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CURRENT LEGISLATION AND DECISIONS

The Role of the United States in the 1963 Transatlantic Air Fare Crisis

> The world is a stupendous machine, composed of innumerable parts, each of which being a free agent, has a volition and action of its own; and on this ground arises the difficulty of assuring success in any enterprise depending on the volition of numerous agents. We may set the machine in motion, and dispose every wheel to one certain end; but when it depends on the volition of any one wheel, and the correspondent action of every wheel, the result is uncertain.—
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> Niccolo Machiavelli, *On Fortune, Chance. . . .*

In the spring of 1963, a seemingly simple matter, the question of passenger fares on commercial flights between the United States and Europe, touched off a heated battle between the member countries of the Atlantic Community. During April and May the dispute became increasingly intense and ultimately degenerated to a point where some of the countries involved, including the United Kingdom, probably America's staunchest ally in the councils of NATO, threatened to seize any United States-flag commercial aircraft landing within its borders. The bitterness of the confrontation surprised most observers. At the outset the odds seemed to favor the United States, a nation of tremendous economic and military strength with an unequalled tradition of leadership in the field of commercial aviation, in its struggle to lower transatlantic passenger fares. No less than sixty-three per cent of the passengers flying between North America and Europe are citizens of the United States.[1] In spite of such incentives and the importance of sheer power in international politics, it was the United States which gave ground when the moment of truth arrived. The history of this international confrontation raises real doubts about the efficiency of the methods and machinery used to determine international air tariffs and about the ability of the United States to give effect to its desire to lower international air fares. The purpose here is to examine this history with an eye towards future determinations of international air tariffs.

I. History

In September and October of 1962, the International Air Transport Association (hereafter IATA), meeting in Chandler, Arizona, adopted fare increases on both transatlantic and transpacific routes.[2] In conferences held prior to this one, the Civil Aeronautics Board (hereafter CAB) had advised the United States carriers involved that it did not approve of fare increases. The old fares were due to expire March 31, 1963, and the new fares were to become effective April 1, 1963. The Chandler resolutions

[1] See Appendix A *infra.*

[2] *Hearings Before the Senate Committee on Commerce,* 88th Cong., 1st Sess., ser. 15, at 89-91 (1963) [hereinafter cited as *1963 Hearings*]. The IATA increase was in the form of a decrease in the discount on round-trip economy-class fares. The one-way economy rate from New York to London remained $270. Under the old ten per cent discount a round-trip ticket between these points was $486. The newer rate cut the discount to five per cent making the round-trip fare $513.

were filed with the CAB, November 23, 1962, and IATA fare tables were filed ten days later. On December 10, the CAB met with American carriers and asked that they justify the increases. Pan American World Airways filed a supporting statement on January 14, 1963, followed by Northwest Orient Airlines on January 25. The CAB considered these statements and expressed its tentative disapproval on February 12, although allowing thirty days for the submission of additional material. The IATA then submitted material which the CAB felt shed no new light. On March 18, the CAB issued its final order disapproving initiation of the proposed fares. Canada also rejected the proposed rates, while European governments accepted them.

With an "open-rate" situation fast developing, European governments postponed initiating the new fares until April 29. A meeting of United States, Canadian and European officials was held in London from April 24 to April 26, but the parties were unable to resolve their differences. Initiation of the new rates was again postponed at the last minute until May 12. From May 8 to May 10, informal diplomatic discussions between the United States and Great Britain were held in Washington without result. At this point in time Great Britain and other European governments accused United States carriers of violating local laws by maintaining the lower rates. Such carriers were variously threatened by foreign governments with revocation of landing permits, confiscation of aircraft and denial of entry to their passengers. In the face of a united foreign stand the CAB, on the advice of the State Department, relented on May 14 and advised United States carriers to raise their rates to those countries which threatened severe economic sanctions.[3] In the days immediately following, United States carriers were simultaneously charging the lower fares to some European countries and the higher fares to others, with countries being switched daily from one category to the other. Meanwhile, nineteen members of the IATA meeting in Bermuda (May 16, 1963) and then at Montreal (May 24, 1963) announced a compromise rate which, in effect, cut the Chandler increase in half.[4] This new rate schedule went into effect on July 16.

Even a cursory view of the events outlined here raises legitimate questions about the efficiency of the present method of determining transatlantic air tariffs. In the United States there has been considerable concern with the apparent inability of the government to achieve its goal of lower fares. Critics point in general to government failure to use the aggregate foreign power of the United States as leverage and in particular at the failure of the government to threaten foreign powers with the imposition of economic sanctions against their airlines similar to the sanctions threatened against American carriers.

II. Economics

Before delving too deeply into the rate crisis, it is necessary for us to examine the underlying causes. Scheduled aircraft flying the North Atlantic route between North America and Europe are rarely filled.[5] The coming

[3] *1963 Hearings* 5-6.

[4] N.Y. Times, May 25, 1963, p. 1, col. 4 at p. 2, col. 7. The one-way jet economy fare between New York and London was cut from $270 to $263. The new IATA five per cent discount on economy round-trip fares was retained resulting in a cost of $499.70 which split the increase between the pre-Chandler round-trip fare of $486 and the Chandler round-trip of $513.

