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Case Notes

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PRACTICE AND PROCEDURE—FEDERAL COMMON LAW IN AVIATION—Federal Rather Than State Law Should Be Applied to Determine the Rights and Liabilities of the Parties Involved in a Mid-air Collision. *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974) *cert. denied*, —U.S.—, 95 S. Ct. 1980 (1975).

On September 9, 1969, near Shelbyville, Indiana, a private plane operated by a student pilot flying under visual flight rules collided with an Allegheny Airlines DC-9 which was receiving and adhering to air traffic control radar directions from an employee of the Federal Aviation Administration and was flying under instrument flight rules. Both planes were destroyed and all eighty-three occupants died. Wrongful death actions to recover damages were brought in eight United States District Courts and subsequently were transferred to the United States District Court of Indiana for consolidated pretrial proceedings under the jurisdiction of the Judicial Panel on Multidistrict Litigation.[1] Defendants Allegheny Airlines and the United States filed cross claims and third party complaints against the estate of the student pilot, the corporate owner of the private plane, and its parent company. Allegheny and the United States then settled the claims of the passengers against them and proceeded against the other three defendants for contribution and indemnity. The district court, however, dismissed the claims for contribution and indemnity, holding that Indiana law applied and that under Indiana law, no such rights existed. Allegheny and the United States appealed, contending that a federal rule of contribution and indemnity should govern the case rather than the Indiana law. *Held, reversed*:[2] The predominant interest of the Federal government in regulating aviation dictates that federal law, rather than state law of contribution and indemnity,[3] should be

[1] *In re* Mid-Air Collision near Fairland, Indiana, 309 F. Supp. 621 (Jud. Pan. Mult. Lit. 1970).

[2] Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir. 1974).

[3] Having determined that a federal rule of contribution and indemnity among joint tortfeasors should control in aviation collisions, the court rejected the con-

applied in actions arising from mid-air collisions in national airspace. *Kohr v. Allegheny Airlines*, 504 F.2d 400 (7th Cir. 1974) *cert. denied*, —U.S.—, 95 S. Ct. 1980 (1975).[4]

The question of which law is to be applied in any aircrash case is not easily answered.[5] It is generally assumed that state law will apply in determining the rights of the parties, the only question being that of determining which state's law is to apply. A leading aviation case in the choice of law area that exemplifies some of the difficulties one encounters in answering that question is *Kilberg v. Northeast Airlines*.[6] In *Kilberg*, a New York resident died in an aviation accident occurring in Massachusetts. The estate brought a wrongful death action in New York state court for damages in excess of that allowed by Massachusett's wrongful death statute. The New York court, moving away from the old *lex loci* doctrine that the law of the place of the accident should control, announced that public policy of New York dictated that the Massachusetts limitations would be inapplicable.[7] As a result of varied state tort law and the difficult task of determining the outcome of a *Kilberg* type analysis, the aviation accident lawyer must wait until the choice of law issue is decided before he can properly frame his grounds for recovery or his defense.[8] The application of a uniform federal aviation tort law would, of course, foreclose the necessity for such analysis and prevent the abuses of forum shopping that are existent under present law. If the rights of the parties in aviation litigation were determined by a uniform law, aircrash litigation would be simpler, less expensive, and more predictable. Unfortunately, there

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tention that the rule should be one of "no contribution" and determined that contribution and indemnity should be applied on a comparative negligence basis. *Id.* at 405.

[4] Justice Douglas voted to grant certiorari.

[5] *See* Abramson, *Where to Sue in Aviation Products Liability Cases*, 40 J. AIR L. & COM. 369 (1974) for a discussion of the factors to be considered in aviation litigation when selecting the forum and opting for the law of one state over that of another state; *See also* Note, 41 J. AIR L. & COM. 133 (1975).

[6] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *See also* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *but see* Neumier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

[7] 9 N.Y.2d 40, 172 N.E.2d 528, 211 N.Y.S.2d 136 (1961).

[8] For a discussion of the various choice of law problems facing the aviation lawyer, *see* Abramson, *Where to Sue in Aviation Products Liability Cases*, 40 J. AIR L. & COM. 369 (1974) and Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

simply is no uniform federal tort law in aviation at present, nor, until *Kohr*, have adequate grounds ever been found for imposing one. The Seventh Circuit, in an uninformative opinion, has attempted to dispose of a most difficult problem in a single paragraph.[9] In that paragraph, the court gave, as the reason for its decision, that federal interest in aviation in general, joined with the presence of the United States as a party, and supervision by the Judicial Panel on Multidistrict Litigation left no perceptible reason why a federal law should not be imposed to determine the rights and liabilities of the parties.[10]

The first Congress of the United States, after considering the question of which law should be applied in civil actions in federal court, provided for a federal system in section 34 of the Federal Judiciary Act of 1789,[11] now the Rules of Decision Act.[12] The Supreme Court's interpretation of this Act, as voiced by Justice Brandeis in *Erie Railroad v. Tompkins*,[13] seemed to indicate the Act had destroyed any notion that there existed a federal common law. Later statements by Justice Brandeis,[14] legal scholars[15] and subsequent courts,[16] however, indicate that a federal common law may still exist. A federal common law has been considered applicable in diversity actions, primarily to fill in interstitially or otherwise effectuate the statutory patterns enacted by Congress,[17] and in areas

[9] Kohr v. Allegheny Airlines, 504 F.2d 400, 404 (7th Cir. 1974), *cert. denied*, ___ U.S. ___, 95 S.Ct. 1980 (1975).

[10] *Id.*

[11] Ch. 20, 1 Stat. 92.

[12] Rules of Decision Act, 28 U.S.C. § 1652 (1970):

> The laws of the several states, except where the Constitution or the treaties of the United States or Acts of Congress otherwise provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply.

[13] 304 U.S. 64 (1938).

[14] On the same day *Erie* was decided, Justice Brandeis, speaking for the court, wrote that "whether the water of an interstate stream must be apportioned between the two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive." Hinderliter v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

[15] *See, e.g.*, McCormick and Hewins, *The Collapse of "General Law" in the Federal Courts*, 33 ILL. L. REV. 126, 144 (1938).

[16] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); and Ivy Broadcasting Co., Inc. v. Am. Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968).

[17] *See* Mishkin, *The Variousness of "Federal Law": Competence and Discre-*

where federal interest is strong and the overall regulatory statutes are comprehensive,[18] *i.e.*, when federal law has *preempted*[19] state law. Unfortunately, no precise standard for determining when federal law has preempted state law exists.[20]

When Congress expressly states that a field is to be regulated by the federal government, Congress has already made the determination, but this is seldom the case, and in all other cases the courts must make a determination of the implied intent of Congress.[21]

The proposition that federal legislation in the field of aviation might give rise to a cause of action under federal common law by way of preemption is not new to aircrash litigators and has been considered in several contexts prior to *Kohr*. In *Rogers v. Ray Gardner Flying Service*,[22] the plaintiffs argued that a section of the

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tion in the Choice of National and State Rules of Decision, 105 U. PA. L. REV. 797, 800 (1957).

[18] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Ivy Broadcasting Co. v. Am. Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968).

[19] Preemption of state law is generally defined as manifest congressional intent to control an activity to the exclusion of state law.

[20] The commerce powers of the federal government have preempted state laws in several areas, including regulation of railway safety equipment, Napier v. Atl. Coast Line R.R., 272 U.S. 605 (1926); interstate shipment of food products, Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942); and in the registration of aliens, Hines v. Davidowitz, 312 U.S. 52 (1941). State law has been held not preempted in areas involving the interstate shipment of fresh fruits, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963) (California statute specifying the minimum oil content of fresh avocadoes entering the state held valid); the control of striking workers, Allen Bradley Local 1111, United Elec. Workers v. Wisconsin Empl. Bd., 315 U.S. 740 (1942) (state statute regulating public demonstrations held not repugnant to National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1970); and regulation of equipment and operating standards for ships on navigable waters, Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (city pollution ordinance held applicable to vessels operating on navigable waterways subject to federal license requirements).

[21] The Supreme Court, in Rice v. Santa Fe Elevator, 331 U.S. 218 (1947), articulated a three pronged test to determine the intent of Congress when none was clearly expressed:

> (i) when the scheme of federal preemption is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, or
> (ii) if the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject, or,
> (iii) if the state law may produce a result inconsistent with the federal statute, the federal measure must prevail.

Id. at 230.

