 7, at 247-48.

<sup>111</sup> *Id.* at 248.

<sup>112</sup> 49 U.S.C. app. § 1441(a) (1982). The section reads:

tion.<sup>113</sup> "No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."<sup>114</sup> The substantive changes came in the redesignation and revision of the regulations.

### B. Regulation Changes

The regulations of the NTSB became part of Title 49 of the Code of Federal Regulations.<sup>115</sup> The Federal Register contains an explanation of the revisions.<sup>116</sup> In the most significant change, the NTSB revised Part 835 pertaining to testimony of NTSB employees.<sup>117</sup> The part sets the policies and procedures for employee testimony.<sup>118</sup> Section 835.2 makes the first regulatory distinction between reports containing purely factual findings and reports containing the NTSB's probable cause determination.<sup>119</sup>

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(1) Make rules and regulations governing notification and report of accidents involving civil aircraft;

(2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;

(3) Make such recommendations to the Secretary of Transportation as, in its opinion, will tend to prevent similar accidents in the future;

(4) Make such reports public in such form and manner as may be deemed by it to be in the public interest; and

(5) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by conducting special studies and investigations on matters pertaining to safety in air navigation and the prevention of accidents.

*Id.*

<sup>113</sup> See *supra* notes 10-20 for a discussion of the early legislation.

<sup>114</sup> 49 U.S.C. app. § 1441(e) (1982).

<sup>115</sup> 49 C.F.R. §§ 800-845 (1986).

<sup>116</sup> 40 Fed. Reg. 30,232 (1975).

<sup>117</sup> 49 C.F.R. § 835 (1986).

<sup>118</sup> 49 C.F.R. § 835.1 (1986). "This part prescribes the policies and procedures regarding the testimony of employees of the National Transportation Safety Board in suits or actions for damages and criminal proceedings arising out of transportation accidents." *Id.*

<sup>119</sup> 49 C.F.R. § 835.2 (1986). The definition section of the part reads:

(a) "The [NTSB's] accident report" means the report containing the [NTSB's] determinations, including the probable cause of an ac-

This section confirms that litigants in civil cases cannot use the report containing probable cause determination.<sup>120</sup> The part also specifies that an NTSB employee can only use the factual report as an aid while testifying.<sup>121</sup> All testimony is similarly restricted to facts obtained by the employee during investigation.<sup>122</sup> The regulation specifically instructs investigators to refuse to testify as to *any* opinions about the cause of accidents investigated.<sup>123</sup>

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cident, issued either as a narrative report or in a computer format. . . . [N]o part of these reports may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports. (b) "Factual accident report" means an investigator's report of his investigation of the accident. (c) "Accident" for purposes of this part, includes "incident."

*Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* § 835.4. This section reads:

(a) A[n NTSB] employee may use a copy of his factual accident report as a testimonial aid, and may refer to that report during his testimony or use it to refresh his memory.

(b) Consistent with section 701(e) of the [1958] Act. . . , a[n NTSB] employee may not use the [NTSB's] accident report for any purpose during his testimony.

*Id.*

<sup>122</sup> *Id.* § 835.3. This section reads:

(a) Section 701(e) of the [1958] Act . . . preclude[s] the use or admission into evidence of [NTSB] accident reports in any suit or action for damages arising from accidents. The purpose of th[is] section would be defeated if expert opinion testimony of [NTSB] employees, which is reflected in the ultimate views of the [NTSB] expressed in its report concerning the cause of an accident, were admitted in evidence or used in private litigation arising out of an accident. The [NTSB] relies heavily upon its investigators' opinions in determining the cause or probable cause of an accident, and the investigators' opinions thus become inextricably entwined in the [NTSB's] determination. Furthermore, the use of [NTSB] employees as experts to give opinion testimony would impose a serious administrative burden on the . . . investigative staff. Litigants should obtain their expert witnesses from other sources.

(b) Consistent with paragraph (a) of this section, [NTSB] employees may testify as to the factual information they obtained during the course of the accident investigation, including factual evaluations embodied in their factual accident reports. However, they shall decline to testify regarding matters beyond the scope of their investigation, or to give opinion testimony concerning the cause of the accident.