[5] *1963 Hearings* 95.

of the large commercial jet, overexpansion of some fleets, and unrestricted flight frequencies have resulted in a capacity problem common to all airlines flying between the United States and Europe. The two United States carriers flying the North Atlantic, Pan American World Airways and Trans World Airlines, are business corporations conducted for profit and conditioned to operate as cheaply as possible. Their view, similar to that of the CAB, is that a lowering of transatlantic air fares would go far towards the development of a mass market which by filling more seats would both benefit the public and allow the airlines reasonable profits while solving the overcapacity problem.[6]

European airlines, on the other hand, are in a very real sense government organs, either being government entities or businesses in form but heavily subsidized by government. Generally, foreign airlines are as much an instrument of policy and governmental prestige as a carrier of passengers and cargo. Certainly this is a legitimate function of an international air fleet. However, long-term subsidization combined with continued awareness of prestige and policy are factors which contribute to the generally accepted fact that foreign carriers are rarely as economically efficient as are United States carriers. In addition it is generally thought that discounting and rebating are practiced heavily by some foreign carriers.[7] In these circumstances foreign airlines and their governments have generally sought to solve the economic problem by raising tariffs in attempts to make current operations pay or to cut losses on the basis of present capacity and the prevailing volume of traffic.

In evaluating the two positions it must be remembered that 62.4 per cent of the total volume of transatlantic air traffic is composed of United States citizens. United States carriers in 1962 carried 36.5 per cent of all transatlantic air passengers while foreign carriers transported the remaining 63.5 per cent.[8] During the same year 47.9 per cent of the total number of American citizens traveling by air between the United States and Europe chose to ride on United States carriers while the remaining 52.1 per cent flew on foreign aircraft. On the same routes only 22.5 per cent of the alien traffic was captured by United States carriers, leaving 77.5 per cent for foreign carriers.[9] These figures show at a glance the large United States contribution to the total market, the large European interest in the market, and obvious balance of payments considerations affecting policy on both sides of the Atlantic. The same figures indicate a strong United States bargaining position. These are the roots which gave stem to conflicting philosophies which in turn burst forth into crisis.

III. International Air Transportation Association

The IATA is a non-governmental agency composed of some ninety of the world's international airlines. The IATA performs many functions out-

[6] N.Y. Times, Aug. 7, 1963, p. 66, col. 2. Pan Am long advocated a "no-frills" super-economy transatlantic service costing in the latest proposal $320 round-trip between New York and London. N.Y. Times, Aug. 14, 1963, p. 66, col. 1. TWA's latest proposal includes cutting the one-way first-class jet fare from New York to London $25 from $475 to $450. This fare was cut from a pre-Chandler high of $500. At the same time TWA proposed cutting the one-way economy-class fare between New York and London from $263 to $256 with retention of the Chandler discount on round-trips of five per cent resulting in a round-trip economy rate of $486.40 or forty cents more than the pre-Chandler rate of $486.

[7] N.Y. Times, May 24, 1963, p. 62, col. 5; *Id.*, Aug. 6, 1963, p. 62, col. 1.

[8] See Appendix B *infra.*

[9] See Appendix C *infra.*

side the field of rate-making.[10] While the IATA denies that it possesses the power to set rates, in effect, since its creation in 1946, the IATA has determined international air tariffs. Before an IATA tariff conference, individual carriers consult their respectve governmental regulatory agencies and at the conference any airline may make its own proposal for rates on a route or series of routes. Through the normal bargaining processes a new rate structure is conceived. The IATA has a unanimity rule which requires an affirmative vote by every participating airline before any resolution can be adopted. Combined with the fact that any airline may vote on any resolution, this means each IATA member has an absolute veto. In actuality, though, IATA has not been faced with great difficulty in reaching compromises acceptable to its members.[11]

The United States carriers lobbied for lower rates in the 1962 Chandler meeting. They succeeded in obtaining a reduced first-class fare and in creating a new, low-cost, twenty-five member group fare with a less stringent affinity test.[12] This, however, was more than offset by the increase in the round-trip economy-class fare.

Upon adoption of new rates the IATA members individually submit the new proposals to the regulatory agencies of the countries in which they operate for the routes concerned. The governments involved may then approve or disapprove. As an example, Chandler rates were accepted by all countries except the United States and Canada which disapproved while Japan, Mexico and Chile deferred action.

Although the IATA is non-governmental, the governments of all IATA members have a great interest in the determination of international air fares. The fact that five governments representing a considerable amount of commercial air power failed to accept the 1963 IATA fare proposals evidenced governmental dissatisfaction with the IATA. Toward the end of the more critical period last summer the representatives of twenty-four governments[13] whose airlines are IATA members met in Ottawa with IATA officials for the purpose of examing the role of IATA in rate-making and made the following recommendations for improvement of the IATA mechanism: (1) restrict the practice of interlocking resolutions—making one fare agreement conditional upon approval of another; (2) retain the airline unanimity voting rule, but explore the possibility of making only carriers operating on a particular route or routes in a par-

[10] *1963 Hearings* 83.