[22] 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

Federal Aviation Act[23] evidenced a preemption of Oklahoma bailment law.[24] The Fifth Circuit did not question that Congress could preempt state law under its Commerce Clause[25] powers, with regard to liabilities for injuries resulting from aircrashes, but the court was not convinced that Congress had clearly indicated any such intent.[26] Later, in *McCord v. Dixie Aviation*,[27] the Tenth Circuit, interpreting the same definitional section of the Federal Aviation Act of 1958,[28] refused, by relying on *Rogers* and on general public policy grounds,[29] to apply federal common law to aviation torts. In *McCord*, the court recognized that sufficient legislative intent would justify imposition of federal tort law but refused to find the necessary strength of interest or comprehensiveness of control to justify its imposition.[30] In the opinion of the court, to impose a federal common law "would constitute abusive judicial law making" better directed to the "law making power of Congress than the adjudica-

[23] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, § 101(26), 49 U.S.C. § 1301(26) (1970), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, provides:

> 'Operation of Aircraft' or 'operate aircraft' means the use of aircraft, for the purpose of air navigation of aircraft, and includes the navigation of aircraft. Any person who causes or authorizes the operator of aircraft whether with or without the right of legal control (in the capacity of owner, lessee or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

The House Committee Report on § 101(26), which amended the Civil Aeronautics Act of 1938, stated:

> Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. *This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances.* (Emphasis added).

H.R. Rep. No. 2091, 80th Cong., 2d Sess. 1836 (1948).

[24] The Oklahoma Supreme Court has expressly held that the negligence of the bailee of an airplane may not be imputed to the bailor. Spartan Aircraft Co. v. Jamison, 181 Okla. 645, 75 P.2d 1096 (1938).

[25] U.S. CONST. art. I, § 8.

[26] 435 F.2d at 1393.

[27] 450 F.2d 1129 (10th Cir. 1971).

[28] For another case interpreting this section, *see* Rosdail v. W. Aviation, Inc., 297 F. Supp. 681 (D. Colo. 1969); *see also* Note, 48 TEX. L. REV. 488 (1970), and Comment, *Liability of the Owner of an Aircraft Under the Federal Aviation Act of 1958*, 38 J. AIR L. & COM. 547 (1972).

[29] 450 F.2d at 1130-31.

[30] *Id.* at 1131.

tive power of the court."[31] Finally, in *City of Burbank v. Lockheed Air Terminal, Inc.*,[32] the Supreme Court, faced with the conflict between a local noise control ordinance[33] and what Lockheed alleged to be overriding federal regulations, announced that there was federal preemption of the field of aviation noise control because the federal statutory scheme was so pervasive as to foreclose the possibility of compatible state regulation.[34] Despite comprehensive statutes[35] and legislative history in support of the majority decision, four justices dissented,[36] stating that Congress could preempt the field if it chose, and that the authority[37] conferred on the Administrator of the F.A.A. by the Federal Aviation Act of 1958 is sufficient to authorize him to promulgate regulations effectively preempting local action, but neither Congress nor the Administrator had chosen to take such action.[38]

Unlike the *Rogers, McCord,* and *City of Burbank* cases, in which the plaintiffs relied on specific statutory provisions, there is no section of the Federal Aviation Act of 1958, nor of any other federal act dealing with aviation, which relates specifically to contribution and indemnity, nor to substantive tort law in general, from which a federal common law via preemption could be inferred. If the *Kohr* decision can be justified at all, the justification must come from the more general provisions of the Federal Aviation Act of 1958, or from some other federal act. The only provision of the Federal Aviation Act, cited by the Seventh Circuit in *Kohr*,[39] section 1108,[40] declares the United States is to possess and exercise complete and exclusive national sovereignty in the airspace of the

[31] *Id.*

[32] 411 U.S. 624 (1973).

[33] Burbank Municipal Code § 20-32.1 made it unlawful for pure jet aircraft to take off from the Hollywood-Burbank Airport between 11 P.M. of one day and 7 A.M. the next day. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 625, 626 (1973).

[34] 411 U.S. at 638.

[35] The court found ample support for their decision in implied preemption of state law by the Noise Control Act of 1972, 42 U.S.C. § 4901 (1974); and section 611 of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1958), both statutes being directly involved with federal regulation of aircraft noise control.

[36] Justices Rehnquist, Stewart, White, and Marshall dissented, 411 U.S. at 640.

[37] 49 U.S.C. § 1431 (1958).

[38] 411 U.S. at 653.

[39] 504 F.2d at 404.

[40] 49 U.S.C. § 1508(a) (1958).

United States. This section, however, is entitled "Foreign Aircraft" and primarily concerns the United States sovereignty over aircraft of other nations flying in American airspace.[41]

Reliance on this section ignores the express purpose of the Act of 1958: "to create one unified system of flight rules and to crystallize in the Administrator the power to promulgate rules for the safe and efficient use of the country's airspace."[42] The federal aviation program regulates the licensing, inspection and registration of aircraft. It makes no provision for its application to tort liability and, in fact, specifically provides that nothing in the program shall abridge or alter the remedies now existing at common law or by statute.[43]

Unfortunately, the *Kohr* opinion fails to point out any other section of the Federal Aviation Act from which federal preemption of tort law can be inferred. An erroneous assumption in the *Kohr* opinion that the section of the Act discussed above[44] is sufficient to evidence federal preemption over aviation tort law is followed by the unsupported statements that the fact that the government was a party to the suit and the litigation had, since its inception, been subject to supervision by the Judicial Panel created by the Multidistrict Litigation Act,[45] justified the imposition of federal law.[46]

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[41] This section is a reenactment, without substantial change, of section 6(a) of the Air Commerce Act of 1926, which, in its original form, provided: "[T]he Government of the United States has, *to the Exclusion of all foreign nations*, complete sovereignty of the airspace . . . of the United States. (emphasis supplied) Air Commerce Act of May 20, 1926, ch. 344, § 6(a), 44 Stat. 568.

[42] United States v. Christensen, 419 F.2d 1401 (9th Cir. 1969); Airline Pilots Assoc. v. Quesada, 276 F.2d 892 (2d Cir. 1960).

[43] 49 U.S.C. § 1506 (1970). Further evidence that federal legislation has not preempted the field of tort litigation is the introduction of a bill to accomplish that end by Senator Tydings in 1968. S. 3305-6, 90th Cong., 2d Sess. (1968). Recognizing the lack of uniformity and inability of the courts to do precisely what the Seventh Circuit in *Kohr* has done, Senator Tydings introduced a bill, which, in its final draft, provided exclusive federal jurisdiction for "those aircraft crashes which involve substantial numbers of people and suits in multiple courts" and a "uniform body of Federal law should apply to all aviation activities . . . within the national sovereignty of the United States." S. 961, 91st Cong., 1st Sess., 115 CONG. REC. 3248 (1969). Overall support for the bill was lacking and the bill never left the Judiciary Committee following Senator Tyding's unsuccessful bid for reelection. *See* Landers, *The Tydings Bill*, 36 J. AIR L. & COM. 550, 556 (1970).

[44] Note 40 *supra*.

[45] 28 U.S.C. § 1407 (1970).

[46] 504 F.2d at 404.

The Federal Tort Claims Act,[47] under which the United States was a party to *Kohr*, calls for application of the law of the state wherein the injury took place.[48] Decisions under the Federal Tort Claims Act agree that the liability of the United States for injuries and damages is governed in the same manner and to the same extent as a private individual's liability under the controlling statutes of the state where the injury took place.[49] John Kennelly[50] has suggested that when the United States is to be denied contribution, public policy would justify "judicial creativeness" in the imposition of a uniform rule of contribution by the federal judiciary rather than waiting for congressional action.[51] Kennelly's argument assumes it is somehow inequitable for the government to pay a disproportionate amount in settlement of a claim. For a federal court to make such an assumption, however, would be to overstep the bounds of judicial creativeness at the expense of an intrusion on the rights of individual states to promulgate substantive tort law and in contravention of the express intent of Congress.[52]

The Multidistrict Litigation Act,[53] which provides for the Judicial Panel that supervised the proceedings in *Kohr*,[54] similarly provides no basis for imposing federal law. Although the Multidistrict Litigation Act makes no provision for the law to be applied, cases decided under the Act have uniformly held that the substantive law of the transferor forum will apply after transfer for coordinated or consolidated pretrial proceedings.[55] The application of the law of the transferor state, additionally, is consistent with the rules for choosing the applicable law under changes of venue.[56]

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[47] 28 U.S.C. § 1346 (1970).

[48] 28 U.S.C. § 2674 (1970); *See* Richards v. United States, 369 U.S. 1 (1962); Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948).

[49] United States v. Praylou, 208 F.2d 291 (4th Cir. 1953).

[50] Eminent aviation lawyer and author of LITIGATION AND TRIAL OF AIR CRASH CASES (1968).

[51] 2 JOHN KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES, 8: 125 (1968).

[52] *See* note 43 *supra.*

[53] 28 U.S.C. § 1407 (1970).

[54] 450 F.2d at 404.

[55] *In re* Four Seasons Securities Law Litigation, 370 F. Supp. 219 (D. Okla. 1974); *In re* Plumbing Fixtures Litigation, 342 F. Supp. 756 (Jud. Pan. Mult. Lit. 1972).