*Id.*

<sup>123</sup> *Id.*

The changes resulted directly from the decisions in *Kline* and *Falk*.<sup>124</sup> In its discussion of the changes, the NTSB stated, "The only opinions proscribed are those which reflect the ultimate determination of cause or probable cause determined by the [NTSB] and expressed in the [NTSB's] reports."<sup>125</sup> This language coincides with the *Kline* decision, but falls short of the rule put forth in *Falk*.<sup>126</sup> The NTSB, in prohibiting investigators from testifying to anything but their factual observations, stated that the *Falk* decision was "clearly in error."<sup>127</sup>

The distinction in the *Kline* decision<sup>128</sup> and the definition section of the new regulation<sup>129</sup> between factual report content and probable cause reflected procedural changes made at the NTSB. As the complexity and scope of accident investigations grew, the NTSB began preparing two distinct reports. The NTSB continues this practice today. The first report, entitled the Factual Aircraft Accident Report and prepared by the accident investigator, does not actually contain a probable cause determination.<sup>130</sup> Litigants can easily obtain this report from the

<sup>124</sup> 40 Fed. Reg. 30,232 (1975). The NTSB stated that it "considers its revised policy to be consistent with existing law, relying in particular on *Kline* . . . [a]lthough it may appear to be inconsistent with *Falk* . . . wherein an investigator was required to express an opinion as to the cause of an accident. . . ." *Id.*

<sup>125</sup> *Id.* The NTSB stated that "Although [it] continues its prohibition against [NTSB] employees acting as expert witnesses in litigation, the previous limitation of such testimony to factual information has been relaxed." *Id.*

<sup>126</sup> See *supra* notes 92-104 for a discussion of the *Kline* and *Falk* decisions.

<sup>127</sup> 40 Fed. Reg. 30,232 (1975). "[T]he rationale for [the *Falk*] decision was clearly in error and any doubt thereon has been removed . . . . The [NTSB] continues its prohibition against the requirement that investigators should testify on matters beyond the scope of their investigation." *Id.*

<sup>128</sup> See *supra* notes 99-101 and accompanying text concerning the *Kline* case.

<sup>129</sup> See *supra* note 119 for the text of the definition section of the regulations.

<sup>130</sup> Papadakis, *supra* note 32, at 520-21. This article lists the contents of the Factual Aircraft Accident Reports as:

- (1) a[n] NTSB form #6120.1 filled out by the accident investigator at the scene of the accident;
- (2) a form #04-R5-5 filled out and submitted by the owner/operator of the aircraft;
- (3) an investigators [sic] narrative report written by the investigator after all factual material has been compiled;
- (4) a flight planning package supplied by the FAA with whom the flight plan was filed;

NTSB in Washington D.C.<sup>131</sup> The Factual Aircraft Accident Report falls outside the scope of the "NTSB's report" for purposes of the prohibition contained in section 1441(e).<sup>132</sup> The other report, the "NTSB's report" or "blue cover" report, contains the NTSB's determination as to the probable cause of the accident.<sup>133</sup> By keeping these reports separate, the NTSB can more easily uphold its own policies regarding the use of the reports.

### C. *The Federal Rules of Evidence*

During 1975, a second statutory change occurred that ultimately impacts on the use of NTSB reports in litigation. On July 1, 1975, new Federal Rules of Evidence took effect, three of which pertain to NTSB investigations and reports.<sup>134</sup>

The first, Rule 803(8), provides a hearsay exception for public records and reports.<sup>135</sup> This provision allows liti-

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(5) a flight following package usually in the form of radio transmissions, transcripts provided by the FAA;

(6) a meteorological survey showing the existing and forecast weather and weather warning provided by the U.S. Weather Service in the region of the path of flight and accident;

(7) malfunction or failure reports of instruments or component reports [sic]. These reports are requested when merited by the investigator from either the NTSB technical laboratories or local FAA approved maintenance shops;

(8) photographs usually taken by the investigator in charge;

(9) wreckage distribution map usually drawn by the investigator in charge;

(10) written witness statements usually requested by the investigator in charge.

*Id.*

<sup>131</sup> See Dombroff & Hatfield, *supra* note 32, at 70. This article is an excellent practical guide to obtaining accident reports. Included are descriptions of useful documents and addresses of the offices to write to obtain the documents.

<sup>132</sup> See *supra* note 119 for the text of the definition section of the regulations.

<sup>133</sup> Papadakis, *supra* note 32, at 523; see also Miller, *supra* note 7, at 280-81 (identifying the two reports).

