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Case Notes

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Case Notes

AIR CARRIERS—TORT LIABILITY—An Air Carrier Is Obligated to Exercise a High Degree of Care, Not Only in the Transit Stage of its Operation, But in the Ticket-Selling Stage As Well. *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612 (7th Cir. 1974).

Plaintiff Edna Suarez, a resident of Virginia, suffered an angina attack in Chicago and was hospitalized there for treatment. Upon being notified by her doctor that his wife could return home, plaintiff's husband made reservations for her on defendant TWA's flight from Chicago to Washington, D.C. He also informed defendant's agent in Washington of the plaintiff's physical condition, that she would require a wheelchair upon arrival at O'Hare Airport, and that fare payment would be by American Express Card. When plaintiff arrived at the airport, she was placed in a wheelchair by a TWA skycap but was refused a ticket by TWA's ticket agent because the American Express Card offered by her bore only her husband's name. By the time the problem of payment had been resolved, plaintiff had been left alone in the terminal for two hours, allegedly had been the subject of abusive language by defendant's ticket agent, and had missed her flight. Upon being informed that her flight had departed, plaintiff suffered a heart attack and was subsequently re-hospitalized. Plaintiff brought a negligence action for damages against the defendant airline in federal court, jurisdiction being based on diversity of citizenship. The trial court charged the jury that defendant owed a duty of ordinary care to the plaintiff, refusing plaintiff's requested charge which placed a duty of the highest degree of care upon the defendant.¹ *Held, reversed and re-*

¹ The district court refused to give the following instructions requested by plaintiff:

At the time of the occurrence in question, the defendant TWA was a common carrier. A common carrier is not a guarantor of its passengers' safety. But it has a duty to its passengers to use the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by air. It was the duty of the defendant . . . before and at the time of the

manded: Even though plaintiff had not received a ticket or attempted to board defendant's aircraft, she was a passenger for the purpose of the common law rule in Illinois which imposes upon carriers a high degree of care and safety. *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612 (7th Cir. 1974).

The standard of care owed by a common carrier to its passengers has been the subject of much debate. It has been variously described as "extraordinary vigilance, aided by the highest skill,"² "utmost caution characteristic of very careful, prudent men,"³ and the "highest degree of care consistent with the proper management of the business."⁴ The common carrier has even been required to protect its passengers "so far as that is practicable by the exercise of human care and foresight."⁵ Some jurisdictions have held the carrier to these extraordinary degrees of care throughout the entire carrier-passenger relationship.⁶ Other jurisdictions have adhered to the view that the duty to exercise the highest degree of care, based on the risk inherent in powerful modes of conveyance, is required only while the passenger is in the actual course of transportation, that is, either boarding, alighting, or actually travelling.⁷ Still others,

occurrence to use the highest degree of care for the safety of the plaintiff.

When a carrier is aware that a passenger is physically disabled or infirm so that the hazards of travel are increased as to her, it is the duty of the carrier to provide that additional care which the circumstances reasonably require.

Suarez v. Trans World Airlines, Inc., 498 F.2d 612, 614-15 (7th Cir. 1974).

² *Morgan v. Chesapeake & O. Ry.*, 127 Ky. 433, ___, 105 S.W. 961, 962 (Ky. Ct. App. 1907).

³ *Pennsylvania Co. v. Roy*, 102 U.S. 451, 456 (1880), where the court held a railroad liable for an injury resulting from a defective berth.

⁴ *Jordan v. New York, N.H. & H. Ry.*, 165 Mass. 346, 43 N.E. 111 (1896).

⁵ *Shoemaker v. Kingsbury*, 79 U.S. (12 Wall.) 369, 376 (1870).

⁶ See *Jordan v. New York, N.H. & H. Ry.*, 165 Mass. 346, 43 N.E. 111 (1896), where the court held the defendant carrier liable for injuries incurred by plaintiff when she fell through a hole in the ladies' toilet room. The court stated that the "plaintiff was a passenger, and the defendant owed her the highest degree of care consistent with the proper management of the business in which it was engaged." *Id.* at ___, 43 N.E. at 111. See also *Ortiz v. Greyhound Corp.*, 275 F.2d 770 (4th Cir. 1960), holding that, under Maryland law, the carrier must exercise the highest degree of care, not only in the transit stages of its operation, but in other stages as well. With regard to station premises and waiting rooms, see *Brckett v. Southern Ry.*, 88 S.C. 447, 70 S.E. 1026 (1911).

⁷ *West Memphis Packet Co. v. White*, 99 Tenn. 256, 41 S.W. 583 (1897); *Neering v. Illinois Cent. Ry.*, 383 Ill. 366, 50 N.E.2d 497 (1943); *Federal Ins. Co. v. Bonilla Colon*, 392 F.2d 662 (1st Cir. 1968).

recognizing that logically the law should require only one duty of care between members of society, hold carriers to a reasonable standard of care in all stages of their operations.⁸

Controversy over the appropriate standard and its proper application is not confined to the different jurisdictions; rather, conflicting precedents can be found even within many states.⁹ The difference of opinion between the district court and the United States Court of Appeals for the Seventh Circuit in *Suarez* on the standard of care a common carrier owes a potential passenger in the terminal, under Illinois law, illustrates this intrastate confusion.

In reversing the decision of the district court, the United States Court of Appeals for the Seventh Circuit in *Suarez* employed a detailed analysis to determine whether the plaintiff was a TWA passenger at the time of the injury. The *Suarez* court indicated that payment of fare is not a prerequisite to the attainment of passenger status.¹⁰ Rather, the court of appeals in *Suarez* held applicable a five-pronged test, devised by the Washington Supreme Court in *Zorotovich v. Washington Toll Bridge Authority*¹¹ and followed by the Illinois Supreme Court in *Katamay v. Chicago Transit Au-*

For a good statement of the supporting rationale for this rule, see *Johns v. Charlotte, C. & A. Ry.*, 39 S.C. 162, 17 S.E. 698 (1893) (dissenting opinion).

⁸ *Union Traction Co. v. Berry*, 188 Ind. 514, 121 N.E. 655 (1919), where the court states:

If there can be no degrees of negligence, it must follow that there can be no degrees of duty. Duty is an absolute term. The law requires nothing more than duty; it will excuse nothing less.

Id. at —, 121 N.E. at 657. For a more recent case following this rationale, see *Thompson v. Ashba*, 122 Ind. App. 271, 102 N.E.2d 519 (1951).

New York has also rejected maintenance of different degrees of care. See, e.g., *McLean v. Triboro Coach Corp.*, 302 N.Y. 49, 96 N.E.2d 83 (1950); *Thomas v. Central Greyhound Lines, Inc.*, 6 App. Div. 2d 649, 180 N.Y.S.2d 461 (1958).

⁹ Federal courts applying New York law exemplify this confusion. In *Krasnow v. National Airlines, Inc.*, 228 F.2d 326 (2d Cir. 1955), the court stated it would be "hard pressed" to choose between the conflicting New York decisions dealing with the standard of care owed by carriers were it not for *McLean v. Triboro Coach Co.*, 302 N.Y. 49, 96 N.E.2d 83 (1950), which indicated to the court the breeze was blowing toward the standard of reasonableness. This application of New York law was quickly criticized in *McFadden v. New York, N.H. & H. Ry.*, 176 F. Supp. 465 (S.D.N.Y. 1959), where the court held that the First Circuit Court of Appeals in *Krasnow*, *supra*, was speculating as to what New York law might become. The *McFadden* court felt that the high degree of care standard for carriers was still the standard followed in New York.

¹⁰ *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 615 (7th Cir. 1974).

¹¹ 80 Wash. 2nd 106, 491 P.2d 1295 (1971).

thority,¹² to determine whether plaintiff had attained passenger status. The five elements of this test are:

- 1) place (a place under the control of the carrier and provided for the use of persons who are about to enter the carrier's conveyance);
- 2) time (a reasonable time before the time to enter the conveyance);
- 3) intention (a genuine intention to take passage upon the carrier's conveyance);
- 4) control (a submission to the directions, express or implied, of the carrier);
- 5) knowledge (a notice to the carrier either that the person is actually prepared to take passage or that persons awaiting passage may reasonably be expected at the time or place).¹³

In using this test, however, the court of appeals discussed only the control element in relation to the facts in *Suarez*, anchoring its decision on that basis alone.¹⁴ The court emphasized that the determining consideration was Mrs. Suarez' disability and virtual captivity in the defendant's wheelchair, underscoring the control element. The opinion further states that under Illinois law, once a common carrier is aware of a passenger's disability, it owes that passenger an even greater degree of attention.¹⁵ Considering the control the defendant exercised over plaintiff and the defendant's knowledge of plaintiff's condition, the *Suarez* majority concluded that Mrs. Suarez was, in fact, a passenger at the time of the attack. The Seventh Circuit reserved decision as to whether a wheelchair could be a mode of common carriage, however, since that determination was unnecessary to the disposition of the case, but the court indicated by inference that a wheelchair might very well fit into that classification.¹⁶ Having resolved that the plaintiff had attained

¹² 53 Ill. 2d 27, 289 N.E.2d 623 (1972).

¹³ *Id.* at 32, 289 N.E.2d at 626.

¹⁴ *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 616 (7th Cir. 1974), where the court quotes the *Katamay-Zorotovich* test but only discusses one of its elements.

¹⁵ *Id.* at 616-17 n.5. For this proposition the court cites 2 RESTATEMENT (SECOND) OF TORTS § 314A (1) (1960). This proposition is accepted in a number of jurisdictions. 14 AM. JUR. 2d *Carriers* 956 (1964). The rationale behind the rule is that the carrier's failure to give special care to an infirm passenger is negligence per se if the carrier is aware or should be aware of the infirmity.

¹⁶ *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 617 n.6, in which the court cites *Fisher v. Mount Mansfield Co., Inc.*, 283 F.2d 533 (2d Cir. 1960).

passenger status, the court of appeals in *Suarez* had no difficulty in finding that she was entitled to a high degree of care, interpreting Illinois law to require a common carrier to exercise a high degree of care whenever the passenger-carrier relationship exists.¹⁷

The decision of the United States Court of Appeals for the Seventh Circuit in *Suarez* is significant for essentially two reasons: (i) the five-pronged test it applies in determining whether the passenger-carrier relationship is present; and (ii) the court's assumption that once that relationship is established the high degree of care automatically attaches.

It is necessary first to examine the *Suarez* court's finding of the passenger-carrier relationship to determine whether this conclusion is justified. The passenger-carrier relationship has traditionally rested upon the basic contractual principles of offer and acceptance—the contract arising when there is an undertaking by an individual to travel on the conveyance and an acceptance by the carrier of the individual as a passenger.¹⁸ Initially, the determination of the presence of these two elements was a fact question for the jury.¹⁹ Gradually, however, there has been a departure from these two concepts through liberal judicial application, showing little allegiance to contractual guidelines and leaving the standard-of-care determination to the judge rather than jury. The passenger-carrier relationship has been found to exist the moment an individual enters upon the carrier's premises with the intention of purchasing a ticket, be it the ticket office, station, or waiting room.²⁰ The actual purchase of the ticket is not a prerequisite for the passenger-carrier relationship, especially if the passenger has not had the opportunity to make the purchase.²¹ Many courts grappling with the passenger-

In *Fisher*, the United States Court of Appeals for the Second Circuit held a ski lift to be a common carrier. The court in *Suarez* suggests, though expressly does not decide, that the wheel chair in this case was a carrier. Alluding to other decisions finding escalators and elevators to be common carriers and the *Fisher* decision, the *Suarez* court indicates that any conveyance which has bodily control over an individual and transports him from one area to another is a carrier.

¹⁷ *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 617 (7th Cir. 1974).

¹⁸ *Weber v. Chicago, R.I. & P. Ry.*, 175 Iowa 358, 151 N.W. 852 (1915); *Galehouse v. Minneapolis, St. P. & S.S.M. Ry.*, 22 N.D. 615, 315 N.W. 189 (1912).

¹⁹ *Aschenbrenner v. United States Fidel. & Guar. Co.*, 292 U.S. 80 (1934); *Chicago, R.I. & P. Ry. v. Stepp*, 164 F. 785 (8th Cir. 1908).

²⁰ *Rawlings v. Wabash Ry.*, 97 Mo. App. 515, 71 S.W. 534 (1903).

²¹ *St. Louis I.M. Ry. v. Green*, 110 Ark. 232, 161 S.W. 148 (1913).

carrier question have based their holdings on an implied contract theory.²² By making its premises available for passenger service, the carrier impliedly accepts the tacit offer of an individual who walks onto its premises with the intent of purchasing a ticket.²³ This theory has also been applied when the plaintiff was injured in the process of boarding defendant's conveyance.²⁴ The rationale behind these decisions is that a carrier, by stopping at a designated point, makes an offer of transportation which is impliedly accepted by the passenger who attempts to board.²⁵ One court has held that in the event the carrier announces that no more passengers will be accepted, any person attempting to board at that time will not be accorded passenger status.²⁶ This decision is based on the contractual principle that an offer remains open until expressly revoked.

The contractual approach to the establishment of the passenger-carrier relationship has to some extent been replaced by judicially-constructed formulas, designed to operate more equitably than the offer-acceptance analysis.²⁷ Vestiges of the offer-acceptance test can still be seen, however, camouflaged within these recently constructed formulas.²⁸ The more recent tests allow more flexibility in application, enabling plaintiffs to recover more easily. The *Suarez* court used the test formulated in *Zorotovich* to determine passenger status; the court inadequately applied the test, however, finding

²² *Roberts v. Yellow Cab Co.*, 240 A.2d 733 (Me. 1968), where the court held that the carrier-passenger relationship exists when one intending in good faith to become a passenger goes at an appropriate time to the place designated for departure and the carrier takes some action indicating acceptance of the passenger as a traveler. *Id.* at 736. For other cases finding the passenger-carrier relationship arising out of an implied contract, see 14 AM. JUR. 2d *Carrier*, § 739 n.19 (1964).

²³ *Weber v. Chicago, R.I. & P. Ry.*, 175 Iowa 358, 151 N.W. 852 (1915).

²⁴ *Illinois Cent. Ry. v. O'Keefe*, 168 Ill. 115, 48 N.E. 294 (1897); *Oklahoma Ry. v. Roebuck*, 205 Okla. 549, 240 P.2d 845 (1951).

²⁵ *Sanchez v. Pacific Auto Stages*, 116 Cal. App. 392, 2 P.2d 845 (1931).

²⁶ *Orr v. Los Angeles Metropolitan Transit Authority*, 213 Cal. App. 2d 699, 20 Cal. Rptr. 355 (1963).

²⁷ *Zorotovich v. Washington Toll Bridge Authority*, 80 Wash. 2d 106, 491 P.2d 1295 (1971); *Katamay v. Chicago Transit Authority*, 53 Ill. 2d 27, 289 N.E. 623 (1972).

²⁸ The test in *Zorotovich v. Washington Toll Bridge Authority*, 80 Wash. 2d 106, 491 P.2d 1295 (1971), takes into consideration factors that have customarily been weighed in determining whether a contractual situation has developed—i.e., intent and knowledge.

the control issue alone determinative.²⁹ Without making any attempt to scrutinize the place or time where the injury occurred, the court of appeals in *Suarez* concluded that the control element, exemplified by the plaintiff's disability and her quasi-captive state in defendant's wheelchair, accorded her passenger status. Perhaps the court felt that the other elements were obviously present and needed no attention. If that were the case the court was perhaps a bit reckless in its application of the test since it is questionable whether the place element was actually satisfied. Mrs. Suarez was in the O'Hare airline terminal at the time of her heart attack. To classify this area as a place under the control of the carrier or provided for the use of persons about to enter the carrier's conveyance unduly stretches the element's limits. Considering the facts of the case in which the test used by the *Suarez* court was devised, the element was most likely inserted to exclude from passenger status individuals who were merely in the general vicinity of carrier operations and not about to board or in close proximity to the potentially dangerous conveyance itself; an analysis of all five *Zorotovich* factors³⁰—not just one—is indispensable to the proper disposition of the passenger-carrier issue under Illinois law.³¹ Although a thorough application of the test might have dictated the same result, courts should exercise caution in applying these tests. Haphazard applica-

²⁹ *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 616 (7th Cir. 1974).