[56] "A change of venue under § 1404(a) generally should be, with respect to

The implications of *Kohr* are far reaching. First, the reasoning of the Seventh Circuit, that a federal law of contribution and indemnity applies to aviation torts, could be expanded to include every facet of aviation litigation, including limitations, wrongful death recovery limits, defenses of contributory negligence, and a myriad of other negligence doctrines. The Seventh Circuit did not elaborate on how it arrived at the conclusion that the federal law of contribution and indemnity would be based on comparative negligence.[57] Seemingly, it would be possible to impose such controversial doctrines as strict liability and crashworthiness just as easily. Secondly, the *Kohr* decision seems to open the doors to the already criticized[58] idea that the Federal Aviation Act creates duties of care which, once violated, give rise to a federal cause of action, and thus to federal question jurisdiction.

In *Gabel v. Hughes Air Corp.*,[59] an action arising out of a collision between a commercial airliner and a military aircraft, a passenger of the airline sought relief against Hughes in federal court based upon federal question jurisdiction[60] and the regulation of commerce,[61] there being no diversity of citizenship.[62] Hughes moved to dismiss for lack of jurisdiction, alleging that no federal question existed, nor was any actionable right conferred under the Federal Aviation Act of 1958 regulating air commerce which would give jurisdiction as a case arising under an act of Congress regulating commerce.[63] The district court denied the motion, reasoning that federal law is not silent as to the duties imposed upon operations of aircraft and the corresponding rights of the parties.[64] The district

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state law, but a change in courtroom." Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

[57] 450 F.2d at 405.

[58] D'Arcy v. Delta Airlines, Inc., 12 Av. Cas. 18,282 (S.D.N.Y. 1974).

[59] 350 F. Supp. 612 (C.D. Cal. 1972).

[60] 28 U.S.C. § 1331(a) (1970): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States."

[61] 28 U.S.C. § 1337 (1970): "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[62] 28 U.S.C. § 1332(c) (1970).

[63] 28 U.S.C. § 1337 (1970).

[64] 350 F. Supp. at 612.

court reported that the source of the right to recover is found in the duties imposed, and the rights flowing therefrom, as contained in the Federal Aviation Act[65] passed under the Commerce Clause,[66] and that jurisdiction over the litigation lay under sections 1331 and 1337 of 28 U.S.C.[67] While the majority of major air crashes involve citizens of different states and damages far in excess of $10,000, thus giving rise to diversity jurisdiction,[68] *Gabel*, now supported by *Kohr*, not only opens the federal courts to purely intrastate disputes in aviation litigation, but makes available the federal common law as a basis for recovery, when none would have been available under state law.

The Seventh Circuit in *Kohr* was faced with a tempting opportunity. The alternatives open to the court were to deny contribution from a joint tortfeasor to Allegheny and the United States, or to radically change the complexion of aircrash litigation, and achieve an equitable apportionment of loss among the parties. By choosing the latter, the court has become midwife to an aspect of aviation law which many thought had been aborted when the Tydings Bill failed.[69] While violative of states' rights to promulgate substantive tort law, and unsupported by the Rules of Decision Act[70] and interpretations of the various federal acts upon which the court relies, the decision has at least focused attention, once again, on the desirability of a uniform tort law for aviation litigation.

Steven D. Nelson

ILLINOIS EXCISE TAXES—RETAILERS' OCCUPATIONAL TAX AND USE TAX—The Illinois Retailers' Occupational and Use Tax Are Validly Applied to Airlines and Their Food Supplier Because the Foodstuffs and Beverages Are Not Purchased For "Resale" Since No Distinct Consideration Is Paid By the Passengers For Meal

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[65] 49 U.S.C. § 1301 *et seq.* (1958).

[66] U.S. CONST. art. I, 8.

[67] 28 U.S.C. § 1331(a) (1970); 28 U.S.C. § 1337 (1970); 350 F. Supp. at 615.

[68] 28 U.S.C. § 1332.

[69] *See* note 43 *supra.*

[70] 28 U.S.C. § 1652 (1948).

Service—*American Airlines v. Department of Revenue*, 58 Ill.2d 251, 319 N.E.2d 28 (Ill. 1974).

In 1963, Illinois retail tax revenue rules were amended to allow taxation of the sale to airlines of food and beverages used to serve passengers and crews. As a result of this change, food and beverage suppliers were made liable for the Illinois Retailers' Occupational Tax and airlines which purchased such supplies were made liable for the Illinois Use Tax. After paying the tax, both American Airlines and its food supplier, Hot Shoppes, filed claims for credit from the Illinois Department of Revenue. With the rejection of these claims, suit was filed by the airline and the food supplier for recovery of the tax paid. Because the Circuit Court of Illinois upheld the Department of Revenue's determination, both taxpayers appealed to the Illinois Supreme Court. The appeal was granted. *Held: affirmed.* The Illinois Retailers' Occupational and Use Tax are validly applied to airlines and their food suppliers because the foodstuffs and beverages are not purchased for "resale" since no distinct consideration is paid by the passengers for meal service. *American Airlines v. Department of Revenue* 58 Ill.2d 251, 319 N.E.2d 28 (1974).

Because of limitations in the state constitution prohibiting the imposition of a traditional sales tax,[1] the Illinois legislature has been forced to utilize a license or occupational tax.[2] The legislature has made retailers responsible for a retailers' occupational tax,[3] based on

[1] The Retailers' Occupational Tax presently in effect is the second tax of its type in Illinois. (Act of June 28, 1933, effective July 1, 1933). The first tax, passed in March 22, 1933 and effective on March 22, 1933, was held unconstitutional by the Illinois Supreme Court in Winter v. Barrett, 186 N.E. 113, 352 Ill. 441 (1933). The grounds of the decision were basically twofold. By exemption of certain sales from the original tax, the effect of the tax was to create an illegal classification in violation of the uniformity requirements of Art. IX, Sec. 1 of the Illinois Constitution and the equal protection clause of the Fourteenth Amendment of the federal constitution. In addition, by providing for a double appropriation to emergency unemployment relief and to reduction of property taxes, the new tax violated Art. V, Sec. 16 of the Illinois Constitution. CCH STATE TAX REP., ILL. ¶ 60-002 (1967).

[2] ILL. REV. STAT. ANN. ch. 120 § 440 (1974). The act passed on June 28, 1933, effective July 1, 1933, was held constitutional in Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1933). The new act eliminated the questionable exemptions and reduced the rate from three per cent to two per cent. CCH STATE TAX REP. ILL. ¶ 60-002 (1967).

[3] ILL. REV. STAT. ANN. ch. 120 § 440 (1974). The Retailers' Occupational Tax applies to all retail sales. There are, however, several areas or groups of sales

gross receipts[4] and a purchaser liable for a use tax[5] calculated on selling price.[6] Because the Illinois Retailers' Occupational Tax[7] (hereinafter IROT) uses the gross receipts of the retailer as its taxable base, it has the same effect as a traditional sales tax.[8] The use tax, though collected by retailers from purchasers, does not have to be remitted by retailers if the IROT is remitted on the same sale.[9] Under this scheme, the retailers are permitted to reimburse themselves at the expense of the purchaser in the form of the Use Tax. In the *American Airlines* case, although Hot Shoppes was held liable for the IROT, American was also liable for payment of the Use Tax.

Before the amendment of the retail tax revenue rules designed by the State Department of Revenue to clarify the different types of vendors who are subject to the IROT, Rule 7 (1)[10] covered vendors

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of tangible personal property which are exempt from the operation of the tax. These exempted areas include sales protected by the federal constitution, sales to charitable, religious, and educational organizations, and sales of newsprint and ink. ILL. REV. STAT. ANN. ch. 120 § 441 (1974).

[4] *Id.*

[5] ILL. REV. STAT. ANN. ch. 120 § 439 (1974). Enacted in 1955, this tax is applied at the same rate as the Retailers' Occupational Tax.

[6] ILL. REV. STAT. ANN. ch. 120 § 439.2 (1974).

[7] ILL. REV. STAT. ANN. ch. 120 §§ 440-441 (1974).

[8] The text of this note has presented a rather simplistic view of sales taxes to avoid confusion. SCHULTZ & HARRIS, AMERICAN PUBLIC FINANCE 344 (7th ed. 1959), classifies five categories of general sales tax. They are:

> (1) [R]etail sales tax; (2) single stage excise on sales by manufacturers or wholesalers; (3) multiple-stage gross sales or turnover tax, applying to all sales by manufacturers, wholesalers, and retailers; (4) gross income tax, applying not only to sales of tangible commodities but also to gross income from services; finally (5) the tax on value added may be considered a general consumption, as well as a business tax.

In one of the first authoritative works on sales tax, HAIG & SHOUP, THE SALES TAX IN THE AMERICAN STATES 3, 4 (1934) classifies sales taxes as:

> (a) Retail Sales Tax, which is imposed only on sales of tangible personal property at retail or for use or consumption. The tax also includes sales of utility services and levies on admissions.
> (b) General Sales Tax, which reaches sales of tangible personal property both at retail and for resale, and also the acts of extracting natural resources and of manufacturing.
> (c) Gross Receipts Tax, which has the essential elements of the general sales tax and in addition is levied upon sales of intangibles.
> (d) Gross Income Taxes, which include (a), (b), and (c), above, and in addition receipts from non-business activities such as rents, interests, salaries.