<sup>134</sup> Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

<sup>135</sup> FED. R. EVID. 803(8). The rule reads:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. Records, reports, statements, or

gants in civil disputes to admit factual reports of investigations made pursuant to law, clearly encompassing Factual Aircraft Accident Reports, but not the "NTSB reports," which are not strictly factual.<sup>136</sup> According to the advisory committee's notes, the drafters envisioned that admissible reports could include hearing testimony.<sup>137</sup> This rule removes the "hearsay based upon hearsay" concern identified in *Universal Airline*.<sup>138</sup> The provision does contain an escape clause if the report appears untrustworthy.<sup>139</sup>

The other significant pronouncements are Rules 703 and 704.<sup>140</sup> Rule 703 allows a testifying expert to base his opinion on any facts usually relied upon by similar experts.<sup>141</sup> Counsel may call any accident investigation expert to testify as to opinions of an accident's cause. The

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data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

*Id.*

<sup>136</sup> See *id.*; see also *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 816 (4th Cir. 1982) (rule 803(8) considered but not relied on to exclude NTSB reports). But see *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 636 (3d Cir. 1977) (NTSB reports held inadmissible under Rule 803(8) because they contain statements of people other than the government officials).

<sup>137</sup> FED. R. EVID. 803(8) advisory committee's note. In their discussion of the admissibility of evaluative reports, the advisory committee wrote: "Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation . . . ; (2) the special skill or experience of the official. . . ; (3) whether a hearing was held and the level at which conducted. . . ; (4) possible motivation problems . . . ." *Id.*

<sup>138</sup> See *supra* note 46 and accompanying text discussing the *Universal* case.

<sup>139</sup> See *supra* note 135 for the text of Federal Rule of Evidence 803(8).

<sup>140</sup> FED. R. EVID. 703, 704.

<sup>141</sup> FED. R. EVID. 703. This rule reads:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

*Id.*

expert would undoubtedly rely on the same facts that go into the NTSB probable cause determination (quite possibly by using the Factual Aircraft Accident Report and even the probable cause determination). An NTSB investigator can also base testimony on any investigation materials that go into the Factual Aircraft Accident Report, but not the probable cause determination made by the NTSB because of the prohibition contained in the regulations.<sup>142</sup>

Rule 704 allows admission of expert opinion regarding any issue in a case, including the ultimate issue.<sup>143</sup> This provision removes any doubt as to the viability of the common law proscription of opinion testimony concerning the ultimate issue in a dispute.<sup>144</sup> The way is clear for investigator testimony as to the probable cause of an accident, at least from the standpoint of the Federal Rules of Evidence.

These statutory and regulatory changes seem clear on their face, but they have not put an end to judicial interpretation. Recent cases highlight areas still unresolved by existing law.

#### IV. PROBLEMS HIGHLIGHTED BY RECENT CASE LAW

Zealous advocates instinctively seek to find a way around rules detrimental to their interests. This desire,

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<sup>142</sup> See *supra* note 122 and accompanying text for the text of the regulation governing admissibility of accident reports.

<sup>143</sup> FED. R. EVID. 704. The rule reads:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) [Section (b) pertains only to expert testimony concerning the mental state or condition of defendants in criminal suits.]

*Id.*

<sup>144</sup> See FED. R. EVID. 704 advisory committee note. The note reads in part: "The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information." *Id.*



combined with liberal judicial interpretation, quickly cast new light on the regulations set forth in 1974.

#### A. *Conflicts of Interest*

In 1978, a potential problem with the use of NTSB reports surfaced in *Seymour v. United States*.<sup>145</sup> Seymour sought a preliminary ruling on the admissibility of several reports including an NTSB Factual Accident Report.<sup>146</sup> The United States urged that section 1441(e) prohibited admission of the report.<sup>147</sup> The court discussed the difference between factual and opinion evidence, but seemed to base its decision on the fact that the plaintiff sought to use the report prepared by the defendant against the defendant.<sup>148</sup> Through this reasoning, the Factual Accident Report (and potentially the probable cause report) become admissions by the government whenever a party sues the United States for damages arising from an aircraft accident.<sup>149</sup>

This decision raises the concern that the knowledge that litigants may use the investigator's report against the government, will influence government employed investigators in their fact gathering.<sup>150</sup> The fact that investigat-

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<sup>145</sup> 15 Av. Cas. (CCH) 17,141 (W.D.Tex. 1978).

<sup>146</sup> *Id.* at 17,142. The other reports sought included the Collateral Investigation of the United States Army, the Technical Report-U.S. Army Aircraft Accident, Ft. Hood Flying Club Records regarding the accident, and Records of the Ft. Hood Flying Club regarding the pilot. The court found all the reports admissible. *Id.*

<sup>147</sup> *Id.* The court cited *Frank* discussed *supra*, at notes 77-84 and accompanying text.