³⁰ In *Zorotovich v. Washington Toll Bridge Authority*, 80 Wash. 2d 106, 491 P.2d 1295 (1971), the Supreme Court of Washington carefully examines each element it sets out to be considered when determining passenger status. The court indicates that the place element was satisfied in *Zorotovich* because the "place was one under the sole control of the carrier." *Id.* at ___, 491 P.2d at 1297 (emphasis added). The court also distinguishes two earlier cases denying passenger status to the plaintiff because the place of the injury was "under the joint control of the companies and open to the public." *Id.* at ___, 491 P.2d at 1298. In *Suarez*, the United States Court of Appeals for the Seventh Circuit does not even treat this element even though the area was not under the sole control of the defendant carrier but was the general terminal area open to the public and under the joint control of many carriers.

³¹ See *Zorotovich v. Washington Toll Bridge Authority*, 80 Wash. 2d 106, 491 P.2d 1295 (1971), in which the test used in *Suarez* was formulated. The Washington court states that all five factors are "to be considered." A consideration of the five factors is designed as a method of determining if an implied contract existed between the carrier and the individual. Without a contract, implied or expressed, the passenger-carrier relationship cannot exist. 14 AM. JUR. 2d *Carriers* § 739 (1964).

The *Suarez* court distorts the implied contract analysis by concluding that, since the defendant carrier supplied the plaintiff with a wheelchair, an implied contract for carriage of the plaintiff was created.

tion could easily result in the inclusion of all who enter airports in the "passenger" category, imposing on the carrier the burden of a high degree of care when the passenger-carrier relation is tenuous at best. The approach of finding a passenger-carrier relationship and automatically declaring a high degree of care should also be questioned since it clouds the real issue which is the amount of care owed by this defendant to this plaintiff under these circumstances.

The high-degree-of-care doctrine has recently been subjected to considerable scrutiny³² and, in some instances, extensive attack.³³ The doctrine has been criticized for a variety of reasons, including the difficulties inherent in its application,³⁴ the perplexity it causes both bench and bar,³⁵ and its invasion of the jury's province as fact-finder.³⁶ The major criticism of the rule is that it undermines the basic concept of American tort law, that society demands that its citizens exercise only a reasonable degree of care in their relationships with one another.³⁷ To distinguish between degrees of care is to contravene this basic tort principle. The premise is that the amount of care exercised must be commensurate with the danger present in the factual situation of each case.³⁸ The strength of this argument is best tested by an historical analysis of the high-degree-of-care doctrine, examining the reason for its birth and subsequent development.

In his treatise on bailments,³⁹ Mr. Justice Story stated the rule of higher duty and rationalized the basis for its existence.⁴⁰ Emphasizing the helplessness of a passenger who has committed himself

³² *McLean v. Triboro Coach Corp.*, 302 N.Y. 49, —, 96 N.E.2d 83, 84 (1950).

³³ *Union Traction Co. v. Berry*, 188 Ind. 514, —, 121 N.E. 655, 658 (1919); *Thomas v. Central Greyhound Lines, Inc.*, 6 App. Div. 2d 649, 180 N.Y.S.2d 461 (1958). See also 14 AM. JUR. 2d *Carriers* § 916 (1964), where it is stated that "the modern trend is away from the artificial and perplexing categories of high and highest degree of care and toward one standard for all cases of reasonable or ordinary care under the circumstances of the particular case."

³⁴ *O'Brien v. New York Ry.*, 185 App. Div. 867, 870, 174 N.Y.S. 116, 118 (1919).

³⁵ *Id.*

³⁶ *Union Traction Co. v. Berry*, 188 Ind. 514, 121 N.E. 655 (1919).

³⁷ *Thomas v. Central Greyhound Lines, Inc.*, 6 App. Div. 2d 649, 180 N.Y.S.2d 461 (1958).

³⁸ *Id.* at —, 180 N.Y.S.2d at 465.

³⁹ J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS (5th ed. 1851).

⁴⁰ *Id.* at 620, 621.

to the carrier's control, Story contended that the carrier is liable for even the slightest neglect in transit.⁴¹ The Supreme Court of Indiana discussed the reasoning behind the rule in *Pere Marquette R.R. v. Strange*.⁴² The opinion in *Pere Marquette* stressed the reliance of the passenger upon the carrier for his safety while being transported and called attention to the inherent danger in carrier operations and the frightful consequences that might result from the slightest omission.⁴³ The high standard of care doctrine is thus the product of two concerns: (i) the danger inherent in carrier operations due to their immense power, and (ii) the passenger's complete bodily surrender to the carrier, relying upon the carrier for his safety. Accordingly, application of the doctrine was initially confined to situations in which passengers were actually boarding, alighting, or being transported since these were the only times the passenger was exposed to the powerful and dangerous conveyances or had entrusted himself to carrier control.⁴⁴ The doctrine has, however, occasionally been blindly and mechanically applied after a technical finding of the passenger-carrier relationship.⁴⁵

The majority in *Suarez* first established that Mrs. Suarez was a passenger of the defendant airline. Having concluded that she fit within that classification, the court of appeals stated that as a passenger, she was "entitled to the benefit of the high degree of care which Illinois affords to passengers."⁴⁶ This analysis avoids the real question of whether a common carrier should owe its passengers a high degree of care in all stages of the carrier-passenger relationship.⁴⁷

⁴¹ Story analogizes between criminal and carrier cases indicating that the carrier and criminal are both held liable for the slightest neglect since the activities of both involve great danger. *Id.* at 621.

⁴² 171 Ind. 160, 84 N.E. 819 (1908).

⁴³ *Id.* at 165, 84 N.E. at 822 (1908). Other jurisdictions have adopted the high standard of care doctrine for similar reasons. See *Kelly v. Manhattan Ry.*, 172 N.Y. 443, 20 N.E. 383 (1889); *Wiley v. Restland Ry.*, 86 Vt. 504, 86 A. 808 (1913).

⁴⁴ *Seaboard Air Line Ry. v. Mobley*, 194 Ala. 211, 69 S. 614 (1915); *Nashville C. & St. L. Ry. v. Crosby*, 183 Ala. 237, 62 S. 889 (1913); *Indiana Union Traction Co. v. Reiter*, 175 Ind. 268, 92 N.E. 982 (1910). See also cases cited note 7 *supra*.

⁴⁵ *Southern Pac. Co. v. Ward*, 208 F. 385 (9th Cir. 1913); *Dodge v. Boston & B.S.S. Co.*, 148 Mass. 207, 19 N.E. 373 (1889).

⁴⁶ *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 617 (7th Cir. 1974).

⁴⁷ The court of appeals was obligated to apply Illinois law in this case. How-

The dissent in *Suarez* emphasized that this is the real issue, indicating that the passenger classification is inconclusive of the standard of care owed.⁴⁸ The amount of care owed should instead be measured by an analysis of the consequences which might attend the lack of care. The dissent cited the same case relied upon by the majority in its decision, *Katamay v. Chicago Transit Authority*,⁴⁹ but interpreted the proposition established in that case differently. In *Katamay*, the Illinois Supreme Court held that the "degree of care should be commensurate with the danger to which the passenger is subjected and the degree of care required to be exercised increases as the danger increases."⁵⁰ The dissent inferentially indicated that the *Zorotovich-Katamay* test is only a means to determine that danger.⁵¹

The dissent in *Suarez* warned of the unwarranted results that can flow from unquestioning adherence to a mechanical rule. To determine the standard of care owed in a carrier case, the court should not establish merely that a carrier-passenger relationship exists. In some stages of the passenger-carrier relationship, the passenger is in no more danger than a customer in a department store, the frustration and risks of delay being relatively similar in both situations.⁵² This is particularly true in the airlines' ticket-selling operations. In the absence of a dangerous conveyance or the passenger's bodily surrender to the carrier, the rationale for the application of the rule is lacking. For this reason, courts have often refused to require the carrier to exercise a high degree of care in the maintenance of its business structures.⁵³ It is arguable that the

ever, the high degree of care instruction was not dictated by Illinois law, which does not fix the proper degree of care solely upon the finding of the passenger-carrier relationship. *Davis v. South Side Elevated Ry.*, 292 Ill. 378, 127 N.E. 66 (1920); *Katamay v. Chicago Transit Authority*, 55 Ill. 2d 27, 289 N.E.2d 623 (1954).

⁴⁸ Quoting *Davis v. South Side Elevated Ry.*, 292 Ill. 378, 217 N.E. 66 (1920), the dissent indicates that the degree of care is "not fixed solely by the relation of carrier and passenger; it is measured by the consequences which may follow the want of care." *Suarez v. Trans World Airlines*, 298 F.2d 612, 618 (7th Cir. 1974) (dissenting opinion).

⁴⁹ 53 Ill. 2d 27, 289 N.E.2d 623 (1972).

⁵⁰ *Id.* at ___, 289 N.E.2d at 625.

⁵¹ *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 618 (7th Cir. 1974) (dissenting opinion).

⁵² *Id.*, where the dissent makes this analogy.

⁵³ See, e.g., *Hoffman v. Lehigh Valley Ry.*, 188 App. Div. 414, 177 N.Y.S. 140 (1919); *Federal Ins. Co. v. Bonilla Colon*, 329 F.2d 662 (1st Cir. 1968).

differentiation between degrees of care should be discarded altogether in favor of a reasonableness standard to be determined by the facts and circumstances of each case.

The New York courts have been re-evaluating the high degree of care doctrine. In *McLean v. Triboro Coach Corp.*,⁵⁴ the New York Court of Appeals suggested a re-examination of New York decisions that have upheld jury instructions holding a common carrier to a "high," "very high," or the "highest" degree of care.⁵⁵ The *McLean* court noted that the judicial distinction among various degrees of care results in difficult application and disturbing confusion to the bench and bar alike.⁵⁶ The New York Court of Appeals' lead in *McLean* was followed in *Thomas v. Central Greyhound Lines*,⁵⁷ in which the New York Supreme Court, Appellate Division, held that reasonable care under the circumstances is the measure of legal liability for common carriers.⁵⁸ The *Thomas* opinion implies that as the danger increases, so does the amount of care a reasonably prudent man would be required to exercise.

The New York rule is more logical than that applied in *Suarez* for several reasons. First, the flexible New York rule allows the amount of care to be determined by the prevailing circumstances rather than by a mechanical rule. This flexibility enables the jury to tailor the required amount of care to the facts of the instant case. Secondly, the fact-finding process is left entirely up to the jury.⁵⁹ Twelve jurors are better equipped to decide, based on their own experience with human conduct, how much care should be exercised in a given situation, than is a single judge. Thirdly, the confusion as to the appropriate jury charge relating to the standard of care is eliminated. There is only one charge—reasonable care under the circumstances.

It might be contended that the abrogation of the high-standard-of-care doctrine in favor of a rule requiring reasonable care under

⁵⁴ 302 N.Y. 49, 96 N.E.2d 83 (1950).

⁵⁵ *Id.* at ___, 96 N.E.2d at 84.

⁵⁶ The court did not indulge in a re-examination of the high standard of care doctrine since that point was not in issue in *McLean*. *Id.*

⁵⁷ 6 App. Div. 2d 649, 180 N.Y.S.2d 461 (1958).

⁵⁸ *Id.* at ___, 180 N.Y.S.2d at 465.

⁵⁹ *Union Traction Co. v. Berry*, 188 Ind. 514, ___, 121 N.E. 655, 657 (1919), holding that how much care a common carrier should be required to exercise constitutes a fact determination for the jury.

the circumstances would encourage laxity in airline safety measures and precautions. One might also argue that a common carrier should be held to a high standard at all times for the protection of passengers who, due to the quasi-monopolistic structure of the carrier industry, have little choice in the carrier they patronize.⁶⁰ A standard of reasonable care under the circumstances should not, however, necessarily relieve the airline of liability nor would it invite careless operation of airline facilities. The reasonable care standard would simply provide a means by which the jury could establish some congruity between the present risk and the corresponding amount of care.

The central question is not whether Mrs. Suarez should recover but rather the appropriate procedure to follow in making that determination. The majority opinion constitutes an awkward attempt to establish the carrier-passenger relationship through the misapplication of a judicially-constructed formula. The *Suarez* opinion suggests that the finding of this relationship is a *sine qua non* for the application of the high standard of care, and so it gropes to find that relationship. The court in *Suarez* should have instructed the jury that the defendant was required to exercise reasonable care under the attendant circumstances. The jury would then have been able to decide, considering Mrs. Suarez' condition, defendant's refusal of the American Express Card as payment, the allegedly rude manner in which Mrs. Suarez was treated, and any other factors it deemed relevant, how much care was owed and whether the defendant exercised that care. Thus, the province of the jury would have been uninvaded, permitting it to tailor the amount of care to the circumstances, resulting in consistent application, less confusion, and a greater sense of even-handed justice.

Hubert A. Crouch, III

⁶⁰ *Brackett v. Southern Ry.*, 88 S.C. 447, 70 S.E. 1026 (1911), in which the plaintiff was allowed to recover damages from defendant due to defendant's failure to keep its waiting room adequately heated. The Supreme Court of South Carolina explained its imposition of a high degree of care as an attempt to prevent the abuse of individuals by an industry controlled by so few companies.

AIR SERVICE—ROUTE CERTIFICATION—The Civil Aeronautics Board May Authoritatively Issue a Temporary Certificate of Public Convenience and Necessity Covering a Route From Which Two Permanently Certificated Airlines Are Concurrently Suspended. *Western Air Lines, Inc. v. CAB*, 495 F.2d 145 (D.C. Cir. 1974).

The Civil Aeronautics Board (CAB), rejecting portions of the *Alaska Service Investigation*¹ Examiner's findings and recommendations, revamped the Alaska air route pattern. Pan American World Airways (Pan Am), holder of the original Alaskan grandfather certificate²—including service to Seattle, Juneau, Ketchikan and Fairbanks—was granted sole non-stop carrier status from Seattle to Fairbanks, but was concomitantly suspended from servicing Juneau and Ketchikan for seven years. Western Air Lines (Western), also permanently certificated to these cities, was suspended for an identical period over its Seattle-Ketchikan-Juneau-Anchorage route while retaining its Seattle-Anchorage non-stop run. Alaska Airlines (Alaska) received temporary certification for the same seven year period along the inside Seattle-Anchorage route, via such intermediate points as Juneau and Ketchikan. Western and Pan Am vehemently challenged the Board's authority to suspend two permanently certificated carriers for a seven year period and to issue a temporary certificate covering a route from which other carriers have been suspended. *Held, affirmed*: It is within the ambit of the Civil Aeronautics Board's authority to suspend permanent certificates and concurrently to issue a temporary certificate to a new carrier over the same route. *Western Air Lines, Inc. v. CAB*, 495 F.2d 145 (D.C. Cir. 1974).

The development of Alaska air service has not proceeded in a rational and orderly fashion.³ In analyzing the Alaska route struc-

¹ CAB Order No. 69-3-68 (Mar. 19, 1969).

² *Pacific Alas. Airways, Inc.—Certificate of Public Convenience and Necessity*, 1 C.A.A. 683 (1940).

³ Although all of the presently concerned air carriers provided Alaska with transportation services in 1938, Pan Am received the "grandfather" certificate to operate between Alaska and the mainland. *Pacific Alaska Airways, Inc.—Certificate of Public Convenience and Necessity*, 1 C.A.A. 683 (1940); *Pacific Northwest-Alaska Service Case*, 42 C.A.B. 489, 505 (1965). Northwest Airlines received temporary authority to extend its operations between New York and Anchorage as part of a more extensive route to the Orient in 1946. *Pacific Case*, 20 C.A.B. 791 (1955). In 1951, both Alaska and Pacific Northern, Western's predecessor, received temporary certification to Seattle but only Pacific Northern

ture in 1965, the Board concluded:

There thus has evolved through a series of proceedings and actions by the Board, the President, and the Congress, but without a determination of economic feasibility on traditional public convenience and necessity grounds by the Board, the present route pattern under which four carriers have been granted permanent route authority to provide service between the Pacific Northwest and one or more of the four major Alaskan air traffic centers.⁴

A comprehensive examination of the Alaska air pattern in 1965 gave rise to sweeping route changes.⁵ Alaska Airlines received seven-year temporary authority to operate between Seattle and Fairbanks with Anchorage as an intermediate point, but lost its Seattle-Fairbanks non-stop grant of authority. Pan Am was suspended from serving Juneau and Ketchikan for seven years. Pacific Northern's authority to serve Ketchikan and Juneau was restricted to flights originating or terminating in Seattle. The decision was not appealed by any of the parties although at the initiation of the investigation Pan Am prematurely challenged the Board's authority to consider such sweeping changes.⁶ The next major Alaska air route investigation culminated in the instant ruling.