[9] CCH STATE TAX REP. ILL. Correlator ¶ 6072 (1967).

[10] Department of Revenue, Rules and Regulations, Rule 7 (1963).

who sold meals to purchasers for use and consumption. After Rule 7(1) was amended, vendors affected by the rule so as to be subject to the IROT included sellers of food and beverages to airlines, provided that the items sold were delivered in Illinois and were used to serve both passengers and crew.[11] The rule was only applicable however, if the airline did not charge separately for the food and beverages.

Following promulgation and enactment of the revenue amendment, Hot Shoppes paid the IROT to the state for the food vendor's sales of meals and foodstuffs and American paid the use taxes to Hot Shoppes.[12] This procedure was followed from November 1 to November 15, 1963. Thereafter, Hot Shoppes and American filed credit claims for taxes paid, basing this action on the belief that they were not liable for either tax.[13] A referee of the Department of Revenue heard arguments and presentations of evidence concerning the Department's amended rule and its enforcement.[14] The referee denied these claims for credit in 1971.[15] Complaints were then filed by Hot Shoppes and American for administrative review in the circuit court of Cook County. The Cook County Circuit Court affirmed the hearing referee's decision and American appealed.[16] The Illinois Supreme Court, in upholding the decision of the Circuit Court of Cook County, relied on three sources: the evidence presented before the Department of Revenue's hearing referee;[17] the lower court's interpretation of the term "valuable consideration;"[18] and past Illinois cases involving the IROT and Use Tax.[19]

The Illinois high court based a portion of its decision on evidence presented to the Department of Revenue's hearing referee that American did not resell the purchased items because it neither offer-

[11] Department of Revenue, Rules and Regulations, Rule 7.1(h) (1963). It should be noted that application of the Illinois ROT to sales of foodstuffs to airlines in the 1950's was attempted but the Illinois courts decided in favor of the airlines. These decisions were all prior to the Department of Revenue's addition of 7.1(h) to its revenue rules.

[12] Am. Airlines v. Dep't of Revenue, 58 Ill.2d 251, 319 N.E.2d 28 (1974).

[13] *Id.* at ___, 319 N.E.2d at 30.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at ___, 319 N.E.2d at 31.

[18] *Id.*

[19] *Id.* at ___, 319 N.E.2d at 31-33.

ed a refund nor made a separate charge.[20] According to that evidence, passengers who did not receive meals because of exigent circumstances such as turbulent weather conditions could not obtain cash refunds for this portion of the passenger's ticket. The high court held that because the airline did not provide a refund for meals that were not served there was not a sale of the food to the airline's passengers.[21] American's policy of giving a voucher, redeemable for a meal at an airport restaurant,[22] to any passenger that wanted the scheduled but unserved meal was dismissed by the court. The Illinois Supreme Court said that this arrangement did not constitute a refund, stating that a passenger who did not request a voucher could not obtain a refund.[23] Furthermore, testimony to the hearing referee by a tax administrator for American indicated that American not only made no internal markup on food served aboard the aircraft but had no specific policy or intent to make a profit.[24] The Illinois Supreme Court was not impressed that the Civil Aeronautics Board included the cost of food when flight price schedules were determined.[25] According to the Illinois high court, the cost of food is included in the price schedules simply because it is a necessary operating expense to enable American to compete with other airlines.[26]

The Illinois high court decided that there could be no retail sale of the food to the airline's passengers unless there was a separate charge for the meals.[27] The separate charge concept has its origin in the early practice of airlines of having a passenger pay a separate charge for a meal when he purchased his flight ticket.[28] Later, be-

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[20] *Id.* at ___, 319 N.E.2d at 28.

[21] *Id.* at ___, 319 N.E.2d at 30.

[22] Brief for Appellant at 30, Am. Airlines v. Dep't of Revenue, 58 Ill.2d 251, 319 N.E.2d 28 (1974).

[23] 319 N.E.2d at 31.

[24] Brief for Appellee at 8, Am. Airlines v. Dep't of Revenue, 58 Ill. 2d 251, 319 N.E.2d 28 (1974).

[25] Brief for Appellant at 30, Am. Airlines v. Dep't of Revenue, 58 Ill. 2d 251, 319 N.E.2d 28 (1974). This portion of the brief discussed the CAB's use of costs in determining the ticket base price.

[26] 319 N.E.2d at 31.

[27] *Id.* at 251, 319 N.E.2d at 28.

[28] American Airlines had offered a program in the 1950's on its flights called Royal Coach Service. Under this service a passenger paid a separate charge for a meal when he purchased his flight ticket.

cause of impracticality and bookkeeping problems the separate charge service was discontinued.[29] The term 'separate charge' as utilized by the Illinois courts traces its importance to Rule 7.1(h) of the Illinois Department of Revenue Rules. Under the rule, if American assessed a separate charge, there would be no tax liability. The Illinois lower court interpreted the word 'separate charge' in Rule 7.1(h) as intending to describe a retail transaction as commonly understood to be an over the counter transaction and that only a separate charge would be acceptable as evidence of a retail sale."[30]

The second important issue before the state supreme court in *American Airlines* was the interpretation of the term "valuable consideration."[31] American contended that it had entered a contractual agreement when a ticket was purchased by a passenger.[32] The airline promised to provide a meal for its passengers, and the purchase of a ticket constituted consideration for that promise; hence American can claimed that this established mutual and reciprical consideration. The Illinois high court, however, refused to recognize the formation of such a contractual arrangement since the formation of a contract requires mutual assent.[33] Because intent and awareness of the formation of a contract are a vital part of a contract, the court decided that every passenger would have had to realize that he had made a contract for delivery and service of meals on board flight before a contractual agreement showing valuable consideration would be arguable.[34] A further problem to be decided was whether American's promise to its passengers was the type of promise that would qualify for a contract. If a meal was not served, a

[29] During this same period, the 1950's, United Airlines offered a similar service. In 1957 United petitioned the CAB and requested that they be permitted to cease the separate charge service and include the price of a meal in every fare while offering each passenger a meal. The CAB granted this request.

[30] Judge Sarnow was the Cook County Circuit Court judge who reviewed the Department of Revenue's hearing referee. Judge Sarnow was also one of the counsel for the Illinois Attorney General who argued the case of Burrows v. Hollingsworth, 415 Ill. 202, 112 N.E.2d 706 (1953). The *Burrows* opinion rejected the Department of Revenue's contention that a separate charge was necessary for a sale at retail.

[31] 58 Ill.2d at ___, 319 N.E.2d at 31.

[32] Brief for Appellant at 29-34.

[33] 58 Ill.2d at ___, 319 N.E.2d at 32. In addition the Illinois Supreme Court said that consideration must be bargained for. (RESTATEMENT OF CONTRACTS § 75, comment b (1932); 1 WILLISTON ON CONTRACTS § 100 (3d ed. 1957).

[34] 58 Ill.2d at ___, 319 N.E.2d at 32.

passenger's only remedy was to accept a meal voucher. On the other hand, if American had, for some reason, failed to provide transportation to a passenger, the airline would have refunded the price of a ticket. Therefore, the Illinois court found that American was essentially selling air transportation to its passengers and was not contracting for meals.[35]

Additional support for the *American Airlines* decision was drawn (by the Illinois high court) from case law involving the application of the IROT. The American Airlines court relied on *Robertson Products Co. v. Nudelman*[36] and *Fefferman v. Marohn*[37] to buttress its decision. *Robertson* presented a fact situation similar to *American Airlines*: a vendor sold paper products, such as tissue paper and napkins, to hotels and office buildings.[38] These facilities did not, in turn, add a specific charge for paper products used by its residents to the total amount charged.[39] The Illinois Supreme Court found that no direct charge was made by the hotel for the paper products and, therefore, a normal sale or resale did not occur.[40] The articles furnished, the *Robertson* court stated, were those to be considered as part of the operating expense of the hotel business.[41] The cost of these items would enter into the rates which were charged, much the same as other items, such as linen towels and glass cups, were added into the total operating cost. In *Fefferman* the complaints of three different vendors concerning imposition of the IROT and Use Tax were consolidated on appeal.[42] All three vendors sold towels, bedding gauze, and other medical supplies to the State of Illinois, its institutions, and to Cook County Hospital. The vendors contended that because the purchasers had either sold, transferred,

[35] 58 Ill.2d at ___, 319 N.E.2d at 32. The Illinois Supreme Court stated that "there was no sale of meals within the meaning of section 1 of the Retailers' Occupational Tax Act (par. 440)."

[36] 389 Ill. 281, 59 N.E.2d 655 (1945). The Illinois Supreme Court in *Robertson* emphasized that a direct charge was not made for the tissue paper and napkins. "Hotels and office buildings are not in the business of selling paper napkins, tissue cups, plates and the like, but they are in the business of running a hotel or an office building or the like." Robertson Products Co. v. Nudelman, 389 Ill. 281, 285-86, 59 N.E.2d 655, 657.