<sup>148</sup> *Seymour*, 15 Av. Cas. (CCH) at 17,142. The court concluded the opinion as follows:

The N.T.S.B. statute may not prohibit the type of evidence sought to be introduced here. The plaintiffs seek only the introduction of the N.T.S.B. factual report, not the N.T.S.B. probable cause report. Since the N.T.S.B. is an agency of the United States, the N.T.S.B. factual report was prepared by employees of the defendant. Accordingly, the N.T.S.B. factual aircraft accident report is admissible into evidence.

*Id.*

<sup>149</sup> See Welch & Faulk, *supra* note 32, at 593. This scenario parallels *Falk*, discussed *supra* notes 92-96.

<sup>150</sup> See Welch & Faulk, *supra* note 32, at 593.

ing teams include employees of parties with an interest in the accident, other than just the government, compounds this problem.<sup>151</sup> Part 831.9 of the NTSB regulations provides that the field investigation team may include persons involved in an accident through their employees, activities, or products.<sup>152</sup> The NTSB presumes that individuals with knowledge of the people and equipment involved in the accident can provide assistance to the lead NTSB investigator.<sup>153</sup> However, plaintiffs will often seek to introduce these reports against parties with employees or equipment involved in the accident. The statute creates an inherent conflict of interest by allowing these interested parties to participate in preparing the report. Any influence over the fact finding exerted by these "assistants" diminishes the objectivity of the Factual Accident Report.

B. *What is "Factual"?*

Under the definitions adopted by the NTSB, the distinction between fact and opinion forms the basis for admissibility decisions.<sup>154</sup> However this distinction is not easy to make.

The decision in *Murphy v. Colorado Aviation Inc.* evidences this problem.<sup>155</sup> The trial court in *Murphy* ruled for the plaintiff and Colorado Aviation appealed.<sup>156</sup> In one of its points of error, Colorado Aviation urged that the trial court incorrectly allowed a former NTSB investigator to testify to the probable cause of the accident.<sup>157</sup>

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<sup>151</sup> See Miller, *supra* note 7, at 274-75.

<sup>152</sup> 49 C.F.R. § 831.9 (1986).

<sup>153</sup> Miller, *supra* note 7, at 275.

<sup>154</sup> See *supra* note 119 for the text of the definitions adopted by the NTSB.

<sup>155</sup> 588 P.2d 877 (Colo. Ct. App. 1978).

<sup>156</sup> *Id.* at 879.

<sup>157</sup> *Id.* at 881. Former NTSB employees are also governed by the regulations prohibiting probable cause testimony. 49 C.F.R. § 835.7 (1986). Section 835.7 reads: "It is not necessary to request [NTSB] approval for testimony of a former [NTSB] employee. However, the scope of testimony of former [NTSB] employees is limited to the matters delineated in § 835.3, and use of reports as prescribed by § 835.4."

The investigator testified to the weather conditions, the fact that the pilot knew of the conditions, the pilot rating necessary to fly in the conditions present, the availability of a safe alternative route for a pilot with the rating of the pilot involved, and that the plane did not appear to malfunction prior to impact.<sup>158</sup> Even a layman would likely conclude from the testimony that the pilot acted negligently and that this negligence was the probable cause of the accident. However, the appellate court allowed the testimony, finding no violation of the NTSB regulations governing testimony.<sup>159</sup>

The testimony found acceptable in *Murphy* is a perfect example of how counsel can use expert testimony to make quite clear to the jury the expert's opinion as to the probable cause of the accident without exceeding the bounds of "fact".<sup>160</sup> Combine this problem with the potential for conflicts of interest among the investigators, and the opportunity for manipulation of reports becomes clear.

### C. *Opinions Contained in Factual Reports*

In the typical case, expert testimony introduces the complex information contained in an NTSB report. Counsel can object to forbidden opinion testimony as the

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<sup>158</sup> *Murphy*, 588 P.2d at 882. The court summarized the investigator's testimony:

He explained navigational aids, the factual circumstances surrounding the accident, the difference between visual (VFR) and instrument flight ratings (IFR), interpreted weather documents, indicated that weather information had been transmitted to the pilot from the Roanoke airport, stated that there was no evidence of any pre-impact malfunction of the aircraft, opined that only an IFR pilot should fly in clouds, that there was a safe alternate route for VFR pilots, and that under prevailing weather conditions in the area at the time of the crash, only an IFR pilot could have been flying properly at the altitude at which the crash occurred. His testimony, however, while leading to such a conclusion, did not state that this accident was caused by the negligence of the pilot.

*Id.*

<sup>159</sup> See *supra* note 122 for the text of the NTSB regulation.