The parameters of the Board's power over airline certificates are set forth in section 401 of the Federal Aviation Act.⁷ The CAB is empowered to grant either permanent certificates bearing no expiration date⁸ or temporary certificates set to expire on a given date.⁹

had original Board approval. Alaska received certification upon President Truman's insistence. U.S.-Alaska Service Case, 14 C.A.B. 122 (1951). Governmental attempts urging Alaska and Pacific Northern to merge proved futile. U.S.-Alaska Service, *supra*. Congress finally granted permanent certification to both airlines in 1957. Pub. L. No. 85-166, 71 Stat. 415, 49 U.S.C. § 481(a)(5) (Aug. 27, 1957).

⁴ Pacific Northwest-Alaska Service Case, 42 C.A.B. 489, 505 (1965).

⁵ *Id.* at 525-26.

⁶ Pan American World Airways, Inc. v. Boyd, 207 F. Supp. 152 (D.D.C. 1962), *rev'd sub nom.* Alaska Airlines, Inc. v. Pan American World Airways, Inc., 321 F.2d 394 (D.C. Cir. 1963).

⁷ Federal Aviation Act of 1958 § 101, 49 U.S.C. § 1301 (1970), *formerly* ch. 601, 52 Stat. 973 (1938).

⁸ 49 U.S.C. § 1371(d)(1) (1970).

⁹ These certificates are "for such limited periods as may be required by the public convenience and necessity." 49 U.S.C. § 1371(d)(2) (1970). At the time of expiration, the certificate must be renewed in order to continue service. *Cf.* 49 U.S.C. § 1371(a) (1970). For a comparison with other regulatory acts, *see* Federal Communications Act of 1934, § 301 *et seq.*, 47 U.S.C. § 301 *et seq.*

A certificate may be revoked only for intentional non-compliance with the Act or any order, rule, regulation, term, condition or limitation imposed by the CAB.¹⁰ Greater latitude is granted the Board in altering, amending, modifying or suspending certificates. The only restriction upon these actions is that the public convenience and necessity must require the measures taken by the Board.¹¹ That certificates issued to *foreign* air carriers may be suspended or *revoked* whenever the "public interest" demands such action,¹² reinforces the view that domestic air carriers may not suffer certificate revocation unless they stand in a position of non-compliance with the Act.

Attempts to refine definitions of Board power in these areas occurred as early as 1944.¹³ In that instance, the Board itself was the promulgator of the limiting interpretation often referred to as the *Panagra* principle. The Board there stated that the modification power could not be used to compel route changes which would constitute basic transformations of the carrier's system or air transportation route.¹⁴

The judiciary has approached this principle with reticence. Appellate courts have refused to enmesh themselves in the difficult problem of interpreting what is at best a vague standard; the principle is mentioned but not applied.¹⁵ Typical of this approach is

(1970); Interstate Commerce Act, Part F, § 1, 49 U.S.C. § 1 *et seq.* (1970); and Interstate Commerce Act, Part III (Water Carrier Act of 1940), § 301, 49 U.S.C. § 901 *et seq.* (1970).

¹⁰ 49 U.S.C. § 1371(g) (1970) provides:

The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition or limitation of such certificate: *PROVIDED:* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated.

¹¹ *Id.*

¹² 49 U.S.C. § 1372(f) (1970).

¹³ *Panagra Terminal Investigation*, 4 C.A.B. 670, 673 (1944).

¹⁴ *Id.* at 673.

¹⁵ *United Air Lines, Inc. v. CAB*, 198 F.2d 100, 106 (7th Cir. 1952); *Alaska*

Alaska Airlines, Inc. v. CAB.¹⁶ Although in that case the airline's route miles decreased from 3,947 to 993, the District of Columbia Court of Appeals ratified the exercise of the Board's modification powers since the totality of economic factors demonstrated that the proposed modification was necessitated by public convenience.¹⁷ By using this thinking the court apparently decided only the second of two issues before it. The first issue, the one strenuously urged by Alaska, was that the modification was tantamount to a revocation.¹⁸ The second issue, dependent upon a determination that the Board action constituted a modification, and the only issue answered by the court, was whether the modification should be sustained as an action demanded by traditional grounds of public convenience and necessity.¹⁹ A later district court case, without mentioning the *Panagra* principle, rejected the CAB's contention that a modification of a carrier's entire system by terminating a single certificate was within the CAB's authority and held that each certificate must be treated separately.²⁰ Regardless of its efficacy, the principle must be acknowledged as a self-imposed recognition by the Board that there are limits to the exercise of its alteration, amendment and modification powers.²¹

The distinction between the powers to alter, amend and modify is non-existent,²² but the suspension power does not fall in this category. The Seventh Circuit contrasted these powers in *United Air Lines v. CAB*.²³ The issue was whether a trunkline's permanent certificate could be temporarily suspended for a period of less than three years and granted to a local service air carrier for experimen-

Airlines, Inc. v. CAB, 285 F.2d 672, 675 (D.C. Cir. 1960); *Western Air Lines, Inc. v. CAB*, 495 F.2d 145, 157 (D.C. Cir. 1974).

¹⁶ *Alaska Airlines, Inc. v. CAB*, 285 F.2d 672 (D.C. Cir. 1960).

¹⁷ *Id.* at 674.

¹⁸ *Id.* at 673.

¹⁹ *Id.* at 674. See *United Air Lines, Inc. v. CAB*, 198 F.2d 100, 106 (7th Cir. 1952).

²⁰ *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 152, 157-58 (D.D.C. 1962), *rev'd sub nom. Alaska Airlines, Inc. v. Pan American World Airways, Inc.*, 321 F.2d 394 (D.C. Cir. 1963).

²¹ A fair standard for distinguishing revocations from modifications appears not to have been distilled by the judiciary. Perhaps *Panagra* maintains a tremor of viability in this regard.

²² Johnson, *Suspension of Certificates of Convenience and Necessity Under the Civil Aeronautics Act of 1938*, 14 J. AIR L. & COM. 512, 516 (1947).

²³ *United Air Lines, Inc. v. CAB*, 198 F.2d 100 (7th Cir. 1952).

tal purposes on a temporary basis.²⁴ The suspension was upheld, but in affirming the suspension two differences between the suspension power and the alteration, amendment and modification power were noted. A whole certificate may be suspended but an alteration, amendment or modification must affect the certificate only partially.²⁵ More importantly, an alteration or modification may be permanent but a suspension must concede the continued existence of the certificate rights.²⁶ The court also circumscribed Board power by stating that the Board could not accomplish step-by-step or piecemeal that which it was prohibited from doing directly.²⁷ Since the suspension was clearly of a temporary and limited nature, the appeal to dismiss the suspension was denied.

Prior to this decision the Ninth Circuit affirmed a similar suspension in *Western Air Lines v. CAB*, because (i) the suspension was unmistakably temporary; (ii) the presently certificated airline was unwilling to serve cities which, in the Board's view of public convenience and necessity, demanded service; and (iii) the new airline, a local service carrier, offered a distinctively new type of service.²⁸ Thus, the courts have approved potent exercises of the Board's suspension and modification powers.

Two powers not specifically mentioned in the statute but to which courts have referred merit attention. In *Pan American World Airways, Inc. v. Boyd*,²⁹ later reversed on other grounds, the district court found an attempt to "terminate" a permanent certificate to be a poorly disguised effort to revoke a certificate for reasons not contained in the statutory revocation clause. If a certificate is revoked, whether it be by that name or some other name and even though it be in the public interest, such action is not sustainable.

²⁴ United Air Lines maintained that a route structure, once established, could not be changed, absent statutory reasons for revocation, irrespective of public need. *Id.* at 107. The Board would contend that through its suspension powers it may cultivate results identical to a revocation. See Caribbean Area Case, 9 C.A.B. 534, 547 (1952).

²⁵ *Id.* at 106.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Western Air Lines, Inc. v. CAB*, 196 F.2d 933 (9th Cir. 1952), *cert. denied*, 344 U.S. 875 (1952).

²⁹ *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 152, 157-58 (D.D.C. 1962), *rev'd sub nom. Alaska Airlines, Inc. v. Pan American World Airways, Inc.*, 321 F.2d 394 (D.C. Cir. 1963).

Furthermore, an indefinite suspension "amounts practically to a revocation."³⁰

The Board is given the power to approve voluntary route transfers,³¹ but nowhere does the statute refer to compulsory route transfer power. If this power exists, carriers can be forced to exchange routes or route segments, thus implying that as an adjunct to the power to transfer, the Board may indefinitely suspend, terminate or revoke certificates in order to effectuate the transfer.³² The Supreme Court has acknowledged the absence of Board power to compel involuntary route transfers.³³

Lacking the power to terminate, transfer, or revoke a permanent certificate for reasons other than disobedience to the Act or Board rule, the Board may only suspend or modify a certificate in the interest of public necessity. Why the CAB chose to suspend in the instant case rather than to modify is a decision not alluded to by the court.³⁴ It must therefore be determined whether or not the

³⁰ 207 F. Supp. at 158. A. THOMAS, ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT 116-17 (1951), found the broad suspension power to be permissibly inclusive of unlimited suspensions indistinguishable from revocations. In the end, the distinction between suspensions for reasons of public interest and revocations based on rules violations must be one of degree. Johnson, *Suspension of Certificates of Convenience and Necessity Under the Civil Aeronautics Act of 1938*, 14 J. AIR L. & COM. 512, 520 (1947). The former chairman of the CAB discussed the difficulty in separating these two powers and proposed an avoidance of the problem by the more frequent use of temporary rather than permanent certificates. *Hearings on S. 3759 & H.R. 8898 Before the Senate Comm. on Interstate and Foreign Commerce*, 83rd Cong., 2d Sess. 73 (1954).

³¹ 49 U.S.C. § 1371(h) (1970).

³² Arguably, the Board may modify an airline's certificate by removing a segment at the same time it modifies a competing carrier's certificate by granting that segment to the second carrier. *Alaska Airlines, Inc. v. CAB*, 285 F.2d 672 (D.C. Cir. 1960). See text accompanying notes 15-21 *supra*.

³³ *Western Air Lines, Inc. v. CAB*, 347 U.S. 67, 72 (1954). "The Board thought it important to keep that incentive alive in order to promote route transfers and mergers which the Board could not compel." At least one writer has concluded on the basis of statutory interpretation and legislative history that none of these suspension, revocation and termination powers exist, except as clearly defined in the Act. *Transfer and Revocation of Certificates of Convenience and Necessity Under the Civil Aeronautics Act of 1938*, 16 J. AIR L. & COM. 471 (1949).

³⁴ Several reasons may be suggested for the utilization of suspension rather than modification powers. One is the fear that a modification of this magnitude would violate the *Panagra* principle. Another is that the Board was fearful of solidifying the Alaska route structure before the Board decided that this particular course of action was permanently advisable.

exercise of power in the Alaskan situation conformed to the congressional grant of authority.³⁵

To buttress the validity of the Board's determinations in the present case the District of Columbia Court of Appeals relied heavily on the necessity of administrative flexibility. The court reasoned that the grant of power to alter, amend, modify and suspend enables the Board to meet with flexibility the demands of commerce and national defense in an industry characterized by continual and rapid changes³⁶ by allowing the Board to revise route patterns through the certificate issuance and suspension powers. The congressional scheme was not intended to install indefinitely the permanently certificated air carrier, but to empower the Board to respond to changes by adjusting the operating authority.³⁷

This power was recognized in the early 1950's in cases upholding trunk line suspensions while experiments were conducted by local service carriers.³⁸ In the instant case, however, the purpose of the experimental period was merely to allow the Board to test a new route pattern in the Pacific Northwest.³⁹ Such an experiment fails to reflect past practice. As was stated in the classic economic study, *Air Transport and Its Regulators*:

Other experiments for which the Board has chosen new carriers have been all-cargo service, helicopter service, all-expense air tours, and specialized coach service between continental United States and Puerto Rico and Alaska. *In each instance the Board has viewed the proposed service as sufficiently novel and sufficiently uncertain to require the attention of a new "specialist" carrier whose life hangs on the success of the experiment.*⁴⁰

Alaska Airlines, an already existing carrier, presents no such novel

³⁵ An examination of the factual issues that led to the various choices of carriers in the Alaskan air markets will not be attempted. Since the application of administrative expertise indubitably entered into consideration, the scope of this work will be confined to an analysis of the extent of CAB power to effectuate the decisions made, not the criteria upon which the decisions were founded.

³⁶ *Western Air Lines, Inc. v. CAB*, 495 F.2d at 156, citing *United Air Lines, Inc. v. CAB*, 198 F.2d 100, 106 (7th Cir. 1952).

³⁷ *Id.*

³⁸ *Western Air Lines, Inc. v. CAB*, 196 F.2d 933 (9th Cir. 1952), *cert. denied*, 344 U.S. 875 (1952); *United Air Lines, Inc. v. CAB*, 198 F.2d 100 (7th Cir. 1952).

³⁹ 495 F.2d at 151.

⁴⁰ R. CAVES, *AIR TRANSPORT AND ITS REGULATORS* 170 (1962) (emphasis added).

or pioneering element in Alaskan air carrier service; rather, it only treads on the market interests of the established and highly similar carriers by installing a heretofore untried route pattern that merely precludes the existing carriers from exercising their full operational rights. The Board is empowered to experiment for well-defined temporary periods,⁴¹ but in those experiments upheld by the courts, the purposes, nature and novelty of the experiments have been drawn with care and precision,⁴² elements which were lacking in the instant case.

The court was quick to point to the structurally advantageous and financially desirable results of the Board's action as justification for the decision. All carriers still have Alaskan operations and financially all should realize a gain from the measures adopted.⁴³ Yet, however laudable the motives of the Board may be, the Board may not revoke a certificate except for violation of section 1371(g) of the Act; nor may it accomplish piecemeal that which it is prohibited from doing directly in one proceeding.⁴⁴

The argument that the Board's actions constituted a piecemeal revocation violative of long recognized principles of route security⁴⁵ failed to deter the Board's conclusions. The court noted that Pan Am and Western have preserved their route security by retaining their certificates, thus allowing for long range participation in Alaska's future. Additionally, the reconciliation of demands for administrative flexibility and conservation of route security interests is a matter calling for line-drawing, focused so that the "spotlight of accountability" rests on the Board, not the courts.⁴⁶ Both of these

⁴¹ *Braniff Airways v. CAB*, 147 F.2d 152 (D.C. Cir. 1945).

⁴² Cases cited note 38 *supra*.

⁴³ 495 F.2d at 156-57. Recent developments cast a shadow of doubt on this conclusion. A CAB law judge approved the sale of Pan Am's Seattle-Fairbanks route to "help bolster Pan Am's shaky finances." Additionally, Pan Am requested a two year suspension of Pan Am's services at Fairbanks on its New York-Tokyo route that would effectively terminate all operations in Alaska by Pan Am. If the CAB's determination that Pan Am would be financially profited by the route restructuring in the instant case were solidly based there would seem to be little need for Pan Am to sell the route to improve its financial position. See *WALL STREET JOURNAL*, Feb. 14, 1975, at 22, col. 2.

⁴⁴ *United Air Lines, Inc. v. CAB*, 198 F.2d 100, 106 (7th Cir. 1952). See textual discussion in text accompanying notes 20-23.

⁴⁵ Brief for Appellant Western Air Lines at 39-46.

⁴⁶ 492 F.2d at 156. The quoted language is from *Frontier Airlines v. CAB*, 439 F.2d 634, 641 (D.C. Cir. 1971), wherein the court stated:

The airline industry and the public alike are largely at the mercy

arguments propounded by the CAB seem to ignore the legislative history of the Act.

The Civil Aeronautics Act of 1938 recognized the importance of bolstering the economic stability of air carriers.⁴⁷ Accordingly, the issuance of certificates of public convenience and necessity was to assure the permanence of operation.⁴⁸ The first administrator of the Civil Aeronautics Authority wrote in 1938 that once a certificate is granted, it "will give the airline a permanent right to the particular operation, subject only to revocation for violation of the Act."⁴⁹

Although primarily concerned with the power to amend certificates without notice or hearing, in the well known *Delta Air Lines* case decided in 1961⁵⁰ the Supreme Court also analyzed the background of the Act and the Board's powers as limited by the security of route concept.

However, the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do. . . . It is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act of 1938—that Congress was vitally concerned with what has been called "security of route"—i.e., providing assurance to the carrier that its *investment*

of the degree of skill and disinterest and good sense which the Board periodically brings to this delicate and difficult task. . . . Unwarranted judicial intervention only serves to divert the spotlight of accountability for the health of air transportation from the place where it should be steadily and continuously focused, that is to say, on the Board.