[37] 408 Ill. 542, 97 N.E.2d 785 (1951).

[38] 389 Ill. at 281, 59 N.E.2d at 655.

[39] *Id.*

[40] *Id.* at ___, 59 N.E.2d at 657.

[41] *Id.*

[42] 408 Ill. at 542, 97 N.E.2d at 785.

or given the supplies to their inmates or patients, the transfer by the vendors to various state and county divisions and the purchase of these items from the vendors was not a retail sale and was therefore exempt from the imposition of the IROT.[43] The Illinois Supreme Court, concluding that the vendors owed the IROT, found that the sale was one for use and consumption and was not a resale since the purchasers did not subsequently sell or transfer for a specific consideration.[44]

The Illinois Supreme Court's decision in *Burrows Co. v. Hollingworth*[45] runs contrary to the *Robertson-Fefferman* decisions. In that case, sales of medical supplies and food were made to a hospital which subsequently transferred them to patients. Contending that there was a "retransfer for a valuable consideration," the supplier urged that he was not subject to the IROT.[46] The Illinois Supreme Court held that retail sale of the products occured between the hospital and its patients.[47]

In *American Airlines* the Illinois high court distinguished *Burrows* and found it inapplicable, announcing that the Department of Revenue had incorrectly argued the *Burrows* case.[48] According to the court in *American Airlines*, by contending that the sales to the hospital were for "use and consumption" by the hospital, the Department of Revenue in *Burrows* had misinterpreted the term "valuable consideration."[49] Had the *Burrows* opinion been the controlling precedent in *American Airlines*, the transfer by the airline to its passengers would have been a transfer for a valuable consideration. In reality, the *American Airlines* decision must be seen as effectively overruling the *Burrows* decision and affirming the *Robertson-Fefferman* view.

The *American Airlines* case should also be compared with a similar case decided by the Georgia Supreme Court under sale and use taxes which are very similar to the IROT and Use Taxes. The Georgia Supreme Court determined the validity of these taxes in

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[43] *Id.* at ___, 97 N.E.2d at 787.

[44] *Id.* at ___, 97 N.E.2d at 788.

[45] 415 Ill. at 202, 112 N.E.2d at 706.

[46] *Id.* at ___, 112 N.E.2d at 707.

[47] *Id.* at ___, 112 N.E.2d at 709.

[48] 58 Ill.2d at ___, 319 N.E.2d at 32.

[49] *Id.*

Undercofler v. Eastern Air Lines.[50] Georgia had imposed its sales and use taxes on meals purchased by Eastern Air Lines from a caterer. These meals were sold to Eastern for consumption by the airline passengers. The Georgia high court held that a retail sale did occur, but that it was not between the airline and the passenger. The court in *Undercofler* found that the act of purchasing a ticket implied passenger consent to a contract for delivery of a meal during the flight and, therefore, the "sale" for revenue purposes was deemed complete the moment the ticket was sold.[51] The Georgia Supreme Court did not refer to any requirement that the airline itemize a separate charge for the purchase of a meal to become a sale at retail. The sale, according to the Georgia court, was not a sale of food for consumption by the airline but a sale of goods to be resold later to the individual passengers.[52] Thus, under a fact situation similar to *American Airlines* the Georgia Supreme Court decided that a retail tax did not apply between the airline and the caterer since a retail sale did occur between the airline and the passengers.

The Illinois Supreme Court's decision in *American Airlines* is readily subject to criticism on several grounds. The comparison in *American Airlines* between passenger meals and the situation in *Robertson* of napkins, tissue, and soap at office buildings, seems tenuous. The soap and napkins are considered a social amenity and convenience. If a flight should be airborne during a usual and common meal time, then a passenger should be entitled to the serving of a meal. Because airlines have become a dominant transportation device in our present society, all passengers should be permitted to retain a semblance of routine in their lives while traveling. The meal is also necessary to enable the airline to remain competitive. The reasoning in *Undercofler* indicates that it is possible to construe the airline's service of food to its passengers as a sale to an ultimate user or consumer. The Illinois Department of Revenue and Supreme Court could force airlines to reinstate a separate charge for meals and beverages to avoid the IROT and Use Tax but a return to this practice would seem to create a new host of problems. Whether a return to the separate charge practice is economically feasible for the airlines is extremely questionable.

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[50] 221 Ga. 824, 147 S.E.2d 436 (1966).

[51] *Id.* at ___, 147 S.E.2d at 443.

[52] *Id.*

One disturbing question remains as to why American litigated the IROT and Use Tax issue through the entire Illinois judicial process. Part of the answer is discoverable with a deeper understanding of the concepts underlying the sales and use tax area. As mentioned earlier, a sales tax is a tax on the sales transaction while a use tax is designed to cover the actual use of the purchased item in that state.[53] Use taxes are designed to reach transactions which would otherwise go taxfree as transactions in interstate commerce.[54] Compensating use taxes are imposed in certain states to collect the state sales tax from purchasers who buy goods outside the state and are usually levied on the use, storage or consumption of goods brought in from another jurisdiction.[55] Without a use tax, a purchaser could buy his goods in a state which had no sales tax and escape all other states' sales taxes. American could escape all state excise taxes if it could avoid paying such taxes in the initial state in which it purchased the beverages and food suppliers. If another state attempted to levy a tax on the sale of food to the airline passengers, American would be able to claim that this action was an unconstitutional taxation of interstate commerce. To achieve this desired effect, American needed first to receive a favorable decision on the IROT and Use Tax issues.

[53] 68 AM. JUR.2d Sales and Use Tax § 191 (1972).

[54] *Id.*

[55] *Id.* It should be considered that American fought this initial imposition of the sales tax on the transaction between themselves and the food supplier based on the following theory. Although the foodstuffs were purchased in Illinois, this does not mean that they were in fact used in that state. Noting the geographic position of Chicago's O'Hare airport and the direction of most flights leaving there, American could have effectively argued that their passengers, the ultimate consumers, had never used the meals while in the state of Illinois. With this strategy American hoped to avoid the use taxes.

A perhaps overriding argument could have been made by the state of Illinois in response if American would have used this theory. The state would argue that to permit this transaction to escape taxation in Illinois would be to allow the sale of foodstuffs and beverages to escape taxation in any state. Another argument could be voiced by the state of Illinois. This would be based on the Illinois definition of use. Use is defined in Illinois as "the exercise by any person of any right or power over tangible personal property incident to ownership of that property" ILL. REV. STAT. ANN. ch. 120 § 439.2 (1939). The state of Illinois may declare that there is indeed a contract formed between the passenger and American for the delivery of the meal. It, the state of Illinois, could further contend that the passenger exercises some type of ownership role over the meal and is within the state's definition of "use." In order to elude the Illinois ROT, American could argue that the sale of the foodstuffs and beverages did not occur in Illinois but while the flight was airborne, and often while passing over other states.

The other reason American pursued this case to its conclusion was its federal income tax implications. Section 164(a)(4) of the Internal Revenue Code allows the deduction from gross income of interest and taxes paid in special situations.[56] Generally, a tax can be deducted only by the person or company upon whom it is imposed,[57] however, there is an exception to this rule regarding certain state retail sales and gasoline taxes.[58] In these special instances, these taxes are deductible by the consumer although the tax is not imposed directly upon him.[59] The Illinois retail taxing scheme becomes significant in this matter. The Illinois ROT is imposed upon the retailer, but is offset by the Illinois Use Tax on the consumer.[60] In the *American Airlines* situation, it appears that American, although they have lost the case, will benefit through federal income tax deductions.[61] Because American is, in reality, paying IROT through their payment of the Use Tax, the Internal Revenue Service should permit them to deduct the Use Tax which they pay. As the Illinois Supreme Court decided, American is the consumer of the foodstuffs and beverages and must pay the Use Tax on all purchases of these items.[62]

The Illinois Attorney General indicated that the *American Airlines* decision will affect all carriers purchasing and serving beverages and food in the State of Illinois.[63] The Attorney General also said that the collection of the Use Tax from the air carriers who purchase food in Illinois could yield from three to five million dollars in additional revenue for the state.[64] Thus the *American Airlines* decision may have opened a new era of taxaiton of commercial air-

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[56] The Internal Revenue Code permits a deduction for state, local and foreign taxes incurred in carrying on a trade or business, or in a "nonbusiness" activity. INT. REV. CODE OF 1954, § 164.

[57] Treas. Reg. § 1.164-5 (1957).

[58] *Id.*

[59] *Id.* The reason for permitting the consumer to deduct the use taxes paid is simple. This deduction is permitted because the customer, (consumer) is paying the sales tax (IROT in Illinois) through the use of a complementary use tax.

[60] This scheme is unique to the Illinois ROT and Use Tax system.

[61] The American case is sufficient proof to the Internal Revenue Service that American Airlines is the ultimate consumer and the tax is imposed on them.

[62] 58 Ill.2d at 251, 319 N.E.2d at 28.

[63] AV. L. REP., Intro. ¶ 585.