<sup>160</sup> See *Loftheidir Icelandic Airlines, Inc. v. McDonnell Douglas Corp.*, 158 Cal. App. 3d 83, 92, 204 Cal. Rptr. 358, 362 (1984) for another example of using expert testimony to make clear the probable cause of an accident.

expert testifies. When litigants introduce entire NTSB reports into evidence, the court can only excise objectionable opinion content after thoroughly examining the document for prohibited statements.<sup>161</sup> *Benna v. Reeder Flying Service, Inc.*, while probably insignificant in its own right, raises the importance of this issue.<sup>162</sup>

In *Benna*, the parties introduced many large items of evidence during the trial, so the judge allowed the jury to deliberate in the courtroom instead of removing the evidence to the jury room.<sup>163</sup> The judge inadvertently left some unadmitted evidence on his bench, including the Factual Accident Report and the NTSB probable cause report.<sup>164</sup> The court found that the jury did not view the probable cause report and found the Factual Accident Report merely cumulative of other evidence offered.<sup>165</sup> Therefore, the court found no error and let the jury verdict stand.

Given the difficulty in distinguishing fact from opinion as to probable cause,<sup>166</sup> admitting the entire Factual Accident Report raises two significant questions: first, whether all NTSB reports necessarily contain or, at least, imply

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<sup>161</sup> See 49 C.F.R. § 835.3 (1986) (FAA states that opinion is intertwined in all accident reports).

<sup>162</sup> 578 F.2d 269 (9th Cir. 1978). The decedents of the copilot and several passengers of a twin-engine DC-3 airplane filed this wrongful death action. *Id.* The plane, which crashed and burned shortly after take-off from McGrath, Alaska, carried Bureau of Land Management forest firefighters. *Id.* at 270. The plane lost a propeller during take-off and crashed into some trees about a mile from the runway. *Id.*

The parties proposed two possible causes for the crash. *Id.* at 270-71. The defendant proposed that the pilot retracted the running gear prematurely causing the propeller on one side of the plane to strike the ground. *Id.* The plaintiff claimed that defendant negligently repaired the engine during a major overhaul conducted three months and 130 hours of operation earlier. *Id.* at 271; see also Welch & Falk, *supra* note 32, at 592 for a discussion of *Benna*.

<sup>163</sup> *Benna*, 578 F.2d at 271. Due to the claim of negligent engine repair, the courtroom contained numerous large engine and propeller parts. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 272. The plaintiff's counsel suggested that the court determine whether anyone had viewed the probable cause report by holding the report up from a distance and asking the jurors if any of them had looked at it. *Id.*

<sup>166</sup> See *supra* notes 154-159 and accompanying text for a discussion of fact versus opinion.

forbidden opinions, and second whether a judge can actually excise opinions from an accident report. The scope and direction of the investigation itself may clearly indicate the investigator's opinion as to the cause of the accident.<sup>167</sup> Admitting unexcised (and possibly even excised) Factual Accident Reports seemingly violates the intent, if not the letter of the prohibition on opinion testimony.

#### D. "Is" v. "Isn't" Testimony

In many aircraft accident cases, a limited number of truly possible causes exist.<sup>168</sup> Sometimes the cause can be determined only by ruling out other possibilities. Counsel used this approach to get at probable cause testimony in *Keen v. Detroit Diesel Allison*.<sup>169</sup>

In *Keen*, the plaintiff contended that a defect in the plane's engine caused the crash.<sup>170</sup> The defendant, who had manufactured the engine, claimed that pilot incapacity caused the crash.<sup>171</sup> As part of its defense, the defendant called an investigator from the NTSB as a witness.<sup>172</sup> The investigator testified "that the aircraft was functioning normally at high power at the time it stuck [sic] the ground."<sup>173</sup> The court found no error in admitting the testimony, because it did not go to the proximate cause of

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<sup>167</sup> See *Sweet v. Schenk*, 792 F.2d 1447 (9th Cir. 1986) ("the government essentially argues that the expert opinions of NTSB investigators are dependent upon, and somewhat reflected within, the opinions expressed by individuals that the investigator interviews during an investigation").

<sup>168</sup> See *supra* note 162 and accompanying text for an example of an accident with limited possible causes.

<sup>169</sup> 569 F.2d 547 (10th Cir. 1978); see also *Welch & Faulk, supra* note 32, at 591 for a discussion of *Keen*.