⁴⁷ The passage of the economic regulations section of the Federal Aviation Act of 1958 was a "reenactment, virtually without substantive change, of the existing law contained in title IV of the Civil Aeronautics Act of 1938, as amended." U.S. CODE CONG. & AD. NEWS, 85th Cong., 2d Sess. at 3755. Speaking for the predecessor bill, the Chairman of the Committee on Interstate and Foreign Commerce said:

Part of the proposal here is that the regulatory body, created by the bill will have authority to issue certificates of convenience and necessity to the operators. This will give assurance of security of route. . . . In my judgment, those two things are the fundamental and essential needs of aviation at this time, security and stability in the route and protection against cutthroat competition.

83 CONG. REC. 6407 (1938) (remarks of Mr. Lea).

⁴⁸ Hester, *The Civil Aeronautics Act of 1938*, 9 J. AIR L. & COM. 451, 454 (1943).

⁴⁹ *Id.* at 453.

⁵⁰ *CAB v. Delta Airlines, Inc.*, 367 U.S. 316 (1961).

in operations would be protected insofar as reasonably possible. And there is no other explanation but that Congress delimited the Board's power to reconsider its awards with precisely this factor in mind; . . . (W)e think the result we reach follows naturally: to the extent there are uncertainties over the Board's power to alter effective certificates, there is an identifiable congressional intent that these uncertainties be resolved in favor of the certificated carrier and that the specific instructions set out in the statute should not be modified by resort to such generalities as "administrative flexibility" or "implied powers."⁵¹

The court's heavy dependence on pre-*Delta* cases⁵² that justify Board action in terms of administrative flexibility seems vacuous in light of clear congressional intent and the Supreme Court's interpretation of the bounds of the delegated power.

Of particular concern to those fearful of the demise of route security was the choice of a seven-year period for suspension purposes.⁵³ In affirming the Board's choice, the court noted first that lesser periods have previously been upheld and secondly that the frequency of review of market conditions is an application of expertise "peculiarly a matter for the Board's judgment."⁵⁴ This and other decisions imposing seven-year suspensions and granting temporary certificates in Alaska indicate that the reasons utilized by the Board in choosing the particular period include the need for a reasonable test pattern subject to future evaluation⁵⁵ and "maximum decisional flexibility" in the face of changing economic conditions,⁵⁶ reasoning already shown to be subject to possible Supreme Court disapproval.

The use of the seven-year period in a suspension case is unique to Alaska,⁵⁷ although seven-year periods have been used in other geographical areas in the issuance of temporary certificates.⁵⁸ Were the suspensions for a single and definite seven-year period there

⁵¹ *Id.* at 322-25.

⁵² Cases cited note 38 *supra*.

⁵³ 495 F.2d at 156.

⁵⁴ *Id.* at 156-57.

⁵⁵ Pacific Northwest-Alaska Service Case, 42 C.A.B. 489, 525 (1965).

⁵⁶ 495 F.2d at 151.

⁵⁷ Pacific Northwest-Alaska Service Case, 42 C.A.B. 489, 525 (1965). Western Air Lines, Inc. v. CAB, 495 F.2d 145 (D.C. Cir. 1974).

⁵⁸ Piedmont Renewal Case, 15 C.A.B. 736 (1952); Robinson Airlines Corp., Certificate Renewal Case, 15 C.A.B. 940 (1952).

would be at least a superficial justification for the court's interpretation of the scope of the Board's power, but the facts of the case inject a dubiousity into this conclusion. This is the second consecutive time that Pan Am has been suspended from its routes in southern Alaska for a present total of fourteen years,⁵⁹ and there is no assurance that at the conclusion of the present suspension Pan Am and Western will be allowed to return to their markets. In fact, the Board stated:

[T]he seven year duration adopted by the examiner represents a reasonable test period, long enough to provide Alaska an *adequate opportunity to develop its service in these markets* and enable it to obtain any financing it might find necessary to acquire or maintain equipment and facilities.⁶⁰

Thus, the Board has allowed a new carrier to develop its services, financing, and identity in a market capable of handling but one carrier and already served by two other permanently certificated airlines, both of which are presently subject to "temporary" suspension.⁶¹ Since a suspension is temporary while a revocation denotes permanence, time naturally assumes a posture of importance in distinguishing the two powers.⁶² The court relegated this potentially powerful interpretive tool to a position of impotence by delegating the decision duration to the Board.⁶³

The duration and application of these suspensions do much to obfuscate the statutory distinction between permanent and temporary certificates. As noted previously, a permanent certificate is of unlimited duration, in contradistinction to a specified and limited period of operation for temporary certificates.⁶⁴ In granting tempo-

⁵⁹ Pacific Northwest-Alaska Service Case, 42 C.A.B. 489 (1965).

⁶⁰ 492 F.2d at 151 (emphasis added).

⁶¹ *Id.* at 152-53.

⁶² United Air Lines, Inc. v. CAB, 198 F.2d 100, 108 (7th Cir. 1952). Even the Board readily acknowledges the suspension power to be temporary in nature. Frontier Certificate Renewal Case, 14 C.A.B. 519, 548 (1951).

⁶³ 495 F.2d at 157. The court also refused to apply the *Panagra* principle in this case but did indicate that time might be a limiting factor. "Similarly the Board has used its suspension powers in restrained fashion, generally limiting suspensions to periods considerably shorter than those at issue here." *Id.* at 156. The refusal to use *Panagra* was well founded because it is a principle appropriate to modifications but not to suspensions. However, the court's refusal to deal more directly with the time element must be viewed as an abdication of opportunity.

⁶⁴ Notes 8 & 9 *supra*. Temporary and permanent obviously denote widely different concepts. Temporary in contradistinction to permanent, Kahn v. Lock-

rary certificates rather than the permanent certificates requested in the *North Atlantic Route Case*, the Board gave as its reason the need for review and flexibility because of changes in shifting elements,⁶⁵ the identical reasoning used by the Board in justifying the current suspensions.

By extending the expiration date of the temporary certificate to a day many years hence and by exposing permanent certificates to the close scrutiny of renewal proceedings at the same time a grant, discontinuance or renewal of a temporary certificate is before the Board, the distinction between the two types of certificates is blurred to the point of non-existence. The Board has suspended a permanent right of operation and placed the question of suspension renewals on the same footing as the issuance or renewal of a temporary certificate. Although the suspended airlines theoretically maintain a right of operation,⁶⁶ the *de facto* effect of the suspensions is constructive revocation of a permanent certificate.⁶⁷ With this loss of a permanent certificate, there would be no need for temporary certification as the Board would have the same weighty power to authorize suspensions, to renew suspensions, and to discontinue suspensions of permanent certificates as it now possesses with regard to temporary certificates. But it is apparent that Congress saw a need for both certificates for the act passed by Congress contains clear and specific reference to the two distinctive types of certificate authorizations. The vague and malleable language of "public convenience and necessity" should not be allowed to defeat unequivocal Congressional intent to create *permanent* and *temporary* certificates.

Perhaps the most far-reaching effect of this case will be felt in the newly-formed attitude of the Board toward competition. The fostering of competition "to the extent necessary to assure the

hart, 392 S.W.2d 30 (Mo. App. 1965); temporary as antithesis of permanent, 239, 243, 247 Corp. v. Poole, 63 N.Y. Misc. 2d 953, 313 N.Y.S.2d 853 (1970); temporary as antonym of permanent, Richards v. Metropolitan Life Ins. Co., 184 Wash. 595, 55 P.2d 1067 (1935). It must be questioned whether a seven year period is "temporary."

⁶⁵ Northeast Airlines, Inc., *North Atlantic Route Case*, 6 C.A.B. 319, 334-35 (1945). See also *Kodiak Airways, Inc. v. CAB*, 447 F.2d 341, 345 (D.C. Cir. 1971).

⁶⁶ A. THOMAS, *ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT* 116-17 (1951).

⁶⁷ Cf. *Hearing on S. 3759 & H.R. 8898 Before the Senate Comm. on Interstate and Foreign Commerce*, 83rd Cong., 2d Sess. 73 (1954).

sound development of an air transportation system" is "in accordance with the public convenience and necessity."⁶⁸ The Board has not only *not* fostered competition, it has withdrawn competition by playing Robin Hood with permanent certificates. Certificate rights have been taken from the "haves" and have been extended to the "have-nots." This represents a significant departure from past policy. Although competitive injury has been deemphasized in restriction removal cases,⁶⁹ the implications of the extermination of originally certificated air carrier's rights in favor of new applicants extend much further.

Three phases of the aviation regulatory process have marked the evolvement of CAB attitudes toward competition.⁷⁰ The first phase of highly restricted competition⁷¹ was followed by expanded competition, particularly in the instance of local-service carriers.⁷²

⁶⁸ 49 U.S.C. § 1302(d) (1970). The complete declaration of policy provides:

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

⁶⁹ *United Air Lines, Inc. v. CAB*, 371 F.2d 221 (7th Cir. 1967).

⁷⁰ E. REDFORD, *THE REGULATORY PROCESS* 29 (1969).

⁷¹ The number of air carriers now operating appears sufficient to insure against monopoly in respect to the average new route case. . . . [T]here appears to be no inherent desirability of increasing the present number of carriers merely for the purpose of numerically enlarging the industry.

Delta Air Lines, Service to Atlanta and Birmingham, 2 C.A.B. 447, 480 (1941).

⁷² See *New York-Chicago Service Case*, 22 C.A.B. 973 (1955). It was at this

The arrival of the jet age signaled the commencement of an era excluding new companies from trunkline services.⁷³ Whether the present case will serve as an ensign to a reworking of the competitive composition of the present route structure is yet to be seen.

During each of these periods a vitally important factor in any decision concerning route structure has been the effect of the proposed change on existing airlines.⁷⁴ In numerous cases, the Board has considered the diversionary effect on existing carriers before making new awards.⁷⁵ The proposition that all additions to present air transportation should be reserved solely for existing airlines is untenable, but competition will be authorized only when benefits outweigh such costs as detrimental effects on existing airlines.⁷⁶ The District of Columbia Court of Appeals declared:

If one certificate for a route exists, and if the grant of a second competitive route would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest, the public interest precludes the competitive grant.⁷⁷

The Board has therefore contrived an interesting method for avoiding a consideration of the effects on an existing carrier—it has simply removed the carrier from the market, thereby removing any effects, positive or negative, on the original carrier. It is not disputed that the Board may suspend a permanent certificate or grant a temporary certificate. The issue not clearly confronted is whether both may be brought about at the same time and for extended per-

time that several Alaska airlines received permanent certificates by Congressional mandate. Act of Aug. 27, 1957, Pub. L. No. 85-166, 71 Stat. 415.

⁷³ E. REDFORD, *THE REGULATORY PROCESS* 29 (1969).

⁷⁴ The only economic reason for this restriction of entry both into the field of air transportation and into a particular route is to protect the existing carriers and, through them the air transport industry from certain undesirable consequences, real or imagined, of unrestricted free entry.

S. RICHMOND, *REGULATION AND COMPETITION IN AIR TRANSPORTATION* 64 (1961).

⁷⁵ United States-Caribbean-South America Route Investigation (United States-Caribbean Part), 49 C.A.B. 427 (1968); United States-Alaska Service Case, 14 C.A.B. 122, 137 (1951); Sarasota-Bradenton Investigation, 32 C.A.B. 177 (1960); Middle Atlantic Area Case, 9 C.A.B. 131, 156 (1948); North Central Case, 7 C.A.B. 639, 658 (1946).

⁷⁶ R. FIXEL, *THE LAW OF AVIATION* § 251 (4th ed. 1967).

⁷⁷ *Delta Airlines, Inc. v. CAB*, 275 F.2d 632, 638 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960).

iods when the presently certificated airlines have done nothing to invoke the Board's revocation powers.

Insofar as *Western v. CAB* stands for the proposition that the Board is empowered to issue temporary certificates covering routes included in suspended certificates—suspended because the market is only large enough for one carrier—it sets a dangerous precedent. A major congressional purpose behind the enactment of the Federal Aviation Act was the elimination of the element of risk and the necessity of gambling from a carrier's operations. Heretofore, carriers have operated with the omnipresent and disconcerting knowledge that their routes may be opened to more extensive competition, but they are now to attempt to maintain a facade of stability while living with the very real risk of being compelled to withdraw from a previously secure, stable and perhaps exclusive route while a new carrier is permitted to intrude, entrenching its operations in the permanently certificated airline's territory for whatever period the CAB chooses to enforce. The case provides a generous, useful and possibly necessary prescription of administrative flexibility to the CAB, but does not seem to reflect the true and limited scope of statutory authority as originally intended and stated by the statute's congressional authors and as interpreted by the judiciary during more than three decades of operation.

Thomas L. Johnson

CONSTITUTIONAL LAW—SUMMARY SEIZURE OF PROPERTY
—The Statutory Scheme Authorizing The Seizure, Without Prior Notice Or Hearing, Of Aircraft Involved In Any Violation Of The Federal Aviation Act Is Constitutional. *Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598 (E. D. Pa. 1974).

In 1972, Helicrane and Aircrane entered into a long-term lease whereby Aircrane supplied a rebuilt military surplus helicopter with a "restricted" certification to Helicrane. Helicrane subleased the

¹ 14 C.F.R. § 21.25 (1974). The "restricted" certification is contrasted with a "standard" certification provided for in 14 C.F.R. § 21.21 (1974). The "restricted" aircraft is subject to less demanding mechanical and operational requirements but has a more limited scope of authorized operations.

aircraft on a short-term basis to industrial users who utilized the helicopter to perform external lift operations. On August 10, 1973, officials of the Federal Aviation Administration seized the aircraft pursuant to their belief that the craft was "carrying persons or property for compensation or hire" in violation of Federal Aviation Regulations.³ Aircrane and Helicrane brought suit in federal court, seeking, *inter alia*,⁴ an injunction restraining the enforcement of the statutory scheme⁵ which authorizes the seizure without prior notice or hearing of aircraft involved in any violation of the Federal Aviation Act.⁵ Aircrane and Helicrane challenged the statutes as unconstitutional and contrary to the Supreme Court's pronounce-

² 14 C.F.R. § 91.39(b) (1974) prohibits "restricted" aircraft from carrying persons or property for compensation or hire; aircraft with "normal" certification are not subject to the prohibition. The FAA believed, and the court so determined, that the subleasing arrangement was a fiction and that Helicrane was essentially providing service complete with helicopter and crew. See *Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598, 611-12 (E.D. Pa. 1974).

³ *Aircrane* represents the merger of two suits: one by Aircrane and Helicrane regarding the constitutionality of the summary seizure; the other, *United States v. Sikorsky H-37 Aircraft*, Civil Action No. 73-2173, in which the government sought to collect civil penalties and to obtain an injunction against further violations of FAA regulations. In the second suit the civil penalties were imposed and the injunction granted; this suit, however, was primarily concerned with the applicability of the statutory language to the fact situation presented. This casenote, while discussing the facts surrounding the violations, will concentrate on the constitutional issues presented in the suit maintained by Aircrane and Helicrane.

⁴ The challenged sections basically provide that a civil penalty arises from any violation of the Federal Aviation Act, and that any aircraft involved in the violation are subject to summary seizure. The specific sections are:

49 U.S.C. § 1471(a)(1) (1970), which provides:

"Any person who violates . . . any provision . . . of this chapter or any rule, regulation, or order issued thereunder . . . shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. . . ."

49 U.S.C. § 1471(b) (1970), which provides:

"In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty"

49 U.S.C. § 1473(b)(2) (1970), which provides:

"Any aircraft subject to such lien may be summarily seized by and placed in the custody of such persons as the Board or Administrator may by regulation prescribe"

49 U.S.C. § 1473(b)(3) (1970), provides that the aircraft shall be released upon payment of a penalty or compromise, failure of the U.S. Attorney to institute proceedings, or upon deposit of a bond.

14 C.F.R. § 13.17 (1974) merely details the officials to carry out the statutes and does not add substantively to the statute.

⁵ Federal Aviation Act of 1972, 49 U.S.C. §§ 1301 *et seq.* (1970), amending 49 U.S.C. §§ 1301 *et seq.* (1958).

ment in *Fuentes v. Shevin*⁶ that notice and an opportunity for a hearing must be provided before any deprivation of property occurs. Since Aircrane and Helicrane were seeking to have declared unconstitutional an act of Congress, a three-judge federal court was convened.⁷ *Held*: The seizure did not constitute a deprivation of property without due process of law. The statutory scheme furthers a governmental interest in public safety of sufficient magnitude to outweigh the owner's⁸ interest in procedural safeguards so that postponement of notice and denial of a hearing is justified. *Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598 (E. D. Pa. 1974).