[64] *Id.*

lines in the United States, since at least thirty-four states presently have some form of retail sales tax.[65]

American's strategy was to escape all liability for the Illinois ROT and Use Tax. By showing that the foodstuffs were used outside the state, American could argue that they were exempt from the two taxes. This was contingent upon showing that the foodstuffs and beverages were resold to American's passengers and that American itself was not an ultimate consumer or user. American was unable to prove this to the satisfaction of the Illinois Supreme Court. But by losing on this point American covered themselves for future income tax purposes. Whether American was the consumer of the foodstuffs, liable for the Use Tax, and therefore eligible to deduct the Use Tax, the *American Airlines* case would seem to be sufficient authority to support this tax deduction. *American Airlines* can also be viewed as a diversion of tax revenue to the state and away from the federal government. As states continue to become hardpressed to meet their ever increasing expenditures, decisions such as *American Airlines* will become more numerous and quite important.

Leonard H. Plog II

FREEDOM OF INFORMATION—EXEMPTION THREE—SWAP Reports are Specifically Exempt From Disclosure by Statute Because FAA Administrator Issued a Withholding Order Pursuant to Discretionary Authority. *Administrator v. Robertson*, — U.S. —, 95 S. Ct. 2140 (1975).

Pursuant to its responsibility to promote the safety of civil aeronautics[1] and its duty to employ inspectors who shall advise and cooperate with air carriers in their inspection and maintenance operations,[2] the Federal Aviation Administration (FAA) developed

[65] John Due, *Sales Taxation* (1957) 3.

[1] "The Administrator is empowered and it shall be his duty to promote the safety of flight of civil aircraft in air commerce . . . ." 49 U.S.C. § 1421(a) (1970).

[2] "The Administrator shall employ inspectors who shall be charged with the duty (1) of making . . . inspections . . . and (2) of advising and cooperating

the Systems-worthiness Analysis Program[3] (SWAP). SWAP teams of experienced investigators make periodic visitations to certified air carriers to inspect and analyze their safety and maintenance operations in order to find any area of maintenance, operation, management, or performance which needs improvement.[4] To facilitate free flow of information and cooperation by the air carriers the program operates with the understanding that the contents of the final SWAP reports, which contain the findings and recommendations of the inspection team,[5] will not be released to the public. Plaintiffs requested and were denied access to SWAP reports[6] for the year 1969.[7] While an intra-agency appeal was pending, the Air Transport Association (ATA), on behalf of numerous member air

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with each air carrier in . . . inspection and maintenance . . . by the air carrier. . . ." 49 U.S.C. § 1425(b) (1970).

[3] FAA Order 8000.3C, April 14, 1972, is the SWAP Handbook currently in effect. It cancelled the previous SWAP Handbook, FAA Order 8000.3B, July 7, 1969, which was in effect when at least some of the SWAP reports requested by Plaintiff were prepared. This note was prepared relying only on FAA Order 8000.3C [Hereinafter cited as Handbook].

[4] Handbook, para. 100. Special SWAP inspections concentrating on systems suspected of being deficient are scheduled on an as-needed basis whenever there are indications that the performance of a particular air carrier is falling below an acceptable level. Handbook, para. 101.

[5] Handbook, para. 202.

[6] "[C]opies of SWAP reports or information therein shall not be publicly released or handled indiscriminately. Individual SWAP reports shall be considered as being 'For Official Use Only' . . . ." Handbook, para. 204. SWAP reports contain much information that could be embarrassing to air carriers and useful in personal injury or wrongful death litigation against them. Some idea of the content of a SWAP report can be gained from the final report format and content outline set out at Handbook, para. 202-b, which provides in part as follows:

> (2)(d) The last portion of this section summary will reflect or summarize the net effect that the deficiencies noted during the inspection have or will have upon economy and safety, the operator, his aircraft, and personnel. This section will also contain a brief statement of alleged noncompliance of the Federal Aviation Regulations that were noted during the inspection.
>
> (3)(b)*3* Sufficient examples will be listed to document discrepancies found during the onsite inspections. . . . They should be of such quality to support legal enforcement action if deemed necessary by the principal inspector.

The reports could be introduced as evidence to establish notice to an airline that a specific defect was frequently occurring, which in turn would tend to establish a duty to check each aircraft for that defect.

[7] The plaintiffs, associates of the Center for the Study of Responsive Law, a Ralph Nader organization, brought this action to compel disclosure so that consumers can decide which are the safer airlines based on the information contained in the reports.

carriers, requested under Section 1104 of the Federal Aviation Act of 1958[8] (Act) that the Administrator issue an order withholding SWAP reports from public disclosure. The Administrator made a determination that disclosure of the SWAP reports would adversely affect the interests of the airlines and was not required in the public interest, and ordered all SWAP reports in existence and thereafter compiled to be withheld from public disclosure. Plaintiffs then brought suit seeking injunctive relief under the Freedom of Information Act[9] (FOIA). The FAA contended that the SWAP reports were within the third exempt category (hereinafter referred to as Exemption Three),[10] which covers documents specifically exempted from disclosure by other statutes. The district court disagreed and ordered the reports released,[11] and the FAA appealed. After the Court of Appeals for the District of Columbia Circuit affirmed in a 2-1 decision,[12] the Supreme Court granted the FAA's petition for certiorari. *Held, Reversed*: SWAP reports are specifically exempted from disclosure by statute under Exemption Three of the Freedom of Information Act and Section 1104 of the Federal Aviation Act.[13] *Administrator v. Robertson*, — U.S. —, 95 S. Ct. 2140 (1975).

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[8] 49 U.S.C. § 1504 (1970) the text, in part, is as follows:

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by he Board [the CAB] or the Administrator [of the FAA], pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. . . .

[9] 5 U.S.C. § 552 (1966). *See* K. Davis, *The Information Act: A Preliminary Analysis*, 34 CHI L. REV. 761 (1967); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, reprinted at 20 AD. L. REP. 263 (1967); Note, *The 1966 Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 741 (1969); and Comment, *The Freedom of Information Act: Access to Law*, 36 FORD. L. REV. 765 (1968).

[10] 5 U.S.C. § 552(b)(3) (1966).

[11] The disrict court did not file an opinion.

[12] Robertson v. Butterfield, 498 F.2d 1031 (D.C. Cir. 1974).

[13] The majority was composed of Burger, C.J., and White, Powell, Rehnquist, and Blackmum, J.J. Stewart, J., joined by Marshall, J., concurred, and Douglas and Brennan, J.J., dissented for the reasons given in Judge Fahy's majority opinion for the court of appeals.

Congress enacted the FOIA to replace section three[14] of the Administrative Procedure Act[15] (APA), which dealt with the publication of information, rules, opinions, and public records by all federal agencies. The FOIA requires every federal agency, upon request from any person for identifiable records, to make the records available,[16] unless the records are within the scope of one of nine categories of information which are exempt from the requirement.[17]

The operative words of Exemption Three are "matters that are . . . specifically exempted from disclosure by statute."[18] Statutes of various form, construction and language have been relied upon by agencies as creating an exemption within the meaning of Exemption Three, but each of the statutes involved can be generally categorized as punitive,[19] mandatory, or discretionary. An example of a punitive statute is the Trade Secrets Act,[20] which penalizes the disclosure of certain kinds of information by any federal employee in an unauthorized manner. Several agencies have contended that this statute justifies withholding information under Exemption Three.[21] The statute, however, only penalizes the unauthorized disclosure of information; it does not speak to the question of

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[14] Act of September 6, 1966, Pub. L. 89-554, § 552, 80 Stat. 378.

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved (1) a function of the United States requiring secrecy *in the public interest*; or (2) a matter *relating solely to* the *internal management* of an agency.
>
> (b) . . .
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> (c) Each agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required *for good cause* to be held confidential and not cited as precedents) and all rules.
>
> (d) Except as otherwise required by statute, matters of official record shall be made available, in accordance with published rule, to persons properly and directly concerned, except information held confidential *for good cause found.* (Emphasis added).

[15] Administrative Procedure Act of June 11, 1946, ch. 324, § 2(a), 60 Stat. 237-44, codified by Act of Sept. 6, 1966, Pub. L. 89-554, 80 Stat. 381 as 5 U.S.C. § 551 *et seq.*

[16] 5 U.S.C. § 552(a)(3) (1970).

[17] 5 U.S.C. § 552(b) (1970).

[18] *Id.* at (3).

[19] 18 U.S.C. § 1905 (1970).

[20] *See also* 42 U.S.C. § 2000e-8(e) (1970).