<sup>170</sup> *Keen*, 569 F.2d at 548. *Keen* piloted a jet for the FAA and died when the plane he was piloting crashed during a test flight. *Id.* *Keen's* wife claimed that defects in the turbine shaft and wheel assembly of the plane's engine caused the crash. *Id.*

<sup>171</sup> *Id.* Detroit Diesel introduced testimony that *Keen* was being treated for high blood pressure. *Id.* at 549. An FAA certification doctor testified that he would not have certified *Keen* had he known about the condition. *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

the crash.<sup>174</sup>

Assuming that the engine manufacturer introduced all possible causes for the accident so as to create doubt that the engine malfunctioned, the only other possible cause in this case was pilot incapacity. By having the NTSB investigator rule out engine malfunction as the cause, defense counsel achieved the same result as if the investigator had testified that pilot incapacity caused the crash. Defense counsel effectively obtained investigator testimony as to the probable cause without violating section 1441 or the NTSB regulations.

#### E. *NTSB Opinion Obtained From Non-NTSB Experts*

The NTSB regulations allow investigators to rely on Factual Accident Reports in preparing to testify.<sup>175</sup> The regulations prohibit relying on, or testifying about, the probable cause report.<sup>176</sup> However, the restrictions on opinion testimony do not and cannot govern experts who are not currently NTSB investigators. Advocates have used this potential loophole in several cases.

One such case is *Travelers Insurance Co. v. Riggs*.<sup>177</sup> Travelers first sought to introduce the entire NTSB report, but the court would not admit any conclusions contained in the report.<sup>178</sup> Travelers then objected when the court allowed the defendant's expert to offer her opinions as to the cause of the crash after viewing the entire NTSB report. The court of appeals found no error in allowing the

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<sup>174</sup> *Id.* at 551. Interestingly, the court relied on the NTSB regulations in finding the testimony admissible:

In our view an absolute prohibition of testimony from agency personnel could and perhaps would in many cases involving circumstances such as those in the case at bar be not only detrimental to a private citizen proceeding as a plaintiff seeking the true facts triggering such a disaster but also in direct conflict with the Department of Transportation guidelines for NTSB investigators. . . .

*Id.*

<sup>175</sup> See *supra* note 122 and accompanying text for the language of the regulation governing investigators.

<sup>176</sup> *Id.*

<sup>177</sup> 671 F.2d 810 (4th Cir. 1982).

<sup>178</sup> *Id.* at 816.

testimony because the expert properly based the testimony on facts within the NTSB report.<sup>179</sup>

A similar series of events occurred in *Curry v. Chevron, U.S.A.*<sup>180</sup> In *Curry*, plaintiff's counsel tried to have their expert testify that he had relied on the NTSB probable cause report, contending that Federal Rule of Evidence 703 permits such use.<sup>181</sup> The court upheld the trial court in allowing the expert to *use* the report, but forbid him from *relying* on the report's opinions and conclusions.<sup>182</sup>

The same situation existed in *Mullan v. Quickie Aircraft Corp.*<sup>183</sup> The defendant in the case contended that the court erred because the trial court allowed the plaintiff's expert to base his opinion on the contents of NTSB reports.<sup>184</sup> The court found no error because the expert had properly relied on only the factual content of the reports.<sup>185</sup>

In *Monger v. Cessna Aircraft Co.*, a court allowed an actual participant in the NTSB investigation to testify as to the probable cause of an accident.<sup>186</sup> The Court of Appeals for the Eighth Circuit had no difficulty with the trial court allowing the defendant to offer testimony of a representative of an engine manufacturer that "worked closely with the NTSB in its investigation."<sup>187</sup> The court stated that the testimony would be barred if the NTSB employed the witness as an investigator, but because they didn't, the regulations did not apply.<sup>188</sup>

These holdings result in a total annulment of section

<sup>179</sup> *Id.* at 816-17.

<sup>180</sup> 779 F.2d 272 (5th Cir. 1985).

<sup>181</sup> *Id.* at 274.

<sup>182</sup> *Id.*

<sup>183</sup> 797 F.2d 845 (10th Cir. 1986).

<sup>184</sup> *Id.* at 846.

<sup>185</sup> *Id.* The opinion does not indicate whether the expert used the Factual Accident Report, the probable cause findings, or both. The court did not find it necessary to differentiate. *Id.* at 848.

<sup>186</sup> *Monger v. Cessna Aircraft Co.*, 812 F.2d 402 (8th Cir. 1987).

<sup>187</sup> *Id.* at 408.

<sup>188</sup> *Id.* The regulation referred to by the court is 49 C.F.R. § 835.3 (1986).

1441(e) and the NTSB regulations.<sup>189</sup> The court in *Mullan* indirectly identified the problem when it refused to exclude testimony from the expert just because the expert and the NTSB, according to the probable cause report, came to the identical conclusions as to the cause of the accident.<sup>190</sup> The expert had used the NTSB report as the basis for his opinion.<sup>191</sup> Thus, to effectively use a beneficial NTSB report at trial a litigant need only find an expert that will read the NTSB reports, then testify to the same opinion as contained in the report.