The Supreme Court has long been plagued by questions of due process in connection with the summary deprivation of private property. Although the factual situations and remedies involved have been varied,⁹ the Court has appeared to be consistent in its analytical framework in utilizing a "balancing of interest" approach.¹⁰ Balancing of interests is the determination of "the precise nature of the governmental function involved as well as the private interest that has been affected by the governmental action."¹¹ More specifically, the question is whether the individual's interest in avoiding a de-

⁶ 407 U.S. 67 (1972).

⁷ 28 U.S.C. § 2282 (1948) requires a three-judge panel whenever an injunction is sought against any Act of Congress as being contrary to the Constitution.

⁸ Helicrane, Aircrane, and a third aviation firm, Keystone Helicopter, were all owned or controlled by the same man (Peter Wright), shared common facilities, and had overlapping personnel. 369 F. Supp. at 601.

⁹ The differences between seizure of property which is being used in violation of a statute, sequestration of property whose ownership is at issue, the attachment or garnishment of property to satisfy an unrelated claim, and the cancellation of property rights for failure to adhere to a statute are not explicitly discussed by the Supreme Court but are reflected in the balancing of interest approach. However, this indirect acknowledgment of these differences has allowed the Court to later ignore them when looking for precedent to bolster a subsequent decision. Thus, the Court substantiates its decision upholding the validity of the summary sequestration of a debtor's property by citing a case involving the summary seizure of misbranded drugs by an administrative agency. *Mitchell v. W. T. Grant Co.*, 94 S. Ct. 1894, 1902 (1974).

¹⁰ The cases up to *Fuentes v. Shevin* consistently used the balancing approach, while *Fuentes* laid down broader but more specific guidelines. *Mitchell v. W. T. Grant Co.*, however, reintroduced the balancing approach leaving the continued validity of the guidelines in *Fuentes* in doubt. A discussion of effect of *Mitchell* constitutes the conclusion of this note.

¹¹ *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

privation of property outweighs the government's interest in summary seizure.¹²

Although the Supreme Court did not establish a classification based on who initiated proceedings which led to summary deprivations of property, many of the early cases dealt with summary actions instituted by administrative agencies. Illustrative of these decisions is *North American Cold Storage v. Chicago*,¹³ in which the Supreme Court sustained the constitutionality of an Illinois statute permitting health inspectors to seize and destroy any contaminated food found in a cold storage house. The state's interest in protecting the lives and health of its citizens outweighed the need for prior notice and hearing. The extent to which the Court will defer to legislative judgments that authorize summary seizure by an administrative agency is shown by *Ewing v. Mytinger & Casselberry, Inc.*¹⁴ The Supreme Court validated the procedure under section 304(a) of the Food and Drug Act¹⁵ permitting government officials to summarily seize misbranded vitamins even though there was no claim or suggestion of any possible threat to health. The emphasis which Congress had placed upon consumer protection was sufficient to justify summary seizure where there was an opportunity for a judicial determination at some state in the proceeding.¹⁶ The Supreme Court later relied upon these cases to establish an exception to the prior hearing and notice requirement of the due process clause.¹⁷

As the Supreme Court began a more expansive treatment of the due process clause, the Court concerned itself not only with seizures initiated by government officials but also with the constitutionality of summary deprivations initiated by private parties; however, the Court did not make any distinction on that basis. In both types of cases, the Supreme Court felt it was confronted with two separate issues implicit in determining the requirements of due process in any case of summary deprivation of property: (i) the procedural

¹² *Goldberg v. Kelly*, 397 U.S. 254, 263-70 (1970).

¹³ 211 U.S. 306 (1908).

¹⁴ 339 U.S. 594 (1950).

¹⁵ 21 U.S.C. § 334(a) (Supp. III, 1950), as amended, 21 U.S.C. § 334(a) (1970).

¹⁶ *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599-600 (1950).

¹⁷ *Fuentes v. Shevin*, 407 U.S. 67 (1972). See notes 33-36 *infra* and accompanying text.

safeguards necessary to comply with constitutional requirements, and (ii) the property interests entitled to constitutional protection. The basic criteria regarding the necessary procedural safeguards are set forth in *Armstrong v. Mango*.¹⁸ In requiring that a divorced father be given notice of the pending adoption of his children, the Supreme Court stated that notice and opportunity for a hearing "must be granted at a meaningful time and in a meaningful manner."¹⁹ *Boddie v. Connecticut*²⁰ elaborated upon this standard by requiring that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."²¹

The landmark case of *Sniadach v. Family Finance Corp.*²² was the first in a series of cases concerning the types of property that are entitled to due process protection.²³ In *Sniadach* the Supreme Court held that due process required a hearing before wages could be garnished, noting that wages represent "a specialized type of property presenting distinct problems in our economic system."²⁴ Similarly, the Supreme Court in *Goldberg v. Kelly*²⁵ invalidated a New York procedure whereby welfare payments could be terminated without a prior hearing. Subsequent to *Sniadach* and *Goldberg* two lines of decisions developed which differed over what constitutional principles these cases announced. One set of lower courts contended that these decisions represented constitutional procedural standards requiring prior notice and hearing before a person is deprived of a significant property interest except in cases where a countervailing government or public interest exists.²⁶ Other courts

¹⁸ 380 U.S. 545 (1965).

¹⁹ *Id.* at 552.

²⁰ 401 U.S. 371 (1971). The Court held that a state denies due process to indigent persons by refusing to give them access to the courts due to their inability to pay court costs.

²¹ *Id.* at 379. *See also* *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²² 395 U.S. 337 (1969).

²³ *See also* *Bell v. Burson*, 402 U.S. 535 (1971) (requiring a hearing prior to the suspension of a driver's license); *Stanley v. Illinois*, 405 U.S. 645 (1972) (requiring a hearing and notice prior to the proceeding depriving an unwed father of custody of his children).

²⁴ 395 U.S. at 340.

²⁵ 397 U.S. 254 (1970).

²⁶ *See, e.g.,* *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

felt that due to the types of property interest involved in *Sniadach* and *Goldberg*, a determination that "necessary" or "essential" property rights were in issue was required before those procedural safeguards were called for.²⁷

This divergence among the courts was resolved and a definitive ruling clearly setting forth the constitutional standard and consolidating previous decisions was supplied by the landmark decision rendered in *Fuentes v. Shevin*.²⁸ In a four-to-three decision,²⁹ the United States Supreme Court struck down the Florida and Pennsylvania pre-judgment replevin statutes³⁰ as contrary to the fourteenth amendment. Without resorting to the balancing-of-interests approach, which had previously been consistently applied in cases involving summary deprivations of property, the Court set forth broad constitutional guidelines. Stating that the purpose of the due process clause with respect to summary seizure was the protection of the individual's use and possession of property from arbitrary encroachment,³¹ the Court reaffirmed the procedural requirement that notice and an opportunity for a hearing be given *before* an individual is deprived of any significant property interest.³² Rejecting those cases holding that due process protection need only be given to "essential" or "necessary" property interests, the Court declared that any "important"³³ property interest that "cannot be characterized as *de minimis*"³⁴ is entitled to procedural due process protection.

²⁷ See, e.g., *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971); *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971).

²⁸ 407 U.S. 67 (1972).

²⁹ Although Mr. Justice Powell and Mr. Justice Rehnquist were members of the Court at the time the decision was announced, they were not members when the case was argued, and did not participate in its "consideration or decision." 407 U.S. at 97.

³⁰ FLA. STAT. ANN. §§ 78.01 *et seq.* (Supp. 1972-1973); PA. STAT. ANN. tit. 12, § 1821 (1967), and PA. RULE CIV. PROC. 1073, 1076, 1077. Although the two acts differ in some respects, particularly the bond requirement, it is sufficient for our purposes to recognize that both statutes authorized state officials to seize property of a debtor pursuant to an *ex parte* proceeding in which a writ could be issued to a creditor on his bare assertion that he was entitled to the possession of the property.

³¹ 407 U.S. at 81.

³² *Id.* at 82, citing *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).

³³ *Id.* at 89, citing *Bell v. Burson*, 402 U.S. 535, 539 (1972).

³⁴ *Id.* at 90 n.21, citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (Harlan, J., concurring).

Fuentes recognized, however, that the requirements of prior notice and hearing are not absolute. There are "extraordinary situations that justify postponing notice and opportunity for a hearing."³⁵ The Court held that such situations must be "truly unusual"³⁶ and presented a three-pronged description of extraordinary situations:

First, in each case, the seizure has been necessary to secure an important government or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it is necessary and justified in the particular instance.³⁷

The Court then listed those cases in which extraordinary situations had been found, all of which involved summary actions taken by administrative agencies.³⁸

Subsequent to *Fuentes* two divergent views developed concerning the analytical framework to be utilized when deciding questions of summary seizure. While there was general agreement that *Fuentes* announced a rigid requirement of prior notice and opportunity for a hearing and that the only exceptions existed in "extraordinary situations," the views differed as to how "extraordinary situations" were to be determined. One view held that the three-pronged description in *Fuentes* set forth the analytical criteria for determining extraordinary situations.³⁹ A second school adopted the view that the description given in *Fuentes* was a mere summary of past decisions and that balancing of interests was the correct approach.⁴⁰

³⁵ 407 U.S. at 90.

³⁶ *Id.*

³⁷ *Id.* at 91.

³⁸ *Phillips v. Commissioner*, 283 U.S. 589 (1931) (summary seizure to collect internal revenue); *United States v. Pfitsch*, 256 U.S. 547 (1921) (to meet national war needs); *Fahely v. Mallonee*, 332 U.S. 245 (1947) (to protect against the economic disaster of a bank failure); *Ewing v. Mytinger & Casselbery*, 339 U.S. 594 (1950) (to protect the public from misbranded drugs); and *North American Storage Co. v. Chicago*, 211 U.S. 306 (1908) (to protect the public from contaminated food).

³⁹ *Gonzales v. County of Hidalgo*, 489 F.2d 1043 (5th Cir. 1973); *Holland v. Parker*, 354 F. Supp. 196, 202 (D.S.D. 1973); Note, *The Supreme Court, 1971 Term-Due Process*, 86 HARV. L. REV. 85, 88 (1972); 48 WASH. L. REV. 646, 656 (1973); 41 FORDHAM L. REV. 1051, 1057 n.52 (1973).

⁴⁰ *Graff v. Nicholl*, 370 F. Supp. 974, 980 (N.D. Ill. 1974); *Eldridge v. Weinberger*, 361 F. Supp. 520 (W.D. Va. 1973); *Velazco v. Minter*, 481 F.2d 573,

It was against this background that the three-judge federal court in *Aircrane* was faced with the constitutionality of the seizure made by the FAA without prior notice or opportunity for a hearing. Even though *Aircrane* involved summary seizure by an administrative agency and would, therefore, seem to require an examination of the description of "extraordinary situations" presented in *Fuentes*,⁴¹ the *Aircrane* court did not feel compelled to use the three-pronged test. The court in *Aircrane* viewed its task as one of determining whether the circumstances surrounding the seizure by the FAA resembled those existing in the cases cited in *Fuentes* as examples of "extraordinary situations" or the circumstances involved in *Bell-Sniadach-Fuentes* where summary action was held to be a denial of due process.⁴² By viewing the description of "extraordinary situations" in *Fuentes* as an encapsulation of previous decisions and not as setting forth specific requirements, the *Aircrane* court proceeded to utilize the balancing-of-interests approach to determine the question of due process.⁴³ Thus, the court in *Aircrane* went beyond previous case law⁴⁴ in advancing the proposition that not only "extraordinary situations" justify dispensing with procedural safeguards, but whenever the balance of governmental interests outweighs the interests of the private citizen, summary seizure is permissible. *Aircrane* represents a return to the highly individualistic and subjective interpretation of procedural due process inherent in the balancing approach and a step away from the basic principles of due process announced in *Fuentes*.

Sections 901 and 903 of the Federal Aviation Act,⁴⁵ challenged in *Aircrane*, allow the FAA to seize any aircraft involved in a violation of the Federal Aviation Act for which a civil penalty may be imposed. Notice to the owner and other interested parties is not given until after the seizure has taken place.⁴⁶ The owner may, however, retrieve his property by posting a bond conditioned upon pay-

578 (1st Cir. 1973); *Getty Oil Co. v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del. 1972).

⁴¹ 407 U.S. at 91.

⁴² 369 F. Supp. at 604.

⁴³ *Id.* at 604.

⁴⁴ See generally cases and material cited in notes 30 & 31 *supra* and accompanying text.

⁴⁵ 49 U.S.C. §§ 1471(a)(1), 1471(b), 1473(b)(2) (1970).

⁴⁶ 14 C.F.R. § 13.17(c) (1974).

ment of the penalty imposed or a compromise amount.⁴⁷

In its preliminary analysis of these statutory provisions, the *Aircrane* court first rejected the rationale of *United States v. Vertrol*,⁴⁸ which upheld the constitutionality of sections 901 and 903.⁴⁹ In an unreported opinion, the single judge hearing the case stated that the overriding objective of the Federal Aviation Act is:

The control of the use of navigable airspace of the United States and the regulation of both civilian and military operations in such airspace in the interest of safety and efficiency of both. 49 U.S.C. §1303(c).⁵⁰

The court in *Vertrol* determined that this provision set forth a governmental interest of sufficient import to allow the seizure to fall within the "extraordinary situation" requirements.⁵¹ The *Aircrane* court rejected this rationale, stating that the constitutionality of the statutes should not be upheld by citing the overall purpose of a statutory scheme as extensive as the Federal Aviation Act.⁵² *Aircrane*, therefore, represents the first attempt to thoroughly examine the overall constitutionality of statutes authorizing the FAA to summarily seize aircraft.

Proceeding through the framework of balancing of interests, the *Aircrane* court examined the government's interest by looking to the effect of the regulation prohibiting restricted aircraft from carrying persons or property for compensation or hire.⁵³ Recognizing that restricted aircraft must meet far less stringent mechanical and operational requirements than aircraft with standard certification,⁵⁴ the *Aircrane* court determined that the regulations expressed a legitimate concern for public safety.⁵⁵ The court did not examine the government's interests to determine if the summary action was necessary. The court did, however, recognize some weaknesses in

⁴⁷ 49 U.S.C. § 1473(b)(3) (1970); 14 C.F.R. § 13.17(e)(3) (1974).

⁴⁸ Docket H 21C, No. 8540, C-72-2101 (N.D. Cal., Aug. 14, 1973) (slip opinion), discussed in 369 F. Supp. at 605.

⁴⁹ 49 U.S.C. §§ 1471(a)(1), 1471(b), 1473(b)(2) (1970).

⁵⁰ 369 F. Supp. at 605.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 605-06; see 14 C.F.R. § 91.39(b) (1974).

⁵⁴ *Id.* The helicopter in question could not meet the standard certification requirement.

⁵⁵ *Id.* at 607.

the government's position by questioning whether there was present the "key characteristics"⁵⁶ of an emergency situation or a narrowly drawn statute to insure that summary action takes place only when justified.⁵⁷

In the traditional balancing-of-interests analysis, the factors relevant to each party are weighed in order to determine which should be dominant. When considering Helicrane's interest, rather than examining the factors tending to weigh in favor of the owner's interest, the *Aircrane* court emphasized the absence of characteristics which the United States Supreme Court had previously found in statutes which were held to be constitutionally deficient. The court in *Aircrane* reasoned that unlike *Sniadach*⁵⁸ and *Goldberg*,⁵⁹ the seizure of the helicopter did not significantly impair the owner's ability to vindicate its rights. While admitting that the property seized was Helicrane's major operating asset, the court felt that unlike a welfare recipient whose benefits are summarily terminated,⁶⁰ Helicrane would be able to seek legal redress without undue hardship.⁶¹

The second factor the *Aircrane* court examined in considering the owner's interest was the likelihood of error that a summary proceeding may foster. The court in *Aircrane* saw very little possibility of factual error since the owner and the FAA had corresponded extensively concerning the possible violations before the seizure took place;⁶² thus, this situation was therefore unlike the situation in which a writ of attachment is issued based solely on the affidavit of a creditor. Finally, the court in *Aircrane* felt that there was limited inconvenience imposed upon the owner of the aircraft since it could recover the helicopter by posting a bond in an amount which was minimal in comparison to the value of the craft.⁶³ In *Sniadach*, however, the attachment of wages inherently undercut the individual's ability to post a bond. In *Fuentes* the bond required was twice the value of the property seized and the ability of the debtor

⁵⁶ *Id.* at 604.