[11] N.Y. Times, Dec. 10, 1963, p. 74, col. 1 and Jan. 8, 1964, p. 62, col. 4. The current rate determination may prove to be the exception that makes this rule. The rate conference began in Salzburg, Austria, in the second week of September. Two meetings later eighteen of twenty airlines in the IATA North Atlantic contingent announced on January 8, 1964, that they had agreed upon tariffs to become effective on April 1, 1964. The new fares reduce the present round-trip economy rate twenty per cent most of the year and eight per cent during a ten and a half-week summer season. On the New York-London route economy-class round trips will be reduced in cost from the present $499.70 to $399 most of the year and to $484.50 in the peak season. First-class fares are also reduced. The New York-London round trip price will fall from the present $902.50 to $712.50. The two dissenters are Irish Airlines, which refuses to accept a September 15 cut-off date for special group fares, and El Al of Israel, which refuses to limit stopover privileges in Europe for flights returning from Israel. The dissenters do not seem to have exercised their veto rights in the IATA meetings.

[12] *1963 Hearings* 54. The round-trip price between New York and London to each individual of a qualifying twenty-five member group is $310.

[13] N.Y. Times, July 19, 1963, p. 52, col. 1. Represented were Argentina, Australia, Belgium, Brazil, Canada, Colombia, Denmark, France, West Germany, Great Britain, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Norway, the Philippines, Portugal, Spain, Sweden, Switzerland, the United States and Venezuela.

ticular agreement eligible to vote thereon or airlines with a "significant economic interest;" (3) make available to interested governments "meaningful information" concerning advanced agenda, committee reports, summaries of daily proceedings, agreements passed and the differences between existing and proposed agreements; (4) provide "an adequate time period" for governments to examine and act on fare agreements before their effective date; (5) make available "a subscription service" at a reasonable price to the "interested public" which would disseminate association agreements at the time they are filed with governments; and (6) provide governments with "relevant" information concerning enforcement actions taken by the association against its own members.[14]

IV. Civil Aeronautics Board

The CAB is an administrative agency which can be traced to the Civil Aeronautics Act of 1938.[15] Under the present state of the law the CAB may not set rates to be charged by air carriers of other governments on routes to and from the United States, although foreign carriers are required to submit proposed rate changes to the CAB. The submitted rates in the instant case were rejected by the five-man Board in a three-to-two vote on March 18, 1963, but in the ensuing confrontation the CAB was incapable of enforcing its decision.

During the recent crisis and immediately thereafter, CAB Chairman Alan S. Boyd voiced the CAB's general position towards transatlantic air tariffs. The CAB felt that rate changes should be adjusted using as a base the operating statistics of the more efficient carriers. The only statistics now available to the CAB are those of the American carriers, since both the IATA and foreign airlines have refused to submit such information in the past. Since the basic problem is one of overcapacity, the CAB sees the solution in lower fares rather than higher ones. At the July 1963 Ottawa conference, mentioned above, Chairman Boyd outlined rate changes acceptable to the United States. They included: (1) substantial general reductions in tariffs; (2) initiation of a super-economy service, possibly with unreserved seating; (3) reduction in off-season rates; (4) reduced directional rates—reductions to generate westbound traffic to balance peak summer Europe-bound traffic over the Atlantic; and (5) extension of group rates on scheduled flights.[16] While recognizing the IATA's disadvantages, the United States admitted "the most practicable method of setting international rates still appears to be the IATA mechanism."[17]

In analyzing the CAB's use of its existing powers in the 1963 dispute, one must start from the premise that the CAB and the State Department in their considered judgments did not believe that the united position of the European governments would be maintained. United States authorities were simply unconvinced that the European nations involved would be as firm as they were or go as far as they did. This attitude was altered on

[14] *Ibid.*

[15] 49 U.S.C. § 421. The CAB was formerly the Civil Aeronautics Authority. The present name and authority are dervied from the Federal Aviation Act of 1958. 49 U.S.C. § 421.

[16] N.Y. Times, July 28, 1963, § XX, p. 1, col. 4. In the same policy statement the United States defined its guiding premise as "facilitating the freedom of international movement for the people, and for their commerce to the fullest extent possible consistent with the requirement of operational safety and the dictates of sound economic conditions and ratemaking principles."

[17] *Ibid.*

May 13, 1963, at which time the State Department and the CAB felt United States carriers must be allowed to increase their rates to escape the imposition of legal sanctions by foreign governments.[18]

In addition, the CAB was handicapped by two other factors. First, following pre-Chandler conferences with the United States carriers, the consensus of official United States opinion was that the conference would not result in fare increases.[19] Second, United States governmental agencies were extremely cautious in policy judgments because from the time of the Chandler meeting until the time of the crisis an interdepartmental committee of the United States government was attempting to develop a total international aviation policy for the United States. It was not until April 24, 1963, that this new policy was publicly released in the form of a statement approved by the President. This policy is not set out here for it conforms closely to that declared at the Ottawa conference, noted above.[20]