[21] *See* Schapiro & Co. v. S.E.C., 339 F. Supp. 467 (D.D.C. 1972), and Frankel v. S.E.C., 336 F. Supp. 675 (S.D.N.Y. 1971), *rev'd on other grounds*, 460 F.2d 813 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972).

whether authorization exists in any particular case.[22] The statute operates only after the question of authorization has been determined. The example of a mandatory statute is found in 44 U.S.C. Sections 2103-2111,[23] which specifically details whether certain public documents should be disclosed or remain confidential. The statutes grant very little discretion to the Archivist of the United States or the Administrator of General Services and limits and conditions the discretion that is given.[24] The courts that have considered mandatory statutes have agreed with the agencies that mandatory statutes specifically exempt matters from disclosure and therefore fall within the scope of Exemption Three.[25]

Unlike litigation involving punitive or mandatory statutes, litigation involving discretionary statutes has resulted in inconsistent decisions.[26] A discretionary statute, of which section 1104 is an example, grants to an agency official the power to determine whether information should be withheld or disclosed, and provides only a general, subjective standard, or no standard at all, to guide him in the exercise of his judgment.

Section 1104[27] allows anyone to object to the disclosure of information, even though the information may not have been obtained from him. The only statutory requirement for making an objection is that it be submitted in writing. Upon receiving an objection, the Administrator has the power to order the information withheld if two conditions are met. First, disclosure of the information must adversely affect the interest of the objecting party, and secondly, disclosure must not be required in the interest of the public.

Assuming that the interest of the objecting party will be ad-

[22] "But this circular reasoning adds nothing to the defendants' armory. 18 U.S.C. § 1905 does not establish an exemption from the Freedom of Information Act, but merely penalizes a disclosure of non-exempt material. We must still determine whether the material here sought is or is not exempt." 336 F. Supp. at 678-79.

[23] (1970).

[24] *See also* 43 U.S.C. § 1398(a) (1970). "A witness may submit material on a confidential basis for the use of the Commission and, if so submitted, the Commission shall not make the material public."

[25] *See* Nichols v. United States, 460 F.2d 671 (10th Cir. 1972).

[26] *Compare* Stretch v. Weinberger, 359 F. Supp. 702 (D.N.J. 1973), *with* People of the State of California v. Richardson, 351 F. Supp. 733 (N.D. Cal. 1972).

[27] *See* note 8 *supra*. Another example of a discretionary statute is 42 U.S.C. § 1306 (1970), which is the statute involved in the cases cited in note 26 *supra*.

versely affected, the key to the Administrator's determination of whether to issue a withholding order is his assessment of the public interest. Whether the public interest is to b weighed against adverse effect to the objecting party's interest is not clear, but that would appear to be a permissible interpretation.[28] Even so, the Administrator's discretionary assessment of the public interest is necessarily a subjective judgment because "the public interest" is a subjective standard.

The court of appeals held that information ordered withheld by the Administrator pursuant to section 1104 was not "specifically exempted from disclosure by statute."

> The ordinary meaning of the language of Exemption 3 is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny. Section 1104 . . . fails to do this.[29]

The court of appeals decision in *Robertson* was not the first to hold that documents must be *specifically* exempted *by statute*,[30] and this interpretation appears to comport with the plain meaning of section 1104. The Fifth Circuit three years earlier had held, contrary to the later decision in *Robertson*, that Section 1104 was within the scope of Exemption Three.[31] The decision was barren of any analysis or discussion of this particular question, and was not discussed by the court of appeals or the Supreme Court in the instant case.[32]

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[28] The court of appeals saw Section 1104 as a congressional delegation of authority to weigh the adverse effect to the interest of the objecting party against the public interest. 498 F.2d at 1032.

[29] *Id.*

[30] *See* Cutler v. C.A.B., 375 F. Supp. 722, 724 (D.D.C. 1974) where that court said:

> The Board fails, however, to give sufficient meaning to the Act's requirement that documents be *specifically* exempted *by statute*. If these words are to have any meaning at all, they must require that the statutes in question either clearly identify some class of documents to be kept confidential or, at the very least, prescribe specific standards by which an administrative agency can determine the propriety of disclosure.

[31] Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971).

[32] The dissenting judge in the court of appeals made reference to *Evans* only in the last paragraph of his dissent, and the Supreme Court mentioned *Evans* only in a footnote to sustain the proposition that obviously the language of Exemption Three is ambiguous.

The Supreme Court did not attempt any statutory construction of Exemption Three, citing the variety of construction given the language of Exemption Three by the lower courts as ample evidence that relevant portions of the exemption are unclear and ambiguous, thus compelling resort to the legislative history.[33] The Court found that the legislative history clearly indicated that Congress was aware of inconsistent laws and prior congressional decisions that in certain instances confidentiality was essential to protect the public interest.[34] The Court also found several indications of a congressional intent that prior statutes remain unaffected by the FOIA,[35] and even a specific indication that section 1104 was within the scope of Exemption Three.[36]

The heart of the problem with regard to the relationship of the FOIA to prior statutes was stated by the Court as follows:

> The respondents can prevail only if the Act is to be read as repealing by implication all existing statutes "which restrict public access to specific public records."[37]

Although the general thrust of this proposition is clear, it is submitted that the statement is somewhat misleading and inaccurate. First, the respondent's construction of Exemption Three does not require the implicit repeal of *all* prior withholding statutes; it only requires the implicit repeal of the discretionary withholding statutes.[38] The respondent's construction was consistent with the continued efficacy of mandatory withholding statutes.[39] Secondly, for the Court's statement to make sense the Court must be using the word 'specific" with the broad, "illusory" meaning attributed

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[33] *See* cases cited at footnotes 26, 30, and 31 *supra.*

[34] Administrator v. Robertson, 95 S. Ct. 2140, 2146 (1975).

[35] 95 S. Ct. at 2147.

[36] More specifically, when the Civil Aeronautics Board brought § 1104 to the attention of both the House and Senate Hearings of 1965, and expressed the agency interpretation that the provision was encompassed within Exemption 3, no question was raised or challenge made to the agency view of the impact of that exemption. *Id.* (footnotes omitted). This *may* be a clear indication of congressional intent with regard to this matter, but it is a better example of how an agency can effectively "salt" the record.

[37] 95 S. Ct. at 2147.

[38] *See* note 27 *supra* for examples of discretionary statutes.

[39] *See* text at note 23 *supra* and note 24 for examples of mandatory statutes. *See* text at note 29 *supra* and notes 45 and 48 *infra* for criteria to determine whether a particular statute is mandatory or discretionary.

to it by the FAA. If used with the narrow meaning attributed to it by the court of appeals, then the word "specific" would indicate that some language *in the statutes* restricted public access to *particular* public records.[40] In effect, the Court's thoughts would be more accurately conveyed if the word "specific" were left out altogether.[41]

These criticisms, however, do not meet the thrust of the Court's proposition, which is basically correct. The respondent's construction of Exemption Three does require the implicit repeal of all discretionary withholding statutes, and, as the Court pointed out, repeals by implication are disfavored.[42] The Court's opinion suggests that there is a presumption against repeal by implication which must be overcome by the party arguing for that result, and in this case the evidence of congressional intent favoring repeal by implication was not sufficient to overcome the presumption.[43]

The primary evidence favoring repeal by implication was twofold. First, the "ordinary meaning of the language" construction given to Exemption Three by the court of appeals would logically entail repeal by implication of all discretionary withholding stautes. The "ordinary meaning of the language" construction was that the statute relied on by the agency must itself specify (i) the documents, or (ii) the categories of documents which may be withheld.[44] The Court said that "[t]o require this interpretation would be to ask of Congress a virtually impossible task,"[45] meaning that Congress would either have to review every category of documents and

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[40] For more on the narrow meaning see text at note 29 *supra.*

[41] Respondents would be quick to point out that the Court's holding in this case would also make more sense if the words "specifically" and "by statute" were eliminated from Exemption Three which is the effect of the Court's holding.

More probably than not, the Court's statement is really a misstatement caused by incorporation of the language of the House Report without realizing that the combination produced exactly the wrong meaning. *See* 95 S. Ct. at 2147.

[42] *Id.* Citing the Regional Rail Reorganization Cases, 419 U.S. 102 (1974) at 133, which in turn cited Morton v. Mancari, 417 U.S. 535, 551 (1974).

[43] The Court never uses the word "presumption," and it is probably best that they did not, but that is the legal concept the Court seems to be spelling out.

[44] *See* text at note 29 *supra.*

[45] 95 S.Ct. at 2147. The Court went on to say: "Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of this legislation—a task which the legislative history shows it clearly did not undertake." This is a permissible, although by no means a mandatory, inference. If Congress intended to take exclusive statutory control of the withholding of information, it would have no need to review delegations of withholding authority.

all other individual documents possessed by the federal agencies or assume that there is no valid reason to withhold any documents not reviewed. The difficulty of the task would depend on how broadly the categories were drawn, but it would still be a formidable task.

With regard to the Court's assessment of the court of appeals interpretation of Exemption Three, what the Court did not say, and what may be inferred from what it did say, should be noted.

First, the Court did not mention a third alternative advanced by the opinion in *Cutler v. CAB*,[46] which was that the statute referred to in Exemption Three could "prescribe specific standards by which an administrative agency can determine the propriety of disclosure."[47] This method of specifying documents which may be withheld from public scrutiny grants Congress greater flexibility than the alternatives mentioned by the Court. It allows Congress to balance the desirability of freedom of information against the need for secrecy without having to undertake "the virtually impossible task" of reviewing each category of documents. It permits Congress to determine the specific criteria which must be met in order to justify withholding information while leaving the application of the criteria in any particular case to the agency.