⁵⁷ *Id.* at 608.

⁵⁸ 395 U.S. 337 (1969).

⁵⁹ 397 U.S. 254 (1970).

⁶⁰ *Id.* at 264.

⁶¹ 369 F. Supp. at 607.

⁶² *Id.* at 609.

⁶³ *Id.* at 608.

to put forth such a bond was doubtful. The *Aircrane* court believed that the \$1,000 bond per violation provided for in section 903 of the Federal Aviation Act⁶⁴ did not have the onerous aspects present in *Sniadach* and *Fuentes*.⁶⁵

The basic question decided in *Aircrane* is the overall constitutionality of the summary seizure provisions of the Federal Aviation Act. Although the *Aircrane* court discussed factors peculiar to the particular parties, the court's analysis was primarily concerned with the absence of notice or opportunity for a hearing prior to seizure by the FAA under section 903 of the Federal Aviation Act.⁶⁶ The court declared that violation of the regulation prohibiting restricted aircraft from carrying property for hire⁶⁷ which gives rise to a penalty under section 901⁶⁸ of the Act represents a significant government interest. The court in *Aircrane*, therefore, ultimately upheld the constitutionality of section 903 on its face provided that the regulation which gives rise to the penalty under section 901 promotes a significant government interest.

The analysis presented in *Aircrane* is open to serious question if viewed in the light of the state of the law at the time the ruling was made.⁶⁹ While the *Aircrane* court relied on that portion of *Goldberg*⁷⁰ cited in Justice White's dissent in *Fuentes*, calling for a more flexible balancing approach in determining due process,⁷¹ the majority in *Fuentes* seemed to require a more rigid test. Also citing *Goldberg*,⁷² the *Fuentes* majority states that while relative interests are relevant in regard to the *form* of the notice and hearing,⁷³ due process requires that, absent "extraordinary situations," opportunity for a hearing *must* be provided before deprivation takes place.⁷⁴ Thus it would appear that the *Aircrane* court's initial determination that a balancing of interest can lead to postponing notice and a

⁶⁴ 49 U.S.C. § 1473(b)(3) (1970).

⁶⁵ 369 F. Supp. at 608.

⁶⁶ 49 U.S.C. § 1473(b)(2) (1970).

⁶⁷ 14 C.F.R. § 91.39(b) (1974).

⁶⁸ 49 U.S.C. §§ 1471(a)(1), 1471(b) (1970).

⁶⁹ *Aircrane* was decided on Jan. 3, 1974.

⁷⁰ 397 U.S. at 263.

⁷¹ 407 U.S. at 102 (White, J., dissenting).

⁷² 407 U.S. at 82.

⁷³ *Id.* at 82, 90 n.21.

⁷⁴ *Id.* at 82.

hearing is inconsistent with the basic thrust of *Fuentes*. Even in its analysis of the interests involved, *Aircrane* seems in conflict with *Fuentes*. The *Aircrane* court's determinations that the seizure did not significantly impair the owner's ability to vindicate his rights and caused only limited inconvenience are both essentially a revival of the theory which attacks procedural safeguards as applicable only to "necessary" or "essential" types of property interest, a position which *Fuentes* explicitly rejected.⁷⁵

In analyzing the government's interest, the *Aircrane* court stood on somewhat firmer ground. The broad interest of public safety the court found so compelling is analogous to the interest in consumer protection the Supreme Court propounded in *Ewing v. Mytinger & Casselberry* as being sufficiently important to allow summary seizure by an administrative agency.⁷⁶ Even though *Fuentes* cites *Ewing* with approval,⁷⁷ it does so in giving examples of instances describing the three-pronged test. It would seem, therefore, that a strict reading of *Fuentes* would render questionable at best a summary seizure based on a governmental interest if there did not also exist a need for prompt action and strict control of the government's "monopoly of force." The court in *Aircrane* recognizes the absence of these "key characteristics,"⁷⁸ but concludes nevertheless that the

minimal nature of the deprivation, the opportunity afforded under the regulations to present complete information to the Agency before seizure, and the opportunity to contest the Agency's claim for penalty in court after seizure allows the seizure to be upheld.⁷⁹

These three factors merely represent a different phraseology of the owner's interest and each is subject to criticism.⁸⁰ The *Aircrane* court examined the nature of the deprivation by considering solely the minimal bond requirement. The lost profits and damage to business reputation that could result from the seizure of the helicopter were not considered even though such a deprivation would appear

⁷⁵ *Id.* at 88-89.

⁷⁶ 339 U.S. 594, 600 (1950).

⁷⁷ 407 U.S. at 92 n.27.

⁷⁸ 369 F. Supp. at 604.

⁷⁹ *Id.* at 608.

⁸⁰ See note 59 *supra* and accompanying text for an initial discussion of the minimal nature of the deprivation.

to be more than minimal. The court interpreted the statutes and regulations as affording the opportunity for the individual to advocate his position to the FAA before seizure.⁸¹ The court relied on 14 C.F.R. § 13.15(b) as mandating the correspondence; section 13.5(b), however, relates only to the *compromise* of civil penalties and requires correspondence only in the event it is considered advisable to compromise the penalty.⁸² The regulation dealing with the *seizure* itself, 14 C.F.R. § 13.17, does not mention either a mandatory duty to compromise a penalty or a requirement of prior notice before seizure. Although admittedly extensive correspondence did occur in *Aircrane*, the validity of the statutory scheme can hardly be based on procedures not required by the scheme.⁸³ Finally, the *Aircrane* court relied upon the availability of a later court determination of the penalty. This position is directly contrary to the position of *Fuentes* that no later hearing can remedy an initial wrongful deprivation of property.⁸⁴

In light of the body of case law that existed when the decision was announced, the overall analysis of the court in *Aircrane* is faulty in construing the requirements of the statutes involved and, more importantly, is inconsistent with the principles of *Fuentes*. Important developments directly affecting *Aircrane* and *Fuentes*, however, have occurred since *Aircrane*. Five months after the decision in *Aircrane* was announced, the United States Supreme Court in *Mitchell v. W. T. Grant Co.*⁸⁵ resurrected the balancing of interest approach in analyzing with the summary seizure of property. One

⁸¹ Dicta in *Aircrane* raises the specter that the communication between Peter Wright and the FAA rises to the level of sufficient notice and hearing to satisfy due process. 369 F. Supp. at 609. The court in *Aircrane* does not resolve the issue, and it is essentially the same contention presented by the balancing factor discussed in the accompanying text to this footnote. The validity of the contention rests upon the requirements regarding correspondence placed upon the FAA by the regulations.

⁸² 14 C.F.R. § 13.15(b) (1974) provides: "The Administrator may compromise any civil penalty. *If a civil penalty is contemplated and it is considered advisable to compromise it . . .*" (emphasis added).

⁸³ It should be noted that while the *Aircrane* court perceives the correspondence as demonstrating that the government's seizure was neither unexpected nor high-handed, the court ignores that a scheduled meeting between Helicrane and the FAA to discuss the alleged violations scheduled for August 9th was cancelled by the FAA and on August 9th the FAA authorized the seizure of the helicopter. 369 F. Supp. at 603.

⁸⁴ 407 U.S. at 82.

⁸⁵ 94 S. Ct. 1895 (1974). The decision was announced May 13, 1974.

day after *Mitchell v. W. T. Grant Co.*, the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*⁸⁶ upheld the constitutionality of a summary seizure by government officials, stating that it was an "extraordinary situation" as discussed in *Fuentes* so that prior notice and hearing were not necessary.⁸⁷

In *Mitchell v. W. T. Grant Co.* the Supreme Court upheld Louisiana's sequestration statute which allows the summary seizure of a debtor's property if the creditor alleges in a sworn affidavit or petition presented to a judge that the debtor has the power to conceal, dispose of, waste or remove the property in which the creditor claims an interest.⁸⁸ Although the Court could have based its decision on language in *Fuentes*,⁸⁹ Justice White, speaking for the Court in what is essentially an expansion of his dissent in *Fuentes*,⁹⁰ distinguished⁹¹ *Fuentes* and announced constitutional standards relevant to *Aircrane*.

Mitchell stands for the proposition that a hearing prior to seizure is not a rigid requirement,⁹² but the Court reached that conclusion

⁸⁶ 94 S. Ct. 2080 (1974). The decision was announced May 14, 1974.

⁸⁷ *Id.* at 2090.

⁸⁸ LA. CODE CIV. PROC. arts. 3501 *et seq.*

⁸⁹ 407 U.S. at 93. This decision could be interpreted as allowing summary seizure if a creditor can demonstrate an immediate danger exists of the debtor harming the property and also demonstrate that the statutes are narrowly drawn to require such a showing. *Mitchell* emphasizes specifically these two points. 94 S. Ct. at 1900, 1904-05.

⁹⁰ Compare 94 S. Ct. at 1901 with 407 U.S. at 101-02, and compare 94 S. Ct. at 1900 with 407 U.S. at 101.

⁹¹ 94 S. Ct. at 1904-05. Although the majority opinion claims to distinguish *Fuentes*, four Justices interpreted *Mitchell* as overruling *Fuentes*: Justice Powell, 94 S. Ct. at 1908 (concurring opinion); Justice Stewart joined by Justices Douglas and Marshall, 94 S. Ct. at 1910 (dissenting opinion). Justice Brennan also felt *Fuentes* required striking down the Louisiana statute. 94 S. Ct. at 1914. Justice Stewart in a vigorous dissent, noted that the five Justices in the majority opinion consisted of the three Justices who dissented in *Fuentes* plus Justices Powell and Rehnquist who were not involved in the *Fuentes* decision. This division prompted Justice Stewart to conclude that *Mitchell* represented "a basic change in the law [based] upon a ground no firmer than a change in [the Court's] membership" 94 S. Ct. at 1914. It is easy to understand Justice Stewart's position in light of the seemingly irreconcilable statements between *Fuentes* and *Mitchell*. *Fuentes* sets forth as a basic constitutional principle that an opportunity for a hearing must be provided *before* any deprivation of a property interest except in cases of extraordinary circumstances, while *Mitchell* allows postponement of the hearing if only property rights are involved. Compare 407 U.S. at 82 with 94 S. Ct. at 1903.

⁹² 94 S. Ct. at 1900-03; *Ruocco v. Brinker*, 43 U.S.L.W. 2056 (S.D. Fla. July 19, 1974).

without stating that the circumstances presented an extraordinary situation. Although *Mitchell* was concerned with the summary seizure of property initiated by a *private* party, the Supreme Court did utilize the same balancing of interest approach to determine the requirements of due process the court in *Aircrane* adopted.

It could be said that the decision in *Aircrane* contains certain prophetic qualities by its emphasis on the specific factors the Supreme Court examined in *Mitchell*.⁹³ Both decisions relied upon the small likelihood of an unjustified seizure as a significant factor weighing in favor of summary seizure.⁹⁴ The availability of reliable documentary evidence also influenced both courts to uphold summary seizure,⁹⁵ and the availability of a judicial hearing at some stage of the proceedings is an additional common element.⁹⁶ Even though an initial analysis of *Aircrane* in terms of *Fuentes* indicates that the court in *Aircrane* was faulty in its approach and analysis, *Mitchell* not only utilized the balancing of interest approach but also validated several of the interest factors which were arguably of questionable validity.

While both *Mitchell* and *Fuentes* involved seizures initiated by self-interested private parties with government officials only indirectly involved, the situation in *Aircrane* was more closely analogous to the facts presented in examples of "extraordinary situations" in which a government administrative agency is the party directly involved by utilizing summary seizure to protect a public interest. The Supreme Court's opinion in *Calero-Toledo v. Pearson Yacht Leasing Co.* would appear to emphasize the distinction.⁹⁷ *Calero* dealt specifically with summary seizure by an administrative agency and what constitutes an "extraordinary situation." The Court upheld the constitutionality of a statutory scheme authorizing the seizure by Puerto Rican officials of a pleasure yacht believed to be carrying controlled substances.⁹⁸ *Calero* appears to have settled the

⁹³ 94 S. Ct. at 1900-03.

⁹⁴ Compare 94 S. Ct. 1905 with 369 F. Supp. at 607.

⁹⁵ Compare 94 S. Ct. 1901 with 369 F. Supp. at 609.

⁹⁶ Compare 94 S. Ct. at 1902 (citing *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) with 369 F. Supp. at 608.

⁹⁷ The fact that Justice Brennan authored the majority opinion in *Calero* and also wrote a separate dissenting opinion in *Mitchell* indicates the Court was making a conscious distinction between seizures initiated by private parties versus government officials.

⁹⁸ 24 PUERTO RICO LAWS ANN. § 2512 (1973) provides that all conveyances,

controversy previously discussed⁹⁹ of whether the three-pronged description of extraordinary situations in *Fuentes* represents a strict requirement or whether the balancing of interests is a valid approach where government officials initiate the process leading to summary seizure. The Court in *Calero*, relying explicitly on *Fuentes*, recognized that summary seizure is permitted only in limited circumstances and stated that such circumstances are those in which the seizure is necessary to secure a governmental or public interest, a special need exists for prompt action, and strict control is maintained by a government official acting within a narrowly drawn statute.¹⁰⁰ The Supreme Court phrased the test in this positive manner and subsequently analyzed the facts solely in terms of the three-pronged test. Although the Court was somewhat lenient in its application of the elements to the facts, it did not go so far as to expressly state that strict compliance with the three elements is the sole criteria. The Court did, however, seem to require that these three elements play a dominant role in determining the constitutionality of a government initiated seizure. In another recent case, the Supreme Court appears to have raised the possibility that these three elements should be viewed as factors in a balancing of interest approach rather than requiring strict compliance with each element.¹⁰¹

including aircraft, used in transporting illegal drugs are subject to seizure. See 94 S. Ct. at 2083 n.1. 34 PUERTO RICO LAWS ANN. § 1722 (1956) provides that notice and opportunity for a hearing are not provided until after the seizure has taken place. See 94 S. Ct. at 2083 n.2.

⁹⁹ See notes 30 & 31 *supra*.

¹⁰⁰ 94 S. Ct. at 2089.

¹⁰¹ *Goss v. Lopez*, 43 U.S.L.W. 4181 (U.S. Jan. 21, 1975). Following a balancing of interests analysis, the Court held that a high school student could not be suspended from school without some type of prior notice and hearing. The student's entitlement to an education was deemed a property interest subject to protection under the Due Process Clause. *Id.* at 4184. This case might be distinguished from seizures made by the FAA since it involves not only deprivation of a property interest but also of liberty. In addition, the relationship between the FAA and those it regulates is in many respects different from the relationship between a school official and a student. *Id.* at 4190 n.13 (Powell, J., dissenting). Without expressly framing its analysis in terms of the three elements of an extraordinary circumstance, the Court effectively utilized the same three factors in balancing the interests involved. While recognizing that order and discipline are essential to an educational environment and that immediate action is often needed to maintain that environment, the lack of any narrowly drawn procedures to protect the student's interests outweighs the first two interests. *Id.* at 4182, 4184.

Since the court in *Aircrane* failed to analyze the seizure by the FAA in terms of these three elements, the question arises whether section 903 of the Federal Aviation Act complies with all three elements. The *Aircrane* court did specifically determine that FAA seizure promoted an important government interest in the protection of public safety.¹⁰² The *Calero* court held that a similar public interest was fostered by the seizure of the yacht carrying marijuana.¹⁰³ *Calero* articulates an additional interest which could be used in future cases to validate section 903 stating that the need to seize property in order to assert *in rem* jurisdiction is a sufficient government interest to allow summary seizure.¹⁰⁴ The Court in *Calero* minimized the requirement that the seizure be "directly necessary"¹⁰⁵ and upheld the seizure that merely "fosters"¹⁰⁶ a significant government interest. The Supreme Court indicated in *Calero* that the requirement of a necessity for prompt action is satisfied whenever pre-seizure hearing and notice would enable mobile property, such as an airplane, to escape the jurisdiction of the court.¹⁰⁷ In both *Aircrane* and *Calero*, however, the seizure was not made promptly after the initial determination that an illegal activity was taking place.¹⁰⁸ The Court in *Aircrane* did question whether the statutory scheme authorizing¹⁰⁹ summary seizure by the FAA is sufficiently narrowly drawn to insure that action is taken only when necessary and justified. The FAA is given wide discretion and may seize property involved in any violation of the Federal Aviation Act, while previously upheld statutes dealt with a specific danger or violation of the law.¹¹⁰ The statute involved in *Calero* required a

¹⁰² See note 76 *supra* and accompanying text.