The CAB has power to institute antitrust actions against foreign carriers where applicable, but in the fare-increase crisis the CAB did not feel it could support such an action where the foreign carriers were required by their governments to increase their rates.[21] Under Section 402(f) of the Federal Aviation Act of 1958,[22] the CAB may use its licensing authority to amend, suspend, cancel, or revoke a permit whenever such action is in the "public interest." Here again the CAB did not feel that it could act effectively because there could be no valid finding that the United States public interest was adversely affected by foreign carriers charging higher rates—indeed, this was favorable to the United States so long as our own carriers were charging the lower rates; and, further, the CAB did not believe a general five per cent rise could legally be found to be against the public interest in a court of law.[23] These powers, all of which the CAB felt inapplicable, where the extent of those which could have been exercised in such a manner as to retaliate in kind against the economic sanctions threatened by various of the European governments.

V. CAB AND THE BILATERALS

Rights and privileges between the United States and foreign governments pertaining to international commercial air travel are governed by a series of bilateral agreements between the United States and each individual foreign power.[24]

The Bermuda bilaterals originated in 1946 and are modeled after the agreement of that year between the United States and Great Britain. Section 1102 of the Federal Aviation Act of 1958[25] provides that the CAB shall exercise its powers "consistently with any obligation assumed by the United States and any other foreign country or foreign countries." The

[18] *1963 Hearings* 11 and 34-35.

[19] *Id.* at 13.

[20] The text of this statement appears herein, p. 76. See also *1963 Hearings* 12 and 35. Johnson, *The International Aviation Policy of the United States*, 29 J. Air L. & Com. 366 (1963).

[21] *1963 Hearings* 18.

[22] 49 U.S.C. § 1372(f).

[23] *1963 Hearings* 8-10, 18 and 44.

[24] *Id.* at 120. Presently there are four different types of arrangements: (1) with a very few foreign governments, the United States has no agreement; (2) a few "Chicago" type bilaterals are in effect which have no rate article; (3) there are one or two bilaterals in effect with a brand new rate article; and (4) with most countries a "Bermuda" type bilateral executive agreement is in effect.

[25] 49 U.S.C. § 1502.

Bermuda bilaterals have alternative rate provisions. At the time these agreements were negotiated it was thought that the CAB would soon be given a general power to set international rates and a provision was included to become operative upon this contingency. The other provision which is presently in force applies while the CAB lacks the power to set rates.

These alternative rate provisions are subparagraphs (e) and (f) of article II of the annex to the British United Kingdom Air Services Agreement of 1946.[26] Both subparagraphs require the submission of proposed rates by the carriers of one country to the aeronautical authorities of the other and establish a thirty-day period in which notice of dissatisfaction may be given and consultations held. If no agreement is reached, sub-

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[26] Agreement With the United Kingdom Relating to Air Services, Feb. 11, 1946, 60 Stat. 1499, T.I.A.S. No. 1507, Annex II at 1505-06. The pertinent provisions read:

> (e) In the event that power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States, each of the Contracting Parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party from becoming effective, if, in the judgment of the aeronautical authorities of the Contracting Party whose air carrier or cariers is or are proposing such rate, that rate is unfair or uneconomic. If one of the Contracting Parties on receipt of the notification referred to in paragraph (c) above is dissatisfied with the new rate proposed by the air carrier or carriers of the other Contracting Party, it shall so notify the other Contracting Party prior to the expiry of the first fifteen of the thirty days referred to, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached each Contracting Party will exercise its statutory powers to give effect to such agreement. If agreement has not been reached at the end of the thirty day period referred to in paragraph (c) above, the proposed rate may, unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its operation, go into effect provisionally pending the settlement of any dispute in accordance with the procedure outlined in paragraph (g) below.
>
> (f) Prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States, if one of the Contracting Parties is dissatisfied with any new rate proposed by the air carrier or carriers of either Contracting Party for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party, it shall so notify the other prior to the expiry of the first fifteen of the thirty day period referred to in paragraph (c) above, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached each Contracting Party will use its best efforts to cause such agreed rate to be put into effect by its air carrier or carriers. It is recognized that if no such agreement can be reached prior to the expiry of such thirty days, the Contracting Party raising the objection to the rate may take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of.
>
> (g) When in any case under paragraphs (e) and (f) above the aeronautical authorities of the two Contracting Parties cannot agree within a reasonable time upon the appropriate rate consultation initiated by the complaint of one Contracting Party concerning the proposed rate or an existing rate of the air carrier or carriers of the other Contracting Party, upon the request of either, both Contracting Parties shall submit the question to the Provisional International Civil Aviation Organisation or to its successor for an advisory report, and each Party will use its best efforts under the powers available to it to put into effect the opinion expressed in such report.
>
> (j) The Executive Branch of the Government of the United States agrees to use its best efforts to secure legislation empowering the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States,

paragraph (f), which is presently in force, provides "the country objecting to the proposed rate may take such steps as it may consider necessary to prevent the inauguration of the service in question at the rate complained of." The consequence is and was that Great Britain and others whose regulatory bodies under their own law have the power to impose sanctions upon our carriers for failure to subscribe to a uniform rate can and did do so pursuant to international law as prescribed by the United States own bilateral agreements. The CAB did not find in its charter the power to impose similar sanctions against foreign carriers when they filed the Chandler fares in the United States.[27]