Secondly, the Court, by implication, rejected any argument that, in enacting the FOIA, Congress had already undertaken to regulate exclusively by statute all withholding of information by federal agencies, that Exemption Three was the mechanism by which Congress intended to adjust the basic scheme set out in the FOIA, and that Congress intended to eliminate all agency withholding discretion. It is true that the legislative history would not support the argument that Congress had *consciously* undertaken this grand proposal, yet the stated purpose of the FOIA and the actual language of the FOIA are consistent therewith. Congress certainly intended to limit the discretionary authority of the agencies to withhold information that was the primary motivation behind the act. The question to which Congress never specifically addressed itself was exactly how far it intended to limit agency discretion. Did it merely intend to eliminate the one discretionary withholding statute which any federal agency could rely upon, or did it intend to eliminate all discretionary statutes? Did Congress actually realize

[46] 375 F. Supp. 722 (D.D.C. 1974).

[47] *Id. See* note 30 *supra.*

that other discretionary statutes which were just as vague as section 3 of the APA could still be relied upon by some agencies? Did Congress fully apprehend the consequences of "the ordinary meaning of the language" that it used in Exemption Three? Nowhere in the legislative history does Congress answer these questions, and the Court had to draw what answers it could from silence.[48]

The foregoing analysis has anticipated and assumed the second point of evidence favoring repeal by implication. That is, one major purpose of the FOIA was to set up workable standards to determine which documents may be exempt from public disclosure by replacing such vague phrasing as "in the public interest" and "for good cause found," which were in the FOIA's predecessor statutes,[49] with specific definitions of information which may be withheld.[50] The argument is that the continued efficacy of such phrases in other statutes as grounds upon which information may be withheld is inconsistent with what Congress intended to accomplish by the FOIA, and therefore, section 1504 must have been implicitly repealed.

The Court, however, was not persuaded to adopt the court of appeals' narrow construction and its implications. The Court's view was that "it was inescapable that some regulatory authorities be vested with broad, flexible discretion."[51] As the Court pointed out, there is no inevitable inconsistency between a general intent to replace the broad standards and a specific intent to preserve for specific agencies broad discretion on what information is to be protected in the public interest.[52] As said very clearly in the concurring opinion, the Court was simply not convinced that repeal by implication was the intent of Congress, and there lies the basis of its decision.[53]

Robertson has several consequences, the most immediate of which is that the FAA does not have to disclose the SWAP re-

[48] The general intent on the part of Congress to leave "prior *specific* statutes" intact and unrepealed is ambiguous with regard to this issue; it is consistent with the arguments and constructions advanced on either side, depending on what is meant by "specific."

[49] *See* note 15 *supra* for the language of the statute.

[50] *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. at 2 (1966), U.S. Code Cong. & Admin. News (1966), at 2419. *See* note 29 *infra*.

[51] 95 S. Ct. at 2148.

[52] *Id.*

[53] *Id.* at 2149.

ports.[54] The Court's decision also allows the FAA and CAB to withhold any other information or documents whenever the Administrator or the Board determines that nondisclosure is in the public interest. This in turn raises the interesting question of the scope of review of a nondisclosure decision by the FAA or CAB.

Section 3 of the APA did not have any provisions for review of agency decisions not to disclose.[55] The only review obtainable was available through Section 10(e)(2)(a) of the APA,[56] and the standard of review was "abuse of discretion." This standard of review was made even more vague by the fact that the agency authority to withhold was founded in such vague phrases as "in the public interest" and "for good cause found." The FOIA sought to rectify this situation not just by eliminating the vague phrases and replacing them with specific standards, but also by providing that upon complaint to the appropriate district court a determination *de novo* would be made of the propriety of the agency decision not to disclose, and that the burden of justifying the decision is upon the agency.[57] The question raised by the Court's decision is whether the propriety of the decision to withhold is to be reviewed against the abuse of discretion standard by applying the public interest standard to the particular fact situation *de novo*, or merely whether the courts are to determine *de novo* whether the information sought has been withheld by an order of the Administrator or Board.

Although neither the majority nor the dissent concerned themselves with this question, the concurring opinion assumed the answer to the question. Relying on *Environmental Protection Agency v. Mink*,[58] Justice Stewart said that when an agency makes a nondisclosure decision based on a statute of the kind referred to in Exemption Three, "the only question 'to be determined in the district court's *de novo* inquiry is the factual existence of such a statute. . . .' "[59]

[54] Nor does the CAB have to disclose the contingency plans for cutback of airlines service in the event of reduction of the available fuel supply, the information sought in the *Cutler* case. *See* 375 F. Supp. at 723.

[55] *See* note 15 *supra* for text of statute.

[56] 5 U.S.C. § 706(2)(a) (1970).

[57] 5 U.S.C. § 552(a)(4)(B) (1970).

[58] 410 U.S. 73 (1973).

[59] 95 S. Ct. at 2149.

In keeping with the spirit and intent of the FOIA, the lower courts could extend the *de novo* inquiry to include the decision to issue the order on the argument that the statutory language used is broad enough to sustain an extended inquiry.[60] Or the courts could fall back upon the general review provisions of the APA which they used before the FOIA.[61]

The form of extended review used to reach the withholding decision, if it is reached, will determine whether the propriety of the order will be reviewed *de novo* or against the abuse of discretion doctrine. Either way, in the case of section 1504 the abuse of discretion doctrine would be applied.

Against either form of extended review it may be argued that the commonly accepted scope of the *de novo* proceeding is that it is limited merely to a determination whether the documents sought fall within the exemption relied upon by the agency. But then, whether the documents sought *should* be within the exemption has never before been a relevant inquiry. A more persuasive argument against falling back upon the general review provisions of the APA is that the express provision in the FOIA for *de novo* review implies that in FOIA cases the general review provisions are no longer applicable. However, if the scope of a FOIA *de novo* inquiry does not include review of the withholding decision, then a concurrent review of that decision under the general review provisions of the APA would not be precluded by the FOIA's express review provisions.[62] Justice Stewart's remarks may be consistent with such concurrent review.

Yet one thing is clear. Under Justice Stewart's interpretation, when an agency relies on Exemption Three, the FOIA, instead of providing a *de novo* determination of the propriety of the de-

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[60] The key language of 5 U.S.C. § 552(A)(4)(b) is that "the Court shall determine the matter de novo." The argument is that "the matter" can be construed broadly enough to include the agency decision to disclose under the statute referred to in Exemption Three.

[61] 5 U.S.C. § 706(1)(A) (1970).

[62] Congress delegated the determination of the public interest to the Administrator. It is doubtful that a federal district court will substitute its determination of the public interest for that of the Administrator's even in a *de novo* proceeding, unless it held that the Administrator's determination was "clearly erroneous" or an "abuse of discretion."

[63] Judge Fahy's opinion below reflects a judicial attitude that will favor some forms of extended review. *See* 498 F.2d at 1036.

cision to withhold the information, may have effectively insulated the decision from any type of review at all. If this is the correct interpretation of the language in Exemption Three, then the district court action provided for is essentially meaningless.[63]

In determining whether this is a desirable result, another consequence of the Court's decision must be considered. Exemption Three, as interpreted by the Court, now covers all statutes that require or permit nondisclosure of government information, no matter what, if any, standards for determining the propriety of the nondisclosure the statutes may contain. An agency that can rely upon any statute which permits nondisclosure is to a certain extent exempt from the provisions of the FOIA, depending upon the breadth of the nondisclosure permitted. Agencies such as the FAA and CAB are effectively exempt from the provisions of the FOIA, and their decisions to withhold may not be subject to review. Moreover, agencies with only limited power to withhold documents have an opportunity to abuse that power, and such abuse will go unchecked unless some form of extended review is provided.

To summarize, the FOIA had one major purpose and that was to limit agency discretion to withhold information. The primary consequence of the Supreme Court's decision in *Administrator v. Robertson* is that, unless the scope of review in FOIA cases is extended, any agency decision based upon any withholding statute other than the FOIA will have been insulated by the FOIA from review, and even if the scope of agency review is extended, the withholding power of the FAA, CAB, and any other agency with a discretionary withholding statute will not have been affected by the FOIA.

Congress must now assess the Court's decision and determine whether the FAA, CAB, and other agencies with discretionary withholding statutes shall be made subject to the provisions of the FOIA. The Courts, in lieu of congressional action, must determine whether and how, if at all, the scope of review in FOIA cases should be extended. *William R. Hayes*

[64] "It should be noted, however, as the Solicitor General has pointed out, that under 49 U.S.C. § 1486, judicial review of an order of nondisclosure under 49 U.S.C. § 1104 [Section 1504] is available in the Court of Appeals." (footnote by the Court, concurring opinion). The fact that this statute exists and its actual effect are immaterial to the present discussion.

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