¹⁰³ 94 S. Ct. at 2090, citing *Ownbey v. Morgan*, 256 U.S. 94 (1921).

¹⁰⁴ 49 U.S.C. § 1473(b) (1970) requires the procedure to follow as closely as possible the rules of admiralty and some authorities indicate that seizure is necessary to permit the maintenance of an *in rem* action in admiralty. See, e.g., *Dow Chemical Co. v. Barge UM-23B*, 424 F.2d 307, 311 (5th Cir. 1970).

¹⁰⁵ *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972), stated that the seizure must be "directly necessary."

¹⁰⁶ 94 S. Ct. at 2090.

¹⁰⁷ *Id.* See also *United States v. One(1) 1972 Wood, 19 Ft. Custom Boat*, FL 8443AY, 501 F.2d 1327, 1329 (5th Cir. 1974).

¹⁰⁸ The Puerto Rican official did not seize the yacht until 3 months after the marijuana was discovered. 94 S. Ct. at 2080. The FAA knew of *Helicrane's* activities for six months before the seizure was made. 307 F. Supp. at 602.

¹⁰⁹ See 49 U.S.C. §§ 1471, 1473(b) (1970).

¹¹⁰ See, e.g., Federal Drug & Cosmetic Act § 304, 21 U.S.C. § 334(a) (Supp.

prior determination that the property was used to convey contraband.¹¹¹ Even in light of the lenient application the Supreme Court in *Calero* gave to the three-pronged test, the statutory scheme allowing for summary seizure by the FAA apparently fails to meet the requirement of a narrowly drawn statute.

The *Mitchell* and *Calero* decisions have dramatically affected the validity of the *Aircrane* decision. Until further decisions clarify the extent to which *Mitchell* withdraws from the principles of *Fuentes*, the applicability of the principles enunciated in *Fuentes* will be in question.¹¹² *Mitchell* at the very least signifies a return to the highly individualistic balancing-of-interest approach in cases involving summary seizure initiated by self-interested private parties. Although it appears that the three-pronged test of *Fuentes* may be utilized by the present Supreme Court as interests to be weighed in a balancing-of-interests approach, the *Calero* decision mandates that these three elements dominate any determination of the constitutionality of a summary seizure initiated by administrative agencies. Until a judicial determination is made applying these three elements to sections 901 and 903 of the Federal Aviation Act, the constitutionality of those sections and the precedential value of *Aircrane* is highly questionable.

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III, 1950), as amended, 21 U.S.C. § 334(a) (1970), allowing seizure of misbranded goods, upheld in *Ewing*; INT. REV. CODE OF 1954, § 6861(a), upheld in *Phillips v. Commissioner*, 283 U.S. 589 (1931).

¹¹¹ 24 PUERTO RICO LAWS ANN. § 2512 (1973).

¹¹² The Supreme Court does not appear to have abandoned *Fuentes* completely. In a recent case concerning a summary seizure initiated by a private party, the Court relied upon *Fuentes* to strike down a Georgia garnishment statute. *North Georgia Finishing v. Di-Chem*, 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975). The Court did emphasize the same factors it considered in balancing the interests in *Mitchell*, particularly the fact that a judge should issue the writ, the requirement that the grounds for the writ be clearly demonstrated in an affidavit, and the right of the debtor to have an immediate hearing at which the burden is on the creditor to prove the grounds upon which the writ is issued. For other cases involving summary seizures initiated by private parties decided after *Mitchell*, see *Sugar v. Curtiss Publishing Co.*, 383 F. Supp. (S.D.N.Y. 1974); *Guzman v. Western State Bank*, 381 F. Supp. 1262 (D.N.D. 1974); *Garcia v. Krasse*, 380 F. Supp. 1254 (S.D. Tex. 1974).

AIR CARRIERS—REFUSAL TO CARRY PASSENGER—DISCRIMINATION—49 U.S.C. § 1511 Allows a Common Carrier to Refuse Transportation to a Fugitive from an Indictment and FBI Warrant Without Liability for Discrimination Under 49 U.S.C. § 1374(b). *Williams v. Trans World Airlines, Inc.*, 369 F. Supp. 797 (S.D.N.Y. 1974).†

Robert F. Williams¹ decided in 1968 to return to the United States and surrender to the Federal Bureau of Investigation (FBI). He had been traveling in various foreign countries since 1961 avoiding an outstanding FBI warrant for his arrest and an indictment alleging kidnapping. On September 4, 1969, Mr. Williams purchased a ticket for flight from Dar es Salaam, Tanzania to London on United Arab Airlines, and from London to Detroit, Michigan on Trans World Airlines (TWA).² Williams arrived in London on September 5, 1969 for departure on TWA for Detroit, Michigan to return to the United States from his self-imposed exile. TWA, a common carrier, had previously decided, however, to re-

† The Second Circuit has just affirmed this case on appeal, *Williams v. Trans World Airlines, Inc.*, 13 Av. L. Rep. 17,482 (2d Cir. 1975). The Second Circuit's opinion is helpful in clarifying such troublesome areas mentioned in this note as the interrelationship between sections 1111 and 404(b) of the Act. The basic considerations of this note and questions raised by it continue to be pertinent in this expanding area of litigation.

¹ Robert Franklin Williams was born in Monroe, North Carolina in 1925. He is a lecturer and author, having written *NEGROES WITH GUNS* (1961). According to Plaintiff's Proposed Findings of Fact filed with the district court, Williams had served as president of the National Association for the Advancement of Colored People in Monroe, North Carolina. Because threats had been made against his life, Mr. Williams carried weapons in his car, which was lawful in North Carolina. He fired these only in target practice. The incident leading to the kidnapping charge is described in Plaintiff's Pre-Trial Memorandum at 3. Armed white men had begun a practice of driving by Mr. Williams's house and firing shots into it. Some black members of the community organized a defensive perimeter around the house. On the night of the alleged kidnapping, a white couple wandered into the area and were taken into plaintiff's house so they would not be hurt. Following this incident, plaintiff was charged with kidnapping. At the time of this case he was a fugitive from the warrant, and had not been tried for this charge.

² The ticket was issued in the name of R. Franklin. This is explained in Plaintiff's Proposed Findings of Fact before the district court, as "the result of a mistake made by the clerk of the United Arab Airlines Office in Dar Es Salaam who incorrectly copied plaintiff's name from plaintiff's passport which is in the name of Robert Franklin Williams." Plaintiff's Proposed Findings of Fact at 6. The Proposed Findings also indicate that United Arab Airlines telegraphed a "reprotection" message to TWA in London in the name of Franklin and that TWA reserved a seat for plaintiff. *Id.* at 5.

fuse carriage to Williams. The FBI had informed TWA that Mr. Williams was a fugitive from an arrest warrant, was returning to the U.S. on a TWA flight, and that there had been a demonstration in Detroit when Williams' wife had arrived there four weeks before. The FBI therefore asked TWA if it would be possible to change the flight's route or its parking location on arrival in Detroit to avert the possibility of a demonstration. With this information, the airline made its decision to refuse transportation in consideration of recent hijackings, the FBI inquiry, and an FBI circular advising that Williams be considered armed and dangerous. Mr. Williams, who is black, alleged unjust and unreasonable racial and political discrimination in violation of section 404(b) of the Federal Aviation Act of 1958.³ *Held*, TWA was justified by section 1111 of the Federal Aviation Act of 1958⁴ in its refusal of carriage on the grounds of possible danger to the flight, and such refusal was not arbitrary, unreasonable, or motivated by racial or political prejudice under the standards of section 404(b) of the Federal Aviation Act. *Williams v. Trans World Airlines, Inc.*, 369 F. Supp. 797 (S.D.N.Y. 1974).

Williams asserted in his complaint that he had been unjustly and unreasonably discriminated against due to his racial and political activities. He sued for damages under section 404(b) of the Federal Aviation Act in the United States District Court for the Southern District of New York.⁵ TWA answered that it was authorized to refuse transportation to the plaintiff by section 1111 of the Federal Aviation Act of 1958.⁶ The district court was thus called upon to deal with the interaction and relationship of these two statutory provisions.

The anti-discrimination provision of the Federal Aviation Act,

³ 49 U.S.C. § 1374(b) (1970). Plaintiff's complaint also asserted causes of action for breach of contract and for false imprisonment. The court held that these must be dismissed "[s]ince the refusal of TWA to accept plaintiff for flight from London to Detroit was authorized" *Williams v. Trans World Airlines, Inc.*, 369 F. Supp. 797, 807 (S.D.N.Y. 1974). These two points will not be discussed here. Jurisdiction was by virtue of 28 U.S.C. § 1332 (1970), based on diversity of citizenship. The district court's decision is being appealed to the United States Court of Appeals; *appeal docketed*, No. 74-1469, 2d Cir., _____ 1974.

⁴ 49 U.S.C. § 1511 (1970).

⁵ 49 U.S.C. § 1374(b) (1970).

⁶ 49 U.S.C. § 1511 (1970).

section 404(b), is a criminal statute.⁷ Section 404(b) provides:

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in air transportation in any respect whatsoever or subject any particular person . . . in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.⁸

This section was first passed as part of the Civil Aeronautics Act of 1938.⁹ It is classified as an economic regulation and is the type of provision generally aimed at rate discrimination.¹⁰ Recent decisions have held, though, that the statute creates a new federal right which may be vindicated in a civil action for damages by the person harmed.¹¹ The types of discrimination which are actionable in-

⁷ 49 U.S.C. § 1472 (1970) makes it a crime knowingly and willfully to violate Section 1374(b).

⁸ 49 U.S.C. § 1374(b) (1970).

⁹ 49 U.S.C. § 1374(b) (1970). The Civil Aeronautics Act of 1938 was substantially reenacted by the Federal Aviation Act of 1958 (72 Stat. 731). Some of the powers and duties of the Civil Aeronautics Board were transferred to the Administrator of the Federal Aviation Agency. Section 484(b) of the Civil Aeronautics Act of 1938 is the same as 49 U.S.C. § 1374(b) and was reenacted in the Federal Aviation Act of 1958 as section 404(b) with no change in meaning. "The reenactment of provisions which are now in effect should be considered as an absolute neutral factor in any question of interpretation which may arise in the future." 2 U.S. CODE CONG. & AD. NEWS 3750 (1958).

¹⁰ *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 723 (1963). Legislative history on this section is rather vague, but speaks in general terms of rate discrimination. The Conference Report to the House of Representatives on the purpose and policy of the 1938 Act stated, "Every air carrier . . . is forbidden to charge discriminatory rates or enforce discriminatory regulations." H.R. REP. NO. 2635, 75th Cong., 3d Sess. (1938). Henry G. Hotchkiss commented on the meaning and development of the Civil Aeronautics Act in H. HOTCHKISS, *A TREATISE ON AVIATION LAW* (2d ed. 1938). An early version of this Act, the Lea Bill, H.R. 9738, 75th Cong., 3d Sess. (1938), also exhibits this concern for rate discrimination.

¹¹ *Archibald v. Pan American World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972); *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 449 (2d Cir. 1956); *Mortimer v. Delta Air Lines*, 302 F. Supp. 276 (N.D. Ill. 1969); *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961); *see also Flores v. Pan American World Airways*, 259 F. Supp. 402 (D.P.R. 1966). These cases seem to firmly establish a private cause of action in favor of one discriminated against under Section 404(b), but it is arguable that this step should never have been taken. *See note 30 infra*; *Reitmeister v. Reitmeister*, 162 F.2d 69 (2d Cir. 1947); *Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co.*, 349 F. Supp. 670, 679 (D. Neb. 1972).

clude not only economic discrimination¹² but also discrimination based on race.¹³

In 1961, Congress passed section 1111 of the Federal Aviation Act, which allows carriers to refuse transportation for safety reasons:

Subject to reasonable rules and regulations prescribed by the Secretary of Transportation, any air carrier is authorized to refuse transportation to a passenger or to refuse to transport property when, in the opinion of that air carrier, such transportation would or might be inimical to safety of flight.¹⁴

The 1961 amendment to the Federal Aviation Act was generally to provide for application of federal criminal law to certain events occurring on board aircraft in air commerce.¹⁵ The Senate report on the bill¹⁶ indicates a concern that this provision not be abused so as to disregard the rights of citizens.

Section 1111 had never been judicially interpreted before *Williams*. This absence of case interpretation and lack of definitive legislative comment has left unclear the relationship between sections 404(b) and 1111. The examination of several questions is important to an understanding of these statutes. One question is whether justification under section 1111 is a complete defense to a charge of discrimination under section 404(b). Another is whether plaintiff automatically succeeds if he shows section 1111 discretion was not validly exercised, or whether there are other defenses defendants may raise. The *Williams* court examined both statutes individually. The court found it necessary to determine

¹² *Archibald v. Pan American World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972); *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973); *Mortimer v. Delta Air Lines*, 302 F. Supp. 276 (N.D. Ill. 1969); *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961).

¹³ *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 449 (2d Cir. 1956); *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962).

¹⁴ 49 U.S.C. § 1511 (1970).

¹⁵ Pub. L. No. 87-197, 87th Cong., 1st Sess., approved Sept. 5, 1961, added section 1111 to Title XI of the Federal Aviation Act which is 49 U.S.C. § 1511 (1970). Public Law 87-197 relates generally to crimes committed aboard aircraft. Section 1111 was amended by Pub. L. No. 93-366, 93d Cong., 2d Sess., approved Aug. 5, 1974, 88 Stat. 418.

¹⁶ S. REP. NO. 694, 87th Cong., 1st Sess. 5 (1961). The committee expects regulations allowing refusal to transport to be made "with zealous regard for the rights of every citizen and to take every precaution to insure against abuse."

whether refusal was justified for safety reasons despite its prior determination that the facts of the case did not support a finding of discrimination under section 404(b).¹⁷ In reaching its conclusion that TWA's refusal to carry Mr. Williams was not "arbitrary, unreasonable or motivated by racial or political prejudice,"¹⁸ the court in *Williams* first examined the recent line of cases¹⁹ establishing the existence of a private cause of action for violation of 404(b).

The test under section 404(b) according to *Mortimer v. Delta Airlines*²⁰ is whether the plaintiff has been deprived of his right to fair, equal, and non-discriminatory treatment.²¹ In *Archibald v. Pan American World Airways, Inc.*,²² the United States Court of Appeals for the Ninth Circuit stated that a prima facie case of undue preference is shown if a passenger has a confirmed reservation and right to a seat which is not honored, and instead, a passenger with a later reservation is allowed to board in contradiction to the policy expressed in the airline's tariff. The defendant airline then has the burden of proving that the preference was reasonable.²³ *Wills v. Trans World Airlines, Inc.*²⁴ referred to an analogous provision in the Interstate Commerce Act²⁵ that has been interpreted to prohibit discrimination in all its forms.²⁶ The *Wills* court disapproved of unwarranted exclusion of a passenger from accommodations to which he is entitled by virtue of his prior con-

¹⁷ 360 F. Supp. at 807.

¹⁸ *Id.*

¹⁹ Cases cited note 11 *supra*.

²⁰ 302 F. Supp. 276 (N.D. Ill. 1969).

²¹ *Id.* at 281.

²² *Archibald v. Pan American World Airways, Inc.*, 460 F.2d 14, 17 (9th Cir. 1972). *Accord*, *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973). This October 18, 1973, decision held that plaintiff established a prima facie case of unreasonable discrimination when his prior reservation was not honored due to overselling. The court said, "The Defendant has failed to sustain its burden of proof that the discrimination was reasonable by demonstrating . . . why . . . its policy did not work an 'undue or unreasonable prejudice or disadvantage in any respect whatsoever' . . ." *Id.* at 132.

²³ 460 F.2d at 17.

²⁴ 200 F. Supp. 360, 363 (S.D. Cal. 1961).

²⁵ "It shall be unlawful for any common carrier subject to the provision of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 49 U.S.C. § 3(1) (1970).