In the same situation (submission of proposed new rates to the authorities of a government) in the event a dispute arose which could not be settled within the thirty-day period, subparagraph (e) provides that the rate proposed would go into effect pending arbitration or settlement of the matter. In other words, should the CAB be given the authority to control international air tariffs and should United States carriers submit low rate proposals to foreign governments, these governments would be forced to accept the United States rates until a settlement was achieved, instead of being able to act in their own interest at will. The difference in the bargaining position of the United States in the two situations is readily apparent. Under subparagraph (f) United States carriers violate local law under international law and subject themselves to legal sanctions if they attempt to cargo lower rates than those adopted by the particular foreign power concerned (which are in effect IATA rates). On the other hand, under subparagraph (e) by international agreement no country could impose legal sanctions against the carrier of another, the CAB would have rate-setting power, and under current circumstances foreign carriers would have to compete against lower United States tariffs until any disagreement was resolved by arbitration or by the parties voluntarily.

Currently, the CAB, with the support of the entire executive branch and the Senate Commerce Committee, is seeking the rate-making power which would put subparagraph (e) of the Bermuda agreements in force.[28] The proposed legislation would give the CAB discretionary authority to prescribe rates and practices and to suspend tariffs in the realm of international air transportation similar to that which it now possesses in the area of domestic air commerce.[29] The Senate Commerce Committee considered and heard testimony upon an alternative proposal, Senate Bill 1539, sponsored by the Air Transport Association, which would empower the CAB to suspend the rates of foreign carriers for one year. This bill was rejected by the Committee on the grounds that it would not bring subparagraph (e) of the bilaterals into play, that it gave no power over United

[27] *1963 Hearings* 7, 20 and 36. The State Department agreed with the CAB on the power question. Mr. Abram Chayes, legal adviser to the State Department, testified that the Department felt the executive branch of government had the right under international law to impose economic sanctions upon foreign carriers and that the United States had inherent sovereign power to do so. However, the Department of State concluded, as a matter of domestic law, that the executive could not impose such sanctions without congressional authority. This position apparently rests upon the decision of the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *1963 Hearings* 32 and 37-43.

[28] S. Rep. No. 473, pts. 1 and 2, 88th Cong., 1st Sess. (1963).

[29] *Id.*, pt. 2 at 1. Both reports recommended passage of Senate Bill 1540. As first reported the bill subjected CAB actions to the approval of the President. In the second report the bill was amended so as to require only that the CAB notify the President of pending actions. Senate Bill 1540 was passed by the Senate as reported in Part 2 unamended by voice vote on November 26, 1963.

States carriers, and that it gave no further control if an agreement were not reached within the 365-day period.[30]

VI. State Department

The Department of State has in general supported the actions of the CAB and its interpretations of foreign, international, and domestic law. It was on its advice that the CAB modified its position in April 1963. The State Department, which has the primary responsibility in the negotiation of bilateral executive agreements, was represented on the interagency committee which formulated the new United States policy promulgated by the President on April 24, 1963. A similar committee now exists under State Department leadership by directive of the President.[31] Within the State Department an Office of International Aviation has been established in the Bureau of Economic Affairs. In addition the State Department in recent and future negotiations has adopted a new rate article which avoids the problems raised under the Bermuda bilaterals.[32]

VII. Criticism

Presently the United States has an announced policy which favors both the IATA mechanism and lower international air fares based on the operations of the more efficient carriers. Generally, the United States carriers approve of this position. The CAB has the power to disapprove proposed tariffs, but no power to act against foreign airlines so long as the "public interest" is not adversely affected. At the same time under the majority of our bilateral agreements foreign governments may act directly against our air carriers within their domestic laws. Measures have been taken to improve United States intra-governmental communications. Foreign governments and airlines have been served notice that the United States will continue to seek lower rates with a vigor heretofore absent.

The CAB's position that it cannot legally take retaliatory action against foreign carriers under existing law has been questioned by a few persons. Even to this minority it should be quite evident that the CAB believes in its position and even more evident that the CAB will not act where it thinks it cannot. Therefore, adoption of Senate Bill 1540 would be the biggest single immediate step that the United States could take toward achieving practical results in its efforts to lower international air tariffs. Giving the CAB the power to make rates would relieve foreign governments of the power to impose sanctions and at the same time permit the United States to charge low fares in contrast to foreign high fares until settlements were reached. Thus the bargaining scales would swing from a position weighing heavily in favor of foreign interests to one weighing possibly even more heavily in favor of the United States position. It is rare that a nation can improve its international bargaining position so much by a purely unilateral internal act. The effect that such action would have upon the bargaining position of United States carriers at IATA rate conferences is obvious, especially in view of the capacity of American carriers and of the number of United States citizens engaged in transatlantic air travel.

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[30] *Id.* at 14. *1963 Hearings* 109-10.
[31] Johnson, *supra* note 16, at 368-70.
[32] *1963 Hearings* 74, 78 and 120.