## V. RECOMMENDATIONS

Over the years several commentators have made recommendations concerning the use of NTSB reports in civil litigation.<sup>192</sup> These individuals have many years experience in this area, often including firsthand knowledge of the workings of the NTSB. Thus, the recommendations below will not appear altogether new. However, given the absurdity of the current situation,<sup>193</sup> continued pleas for either legislative action, regulatory action, or both, are critical.

In 1934, when Congress enacted the first ban on use of accident reports, courts undoubtedly viewed air travel as an ultrahazardous activity. Since 1934, the language of the statute has remained unchanged,<sup>194</sup> while air travel has become a commonplace aspect of daily life. Yet, the modern court opinions contain no new reasons for the ev-

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<sup>189</sup> See *Loftheidir Icelandic Airlines, Inc. v. McDonnell Douglas Corp.*, 158 Cal. App. 3d 83, 95-97, 204 Cal. Rptr. 358, 364-66 (1984) (court of appeals reversed because trial court excluded testimony of plaintiff's expert witness, who was a former NTSB investigator and had signed the probable cause report).

<sup>190</sup> *Mullan*, 797 F.2d at 845. The court said, "To hold, as Quickie's argument suggests, that [the expert] impermissibly relied on the NTSB report because his conclusions were the same as or similar to those of the NTSB investigators, is an inference which we shall not make." *Id.* at 848.

<sup>191</sup> *Id.*

<sup>192</sup> See, e.g., Miller, *supra* note 7, at 291-93; Welch & Faulk, *supra* note 32, at 600-02.

<sup>193</sup> See *supra* notes 145-191 and accompanying text for a review of recent cases concerning admissibility of accident reports.

<sup>194</sup> See *supra* notes 10, 27, & 113.



identitary ban. The 1951 decision in *Universal Airline* still contains the best synopsis of the reasons for the policy.<sup>195</sup>

The court in *Universal Airline* first identified the congressional mandate to the NTSB (then the CAB): investigate current accidents so as to prevent future accidents.<sup>196</sup> This mandate gives the NTSB the clear goal of preventing accidents. This same goal forms the basis of our tort system: apportion the cost of accidents to the responsible parties so as to promote safety. Seemingly, the courts and the NTSB could both better achieve the goal by cooperating. Instead, a wall exists in the form of section 1441(e) that forces the two to strive for the goal separately.

The *Universal Airline* opinion lists the second reason for section 1441(e) as the belief that witnesses would not disclose facts completely and honestly without a guarantee of confidentiality.<sup>197</sup> Originally, only the CAB had access to accident reports.<sup>198</sup> They used the reports strictly to further aviation safety through rule changes.<sup>199</sup> Now, litigants have ready access to the reports. A witness, intent on hiding facts, can not rely on section 1441(e) to maintain confidentiality. Furthermore, a negligent pilot will not admit liability to an NTSB investigator, only to have the statement used by the FAA in a certificate action. This reason for the statute no longer fits with reality.

The CAB also justified the statute on the grounds that one investigator might reach a conclusion different from the agency's ultimate finding.<sup>200</sup> Any disagreement as to the cause of an accident apparent from the reports or from investigator testimony impacts on the weight a jury should give the evidence, not the admissibility of the evidence. Certainly, in any contested air crash case, opposing experts will suggest many conflicting probable causes for the accident. The NTSB has no reason to concern it-

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<sup>195</sup> See *supra* note 40 for the court's statement of the CAB's reasons.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See Welch & Faulk, *supra* note 32, at 585.

<sup>199</sup> *Id.*

<sup>200</sup> See *supra* note 40 for the court's statement of the CAB's reasons.

self with presenting only one unified opinion about an accident.

*Universal Airline* cites the fourth reason as the concern that investigators might influence the outcome of civil litigation.<sup>201</sup> At the time the CAB gave this reason, only CAB investigators took part in the investigation. Today, representatives of each entity with employees or products involved in the crash take part in the investigation.<sup>202</sup> The NTSB investigators do not operate in a vacuum. The non-NTSB representatives on the investigation team look out for their own interest. Furthermore, modern technology provides the opportunity for testing not even imagined when Congress passed the first air commerce legislation. Many times this testing requires moving and even destroying the item tested, making it impossible for private investigators to follow-up. Courts recognize this predicament and sometimes allow investigator testimony when no other source of information exists.<sup>203</sup> In this situation, the report of investigators *should* influence the outcome of civil litigation.