²⁶ *Dixie Carriers v. United States*, 351 U.S. 56, 60 (1956).

firmed reservation.²⁷ Because these cases deal largely with discriminatory "bumping" of passengers due to ticket oversales, the *Williams* court found them inapposite and of little guidance in determining the meaning of unreasonable prejudice and unjust discrimination when dealing with a claim of racial and political unfairness.²⁸

The plaintiffs in *Fitzgerald v. Pan American World Airways*²⁹ alleged racial discrimination and sought to recover damages under section 404(b). The United States Court of Appeals for the Second Circuit held that though section 404(b) of the Federal Aviation Act is a criminal statute, it was enacted for the benefit of passengers using the facilities of air carriers, and by implication provides a civil remedy for violation of the rights safeguarded by this provision.³⁰ Later cases have also held that section 404(b) created an actionable civil right that can be applied to racial discrimination. The United States District Court for the Northern District of Illinois, in *Mortimer v. Delta Air Lines*,³¹ stated that the remedy available under section 404(b) provided relief for injury from discrimination and disadvantage whether occasioned by racial, religious or economic motives.³² *United States v. City of Montgomery*³³ also held that the anti-discrimination provision forbids racial discrimination.³⁴ The *Williams* court acknowledged these cases but

²⁷ 200 F. Supp. at 365. Though bumping due to oversale was not the issue, the court in *Flores v. Pan American World Airways*, 259 F. Supp. 402, 405 (D.P.R. 1966), dealt with the question of proof of discrimination and considered whether or not there was any reason or attempt to discriminate and whether there was such discrimination in fact.

²⁸ 369 F. Supp. at 804.

²⁹ 229 F.2d 499 (2d Cir. 1956).

³⁰ 229 F.2d at 501. Cases not implying a private cause of action from the Federal Aviation Program include: *Moungey v. Brandt*, 250 F. Supp. 445 (W.D. Wis. 1966); *Rosdail v. Western Aviation, Inc.*, 297 F. Supp. 681 (D. Colo. 1969); see also *Yelinek v. Worley*, 284 F. Supp. 679 (E.D. Va. 1968). The courts in these cases distinguished the facts before them from the *Fitzgerald* case. The *Moungey* court points out that the issue of *Fitzgerald* arose under the economic regulation sections of the Federal Aviation Program rather than the safety regulations as in *Moungey*, and that there was an adequate state remedy in *Moungey* which was absent from *Fitzgerald*. *Rosdail* can also be distinguished by the availability of a state remedy and the fact that it was based on the definitional section of the Federal Aviation Program.

³¹ 302 F. Supp. 276 (N.D. Ill. 1969).

³² *Id.* at 281.

³³ 201 F. Supp. 590, 593 (M.D. Ala. 1962).

³⁴ *Montgomery* was an enforcement proceeding, however, rather than a case

gave them only brief consideration and thus found neither the bumping nor racial cases helpful.³⁵

Finding little guidance in prior section 404(b) cases as to what constitutes "unjust discrimination," the district court in *Williams* looked to the general prohibition against discrimination in 42 U.S.C. §§ 1981-1983 and the proof these sections require. The test under sections 1981-1983 is whether one is deprived of a right that would be accorded a person of a different race in like circumstances.³⁶ The *Williams* court applied this test and found that plaintiff failed to meet the test on either racial or political grounds.³⁷

The *Williams* decision is the first to interpret section 1111. In analyzing the statute, the court noted that it was enacted at a time of much national concern about hijackings and crimes aboard aircraft and was a part of a legislative response to that concern.³⁸ The court's analysis of section 1111 looked also to early common law cases holding that "the carrier certainly has the right to exclude from his vehicle anyone whose condition is such that a possibility of danger may be thrown upon the other passengers if he is admitted as a passenger."³⁹ The *Williams* court quoted at length from the 1893 *Meyers* decision,⁴⁰ which spoke of the right of a common carrier to exclude one who might cause injury to passengers because of the high duty of care for passengers placed upon the carrier.

The opinion in *Williams* did not tie together sections 404(b) and 1111, nor did it explain the relationship between the two. The court treated both statutes separately and announced separate con-

implying a private cause of action. See also *Henderson v. United States*, 339 U.S. 816 (1950); *Mitchell v. United States*, 313 U.S. 80 (1941).

³⁵ For an interpretation of the passage dealt with in *Williams*, 369 F. Supp. at 804 n.5, see *Moungay v. Brandt*, 250 F. Supp. 445, 453 (W.D. Wis. 1960).

³⁶ *Schetter v. Heim*, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969).

³⁷ 369 F. Supp. at 804, 807.

³⁸ H.R. REP. NO. 958, 87th Cong., 1st Sess.; 2 U.S. CODE CONG. & AD. NEWS 2563 (1961).

³⁹ *Meyers v. St. Louis, I.M. & S. Ry.*, 54 F. 116 (8th Cir. 1893). In *Connors v. Cunard S.S. Co.*, 204 Mass. 310, 90 N.E. 601 (1910), the court cites such cases as *Meyer* and *Thurston v. Union Pac. R.R.*, 23 F. Cas. 1192 (No. 14,019) (C.C.D. Neb. 1877), as holding that the carrier may refuse transportation if it reasonably supposed that the safety of the other passengers would be endangered. *Thurston* lists fugitives from justice among those who may be refused.

⁴⁰ 369 F. Supp. at 805.

clusions of law on each.⁴¹ This treatment beclouds the meaning of the two statutes and the standards required to prove or defend against a charge of discriminatory refusal to carry. Their separate treatment by the court in *Williams* suggests that it is necessary to reach section 1111 even assuming a prior determination that refusal was not discriminatory under section 404(b). The *Williams* court determined the discrimination issue under section 404(b) by applying 42 U.S.C. §§ 1981-1983 tests wholly apart from the safety issue.⁴² The court then treated the section 1111 issue separately as though plaintiff, having failed under section 404(b), might still succeed under section 1111. To the extent the court in *Williams* meant to promulgate this mode of analysis, its reasoning seems questionable. Section 1111 of the Federal Aviation Act says nothing about a private right of action, and none has been implied under this section. Its purpose was to allow air carriers to refuse persons for safety reasons to protect against hijackings.⁴³

The cause of action in *Williams* was brought under section 404(b) for which courts have implied a private cause of action.⁴⁴ It thus seems that the better course would be first to determine if there were a prima facie case of discrimination made out under section 404(b). *Mortimer* stated that such discrimination may be "racially, religiously, or economically motivated or . . . result[ing] from the carrier's disregard for its own priority rules."⁴⁵ If a case of discrimination is not made out under section 404(b), the inquiry should stop there, and it would thus be unnecessary to reach section 1111 since section 1111 itself arguably does not support a private cause of action. If a case of discrimination is shown, however, courts should then determine whether the discrimination were reasonable or justified by section 1111 safety reasons as the defendant airline in *Williams* claimed. This analysis also uses the finding of safety justification as a means of showing the reasonableness of the refusal, and thus defeats the claim of "unjust discrimination . . . or unreasonable prejudice. . . ."⁴⁶

⁴¹ *Id.* at 807.

⁴² *Id.* at 804.

⁴³ See note 15 *supra*.

⁴⁴ See note 11 *supra*.

⁴⁵ 302 F. Supp. at 281.

⁴⁶ 49 U.S.C. § 1374(b) (1970).

If a court found that an airline's refusal to carry was justified under the safety provision, it seems that such a determination should dispose of the discrimination claim and be an absolute defense to it. For if the court found that the basis of refusal was a bona fide concern for safety, that finding should preclude any other finding that the action was unjustly or unreasonably discriminatory. This analysis presumes a finding that the carrier's decision was based on safety factors and was not a camouflage of arbitrary or discriminatory refusal.⁴⁷ If the court were to find that section 1111 discretion was not validly exercised and that the airline's refusal was not justified for safety reasons, then a plaintiff should succeed if he has shown discrimination.⁴⁸

In its analysis of section 404(b) the *Williams* court distinguished earlier cases under the section involving oversales bumping and racial discrimination.⁴⁹ This core of cases, however, does appear to establish guidelines for a finding of unjust discrimination⁵⁰ and for implying a private cause of action under section 404(b)⁵¹ that would be applicable to the *Williams* case. Finding these cases inapposite, the *Williams* court found guidance in the standards enunciated under 42 U.S.C. §§ 1981-1983 which examine whether one is deprived of a right that would be accorded a person of a different race in like circumstances. The facts in *Williams* did not fit exactly into sections 1981-1983, so the court was able only to draw a loose analogy. The *Williams* court recognized that the purpose of sections 1981-1983 is to protect only against racial discrimination,⁵² but does not answer the political discrimi-

⁴⁷ See discussion of section 1111 *supra*. That the tariffs regarding 49 U.S.C. § 1511 and a decision thereunder must be genuinely based on safety concerns and not a mask for discriminatory practice is indicated by the *Williams* court: "Such Tariff restrictions, however, do and did not permit specific kinds of discriminatory action by the carrier . . ." 369 F. Supp. at 803.

⁴⁸ This is analogous to cases of bumping due to oversales. See note 12 *supra*. *Archibald* said if a passenger has shown his priority was not honored, he has made a showing of discrimination, and the burden shifts to the airline to show that it was reasonable "by demonstrating company policy and why . . . one passenger was chosen over another." 460 F.2d at 17. Thus if defendant cannot justify the action based on his tariffs or safety reasons, plaintiff should succeed.

⁴⁹ 369 F. Supp. at 804.

⁵⁰ See note 11 *supra*.

⁵¹ See text accompanying notes 19-35 *supra*.

⁵² *Abshire v. Chicago & E. Ill. R.R.*, 352 F. Supp. 601 (N.D. Ill. 1972); *Schetter v. Heim*, 300 F. Supp. 1070 (E.D. Wis. 1969).

nation issue raised by Williams,⁵³ and that section 1983 does not apply to discrimination by private individuals.⁵⁴

The *Williams* decision allows the air carrier broad discretion in determining what constitutes a danger to safety and endorses a relaxed interpretation of "would or might be inimical to safety of flight" by analogy to the broad discretion granted to carriers in cases like *Meyer*.⁵⁵ Such a close reliance on *Meyer* and similar common law cases seems somewhat misguided. This statute was enacted because of congressional concern over hijacking and recognition of the need to punish and guard against it. Its intended application seems only for the limited purpose of protecting against hijacking and crimes aboard aircraft that were the national concern at the time of enactment.⁵⁶ Thus it should be more strictly construed than the common law rules.

Even if Congress did intend to enact the more liberal common law doctrine, it is questionable whether the facts of *Williams* supported a reasonable belief of inimicability. The FBI in its communications with TWA did not warn of any danger aboard the flight or of any possibility of hijacking, but only of the possibility of a demonstration on arrival in Detroit, and simply asked whether the aircraft could be parked elsewhere or rerouted.⁵⁷ TWA submitted that neither alternative was feasible,⁵⁸ but still was given no indication that Williams posed any threat of hijacking. In fact, Williams was returning to the United States to surrender and rejoin his family.⁵⁹ The court's preoccupation with the necessity to guard against hijacking thus seems misplaced. It seems that the threat to safety was the possibility of a demonstration on arrival at the airport in Detroit. Though this, rather than hijacking, seems to pose the more real and honest problem of safety or danger the court treated it lightly.

If consideration of hijacking and danger to flight were indeed the reason for TWA's refusal to carry Williams, it seems anomalous

⁵³ 369 F. Supp. at 804.

⁵⁴ 300 F. Supp. 1070.

⁵⁵ 54 F. 116 (8th Cir. 1893).

⁵⁶ See legislative history in notes 15 & 16 *supra*.

⁵⁷ 369 F. Supp. at 800.

⁵⁸ *Id.* at 805.

⁵⁹ *Id.* at 799, 801.

that carriage was not conditioned on Williams' submitting to a search or that TWA did not at least request that Williams be searched first.⁶⁰ Such procedures would seem consistent with TWA's tariff in effect at that time which provided in Rule 8(A):

(3) Carrier will refuse to carry or will remove at any point, any passenger who refuses to permit search of his person or property for a concealed deadly or dangerous weapon or article or explosives.⁶¹

TWA's decision, however, was made on August 28 or 29, 1969,⁶² a full week before Williams presented himself for flight, and thus was without any consideration of whether Williams would in fact be armed and pose a threat at the time of departure.⁶³ The refusal to transport Williams was final, even though a search by British authorities ascertained that he was carrying no arms or ammunition.⁶⁴ TWA's decision was based on the FBI circulars and communiques. It seems, though, that a reasonable and considered decision on the danger of an individual should turn on more than the fact that he has had a gun in the past, and that whether he will be dangerous to a flight indeed depends upon his possession of weapons and other circumstances at the time of boarding.

⁶⁰ The *Williams* court stated in its Findings of Fact that "there was no rule at that time with respect to searching passengers." 369 F. Supp. at 800. The meaning of this seems unclear. TWA's tariff, as quoted in the text accompanying note 61 *infra*, provided for search, and as early as September 27, 1968, a Civil Aeronautics Board tariff regulation authorized a carrier to deny transportation to any passenger refusing to permit a search of his person or property. Rule 6(A)(3)(a)-(b), CAB Local Passenger Rules Tariff No. PR5, C.A.B. No. 117, at 9 (effective October 27, 1968).

⁶¹ Trans World Airlines, Inc., Local & Joint International Passenger Rules Tariff No. R-3 (1961).

⁶² 369 F. Supp. at 800.

⁶³ The court placed emphasis on the language of *Meyer* that it would be an unjust burden to hold that a carrier may not refuse a passenger "simply because, at the moment he offers himself as a passenger, he is quiet, well behaved, or apparently harmless." The meaning of this is not that the circumstances at time of boarding are not to be considered. This language must be construed in light of the facts of the case. *Meyer* involved a dangerous insane man, and this condition and his inimicability were not erased merely because he appeared well behaved at the time of boarding, and the carrier should not be required to take him merely because he was quiet at that moment. But in the instant case, Williams' behavior and his possession or non-possession of weapons at the time of boarding were factors which determined whether in fact he was dangerous at all.

⁶⁴ 369 F. Supp. at 801.

The district court's decision in *Williams* upheld TWA's refusal to carry Williams, thus giving a broad interpretation to the right of the airline to refuse carriage when in its discretion transportation would or might be inimical to safety of flight.⁶⁵ It was reluctant to construe too lightly this provision at the risk of emasculating this measure of protection for the airlines. The district court apparently wanted to allow the air carrier a full measure of preserving the safety of air transportation because of the peculiar vulnerability of flights to piracy and acts of sabotage.

The tendency of the *Williams* decision, though, is to allow the airline to make the decision first and then study it later, rather than to require a careful consideration of all the circumstances, including the passenger's status on arrival at the airport, before denying him passage. It would certainly be outside the intended scope of the statute to allow a carrier to refuse an individual a week in advance after simply being presented with an FBI dossier, or because he had an arrest record, or had carried a gun in the past. The court's failure to give a firm standard or more definite guidelines for determination of inimicability under section 1111 might, however, incline carriers to exclude summarily certain passengers without serious consideration of the individual's rights and the important duty incumbent upon them to justly and reasonably extend service regardless of the passenger's politics or race. It is doubtful that the facts of the instant case justified the district court's finding as Williams was carrying no gun⁶⁶ and was returning to surrender.⁶⁷ The airline was permitted to rely on the FBI information without investigating its accuracy.⁶⁸ To allow this seems proper, but there is still some question whether such information should always be sufficient. The law would seem to require more than an FBI circular delineating past conduct of an individual before depriving him of his right to travel. An evaluation of the danger posed by a passenger does not seem complete without consideration of the circumstances at the time of boarding.

The difficulty with the *Williams* decision is the danger of generating a carelessness with passengers' rights and abridgment of their

⁶⁵ 49 U.S.C. § 1511 (1970).

⁶⁶ 369 F. Supp. at 801.

⁶⁷ *Id.*

⁶⁸ *Id.* at 806.

civil liberties in favor of an undisciplined discretion and control by airlines. The ramifications of such a rule would be clearly against the grain of decisions such as *Fitzgerald*, *Archibald*, and *Wills* which so forthrightly sought to protect the individual passenger's rights from the unfettered discretion of airlines. In analyzing an airline's determination of danger, courts must ensure that the refusal to transport provision of the Federal Aviation Act of 1958 is not over-construed in favor of airlines at the expense of an individual's rights. The courts must not overlook the carrier's duty to furnish transportation upon reasonable request⁶⁹ nor abridge any citizen's right of freedom of transit.⁷⁰ As this area of the law continues to be litigated,⁷¹ the courts should reflect on the specifically defined purposes for which these statutes were enacted⁷² in making their judicial determinations.

Lyle D. Pishny

⁶⁹ 49 U.S.C. § 1374(a) (1970).

⁷⁰ "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304 (1970).

⁷¹ *Mason v. Belieu*, 13 Av. L. REP. ¶ 17,114 (D.D.C. May 10, 1974).

⁷² See notes 9, 10, 15, & 16 *supra*.

Current Literature