The governmental recommendations made to the IATA at Ottawa seem reasonable and in the best interests of all concerned.[33] They should be adopted. The CAB sent two unofficial observers to this year's IATA rate conference at Salzburg, Austria. While this action was undoubtedly aimed at achieving better liaison and enhancing the bargaining position of the United States, the wisdom of such an innovation is not free from legitimate doubt. The rate-making function of the IATA is not an easy one. Considering the number of participants, the number of interests represented and the complications inevitable in such an environment, it is to its credit that the IATA has been able continually to suggest compromise schedules. If the United States initiates the practice of sending unofficial (or official) observers, certainly other nations will be tempted to do likewise. The CAB should weigh carefully the need for observers and their influence against the possibility that other governments will be led to send observers and the possible consequences of governmental representation at IATA rate conferences. It would seem to the IATA's benefit to improve its communications with governments via the Ottawa suggestions rather than to be host to a swarm of unwanted visitors.

The question of government representation at IATA meetings is a ticklish one. The IATA claims to be purely an organization composed of airlines. However, the government-airline relationship is much closer in most countries than it is in the United States. As a result, many IATA delegates are quasi-governmental spokesmen, if not governmental representatives in fact. American carriers have no official and little actual authority to speak for the United States government. At times the position of a carrier and that of the United States differs on a particular topic. Yet the interest of the United States is as great as that of any other government in the issues at hand at an IATA meeting. These are the motivating considerations which led to the presence of CAB observers at the most recent series of IATA rate conferences.

Capacity legislation has been often suggested as one approach to the problems herein discussed. Capacity proposals normally provide for United States regulation of the frequency of international flights through the granting of landing permits. However, the three major interests involved, the CAB, the Department of State, and the United States carriers are united against such action. The United States has long been a leader in advocacy of free and unlimited air access. This position does not seem likely to change in the immediate future.[34]

What, then, are the final solutions to the problems presented? One suggestion is that the United States should define a definite policy and unify its actions. Steps in this direction have been taken. However, the officially announced policy speaks only in general terms and adds little to the knowledge of interested parties. This is no advance; the need is for detailed guidelines and specific responsibilities. A second remedial step is to give the CAB the power it seeks. This seems in the offing. However, there persists the feeling that something more should or could be done.

Part of the problem of the United States stems directly from its system

[33] See note 10 *supra* and accompanying text.

[34] *1963 Hearings* 21-23 and 74. In the recent past commentators have taken a dim view of the wisdom and legality of giving the CAB power to control capacity offered international air travelers in the United States. See generally: Kittrie, *United States Regulation of Foreign Airlines Competition*, 29 J. Air L. & Com. 1 (1963); McCarroll, *The Bermuda Capacity Clauses in the Jet Age*, 29 J. Air L. & Com. 115 (1963); and Note, 51 Geo. L.J. 593 (1963).

of separation of powers. Through the CAB, Congress exercises its control over foreign commerce. When a crisis arises with a foreign power, a switch must be made to the executive arm of government which through the State Department, exercises its plenary function in the area of foreign relations. It was painfully evident during April 1963, that both the CAB and the State Department had jurisdictional problems. As a consequence, the transition from one agency to the other was jumbled. If the CAB gets its new powers will United States carriers go to IATA conferences to bargain on their behalf or on behalf of the United States government? There is a persistent feeling that foreign carriers speak for their governments in the IATA now. Is this desirable? Is it avoidable? If not, why not forego the rate-making function of the IATA and let the governments bargain directly—multilaterally—and cut out the middleman? This would of course probably mean giving up the veto power now held by each member of the IATA. What is the value of this veto? One question partially answers another and suggests others.

Final answers are not forthcoming. At best we can but agree that that government can bargain best which controls the most variables. At the core of international relations is power. It has always been thus. Power must be related to a particular place in time and the diplomacy of air travel cannot be separated from international relations in general. The past year has demonstrated that at one point in time the United States could not prevail against a united Europe. The Machiavellian engine that will determine future transatlantic air fares continues to function, though slightly altered.

Ray Allen Goodwin

APPENDIX A†

Number of United States Citizens Who Traveled by Air Between the United States and Major Areas of the World During the Year Ended June 30, 1962

Areas	Number	United States citizens as per cent of total passengers
1. United States and Europe	1,418,499	62.4
2. United States, Asia, and Oceania	318,156	61.4
3. United States and South America	130,038	35.2

† S. Rep. No. 473 pt. 2, 88th Cong., 1st Sess. (1963) p. 10. Source: Bureau of International Affairs, Civil Aeronautics Board as compiled from Immigration and Naturalization Service reports.

APPENDIX B†

Participation in Scheduled North Atlantic Traffic To and From the United States of Reporting IATA Member Airlines, Calendar Year 1962

	Passengers		Cargo	
	Number	Per Cent	Short Tons	Per Cent
United States Airlines	725,337	36.5	34,346	41.6
Foreign Airlines	1,263,660	63.5	48,291	58.4
Total	1,988,997	100.0	82,637	100.0

† S. Rep. No. 473 pt. 2, 88th Cong., 1st Sess. (1963) p. 13. Source: Bureau of International Affairs, Civil Aeronautics Board as compiled from Immigration and Naturalization Service reports.