The CAB, as expressed in *Universal Airline*, finally cites money as a reason for limiting the use of accident reports.<sup>204</sup> In expressing probably its most honest reason, the CAB expresses its worst reason. Again, the NTSB and the tort system share the same goals. The NTSB should not attempt to hide behind budgetary constraints when litigants come calling. The NTSB should require litigants to compensate investigators called to trial, just as the parties compensate any other expert. This situation does not support limiting the admissibility of the probable cause report.

Two other reasons for maintaining section 1441(e) float through the cases and commentary. First, introducing the NTSB's finding as to probable cause supplants the role of

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<sup>201</sup> *Id.*

<sup>202</sup> See *supra* note 152 and accompanying text for a discussion of this provision.

<sup>203</sup> See *supra* notes 173-174 and accompanying text for an example.

<sup>204</sup> See *supra* note 40 for the court's statement of the CAB's reasons.

the judge and jury.<sup>205</sup> This reason carried more weight before Congress adopted Federal Rule of Evidence 704.<sup>206</sup> Now, any expert can express an opinion as to the ultimate issue in a case. Viewing the report as an expert, the concern over supplanting the role of judge and jury no longer carries any weight. Second, juries view a report prepared by a governmental agency as more credible, just because of the preparer.<sup>207</sup> The Federal Rules of Evidence do support this reasoning. Rule 803(8) creates a hearsay exception for government reports, but only if they are factual.<sup>208</sup> However, litigants can readily challenge the credibility of NTSB reports through a battle of the experts. In many major cases, litigants have their own in house experts that took part in the NTSB investigation and can challenge the findings from first hand knowledge.<sup>209</sup> In any case, the litigant can argue the report is admissible under rule 803(24), the general hearsay exception.<sup>210</sup>

The current confused state of the law mandates change. The regulations allow litigants to admit into evidence the Factual Accident Report even though the NTSB admits that it contains opinion that a court cannot effectively excise.<sup>211</sup> Potential litigants can influence the report

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<sup>205</sup> See Papadakis, *supra* note 32, at 521. The CAB may have considered this justification in stating their fourth reason. See *supra* note 40.

<sup>206</sup> See *supra* notes 143-144 for a discussion of Federal Rule of Evidence 704.

<sup>207</sup> *Beena*, 578 F.2d at 272.

<sup>208</sup> See *supra* notes 135-139 and accompanying text for a discussion of Federal Rule of Evidence 803(8).

<sup>209</sup> See *supra* note 152 for a discussion of outside party involvement in investigations.

<sup>210</sup> FED. R. EVID. 803(24). The requirements under rule 803(24) are:

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

*Id.* A plaintiff might readily argue that the probable cause report is more probative as to the cause of an accident than anything the plaintiff can reasonably produce through individual effort.

<sup>211</sup> See 49 C.F.R. § 835.3 (1986).

through their involvement in the investigation, but opposing counsel can address this by attacking the credibility of the report, emphasizing to the jury that they should not give the report much weight. Courts allow investigators to testify to all the reasons a plane did not crash, but the investigator cannot say why it did. A court carefully examines the basis of an expert's testimony, because the opinion must not come straight from the probable cause report. Yet, the same court justifiably refuses to rule that the expert used the improper source just because the expert and the report came to the same conclusion. A court finds that the Factual Accident Report is an admission against the government and thus not hearsay,<sup>212</sup> while the real admission is the probable cause report.

Rather than putting courts and litigants through the games currently taking place in the courts, Congress should drop all restrictions on use of NTSB findings. Let the evidence in for whatever it is worth, and let the parties battle over credibility. Section 1441(e) began with an "uncertain purpose"<sup>213</sup> and has definitely not found one today. Allow courts to view the reports under modern evidentiary rules and not a suspect 1934 edict. Give taxpayers their money's worth from the reports and allow the NTSB and tort system to work in harmony.

### CONCLUSION

The road from the first air commerce legislation to the present includes many turns. The NTSB played no small role in the phenomenal success that the airline industry has enjoyed. Congress attempted to limit the role of the NTSB to accident prevention only, but ingenious attorneys have used the courts to expand this role by presenting NTSB findings in civil litigation in various ways. The complexities of aircraft accident investigation warrant this increased role. Courts have added judicial gloss to a stat-

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<sup>212</sup> See FED. R. EVID. 801(d)(2).

<sup>213</sup> See *supra* note 29 and accompanying text.

ute extremely clear on its face. As more courts ignore the current prohibition on the use of NTSB findings, plaintiff's attorneys will begin to forum shop as inequities develop between jurisdictions. The time has come, once again, for the Legislature to speak.