APPENDIX C†

Air Passengers Between the United States and Europe Year Ended June 30, 1962

	Passenger	Per Cent Group Total	Per Cent Grand Total
U. S. Citizens:			
On U.S. Airlines	679,745	47.9	
On Foreign Airlines	738,754	52.1	
Total U .S. Citizens	1,418,499	100.0	62.4
Aliens:			
On U.S. Airlines	192,911	22.5	
On Foreign Airlines	663,287	77.5	
Total Aliens	856,198	100.0	37.6
All Passengers:			
On U.S. Airlines:			
U.S. Citizens	679,745	77.9	
Aliens	192,911	22.1	
Total U.S. Airlines	872,656	100.0	38.4
On Foreign Airlines:			
U.S. Citizens	738,754	52.7	
Aliens	663,287	47.3	
Total Foreign Airlines	1,402,041	100.0	61.6
Grand Total	2,274,697		

† S. Rep. No. 473 pt. 2, 88th Cong., 1st Sess. (1963) p. 11. Source: Bureau of International Affairs, Civil Aeronautics Board as compiled from Immigration and Naturalization Service reports.

Wrongful Death — Admission of Evidence — Hearsay

Plaintiff brought suit against defendant airline company for wrongful death resulting from a crash of an Eastern Airline's Constellation near Imeson Airport, Jacksonville, Florida, on December 21, 1955. The rights of the parties were governed by the rules promulgated at the Warsaw Convention,[1] which meant that in order to avoid a limitation on the amount of damages recoverable it was necessary to prove "wilful misconduct." To sustain this burden of proof the plaintiff attempted to introduce in evidence the testimony of a Civil Aeronautics Board investigator, based on an investigation report prepared by a specially hired employee working under his supervision. The employee was not available for cross-examination to determine how he arrived at the conclusions contained in his report. The testimony was admitted at the trial level over the objection that it was hearsay, but on appeal the Third Circuit reversed. *Berguido v. Eastern Airlines Inc.*, 317 F.2d 628 (3rd Cir. 1963).[2]

The plaintiff claimed that at the time of the crash the weather was steadily deteriorating around the airport and that the crew came in at an excessive rate of speed, attempting to land before the airport was closed. Plaintiff further alleged that the pilot deliberately flew a pattern below his glide slope and the authorized minimum. It was undisputed that the plane was below both the instrument approach minimum and the visual approach minimum. The plaintiff alleged that this deliberate behavior was the cause of the crash. Therefore, the key to the case was why the aircraft was below the legal minimum.

Principal reliance was placed on the testimony of the plaintiff's two expert witnesses. They were permitted, over objection, to offer their opinion as to whether the pilot intentionally flew in an unsafe manner. The experts then used the facts contained in the investigation report to formulate the answers to various hypothetical questions.[3] The information contained in the investigation report was put into evidence by the testimony of the chairmen of the CAB Operations and Structures Committees that investigated the crash, Van Epps and Searle. Van Epps read from a summary report submitted by Searle (as head of the Structures Committee) to refresh his recollection and explain the meaning of figures contained therein. He refreshed his memory only as to what he personally observed and what he had previously read in the report. He had made none of the statistical computations as they were Searle's responsibility. It was revealed on cross-examination that the calculations were made by a Lockheed aero-

[1] 49 Stat. § 3,000 (1929). This Convention provides, inter alia, that the carrier's liability for damages will ordinarily be limited to 125,000 francs (approximately $8,300), unless the plaintiff sustains the burden of proving that the damage was caused by the "wilful misconduct" of the carrier. If the burden is sustained the liability limitation is lost to the carrier. See specifically, Arts. 17, 20(1), 22(1), & 25(1).

[2] The United States Supreme Court granted certiori in this case on November 8, 1963.

[3] The facts contained in the report were as follows:

(1) The speed of the plane at the time of impact was 140 knots per hour;
(2) during the last 200 feet of the flight path its angle of descent was 2 1/2 degrees at a rate of ten feet per second;
(3) just prior to impact the attitude of the aircraft was 11 1/2 degrees right bank; and
(4) the plane was in a 4 3/4 degree nose-up position.

nautical engineer working under Searle's supervision. After determining this fact, the defendant claimed that the testimony of the two CAB chairmen based on the findings of another person who was not available for cross-examination, was hearsay and thus inadmissible. Plaintiff argued that the engineer's only function was mathematical and the simple operation of mathematics performed did not make this testimony either hearsay or opinion.[4] The primary issue on appeal was one of first impression, namely, whether testimony of a chairman of a CAB investigating team based on his official report to the CAB of an airplane accident is inadmissible as "hearsay" to the extent it contains factual data and mathematical calculations premised on that investigation assembled by a team member under his supervision.

The majority held that a CAB investigator could use a summary crash report to refresh his recollections as to what he personally observed at the crash scene when his testimony did not embody an opinion and did not reflect the Board's finding as to probable cause of the crash. However, in this case since the summary report which was used to refresh the investigator's memory had been prepared by an employee and not the investigator, the report was deemed hearsay and inadmissible. In arriving at this conclusion the court noted in particular that the employee was not available for cross-examination to determine how he arrived at his final figures or to ascertain what assumptions he made in the process. The court decided, considering the circumstances as a whole, that it was not possible to arrive at the pertinent mathematical conclusions without making assumptions and choices based on physical facts found at the scene of the crash. This holding was attacked by Judge Kalodner in his dissent on the motion for rehearing.[5] He felt that this was not hearsay since the record did not sustain the conclusion that assumptions and choices necessarily had to have been made.[6] Furthermore, Judge Kalodner felt that since Searle in his capacity as the CAB committee chairman had "checked" the contents of the report and found the calculations "to be true" and testified "*that as far as he knew* (the investigator) *had not made any 'assumptions,'* " the evidence was not hearsay.

Manifestly, no one can prepare a detailed investigation report in precise terms without at some time making assumptions or conclusions when only physical evidence is available to form the basis of the pertinent calculations. Desirably, then, underlying assumptions and hypotheses should be tested through cross-examination. The problem is acute for both plaintiff and defendant where, as here, the only evidence that can be offered to establish the plaintiff's claim is technically hearsay. If it is excluded, the plaintiff will in all probability lose the case; if admitted, the defendant is greatly handicapped for it is almost impossible to counter without the aid of cross-examination. The majority opinion did not rely on any case law to establish that the report was hearsay but relied strictly on what was really a fact determination.

Although this was a case of first impression, state case law approaching the problem is not favorable to admission.[7] For example, a Kentucky court[8]

[4] Berguido v. Eastern Airlines, Inc., 317 F.2d 628 (3rd Cir. 1963).
[5] *Id.* at 632.
[6] *Id.* at 633.
[7] Annot., 23 A.L.R. 2d 1360 (1952).
[8] Hodge v. Commonwealth of Ky., 287 S.W.2d 426 (1956).

in an involuntary manslaughter case refused to admit a state trooper's official report in evidence which contained a comprehensive diagram based upon the trooper's conclusion as to manner in which the accident had occurred. This was held to be hearsay even though the trooper was available for cross-examination and defense counsel had asked him to look at his report and read from it.

In the field of aviation the Civil Aeronautics Act[9] bars admission of CAB reports in damage actions but does not prohibit the use of the report to refresh a witness's memory.[10] In 1951, before this statute was enacted, the exclusion of an Army Board's investigation report of an airplane crash was held proper in *Barnes v. Northwest Airlines*[11] on the grounds that such reports contained expressions of opinion not admissible in evidence as public records, since defendant had no opportunity to cross-examine with reference to the report and that its conclusions were hearsay.

State case law on the admission of testimony based on memoranda prepared by others[12] and federal policy on admission of aviation investigation reports[13] tend to support the majority opinion in this case that under present hearsay rules the evidence in question should be excluded. However, the apparent desirability for admitting this evidence questions whether the present rules are satisfactory. The Uniform Rules of Evidence would admit the report when it was the duty of the reporting officials "to investigate the facts, . . . and make findings or draw conclusions based on such investigation."[14] This rule could be extended to include an expert hired to make an investigation report, but this would conflict with the policy of withholding CAB reports from damage suits.[15] The American Law Institute's Model Code of Evidence[16] provides that evidence of a writing made as a record, report, or memorandum of facts and conclusions concerning an act, event, or condition, is admissible as tending to prove the truth of the matters stated therein if made by a government official or his subordinates in the performance of the ordinary duties required of his office. This would allow admission of the report in the instant case even though the traditional rules of evidence would regard it as hearsay.

In special fact situations several factors indicate that there should be some method of allowing this type of hearsay testimony, especially when it is the only available evidence. Where the court will be aware that hearsay is being offered and can evaluate this as in the case of a trial without a

[9] 49 U.S.C. § 1441(e), (Supp. 1962). "No part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." See Lobel v. American Airlines, 192 F.2d 217 (2d Cir. 1951) and Israel v. United States, 247 F.2d 426 (2d Cir. 1957) for interpretation of this statute.

[10] Maxwell v. Fink, 264 Wis. 106, 58 N.W.2d 415 (1953).

[11] 233 Minn. 410, 47 N.W.2d 180 (1951).

[12] Testimony based on memoranda made by others held inadmissible as hearsay. Lusardi v. Prukop, 116 Cal. App. 506, 2 P.2d 870 (1931); Bourland v. Batchock, 186 Miss. 223, 188 So. 9 (1939); New York Cent. R.R. Co. v. Public Utilities Commission, 124 Ohio St. 549, 179 N.E. 739 (1932); Beaufort Truck Growers Ass'n. v. Seaboard Air Line Ry. Co., 128 S.C. 1, 121 S.E. 554 (1924).

[13] Lobel v. American Airlines, 192 F.2d 217 (2d Cir. 1951); Israel v. United States, 247 F.2d 426 (2d Cir. 1957).

[14] Uniform Rules of Evidence rule 63(15).

[15] See Simpson, *Use of Aircraft Accident Investigatoin Information in Actions for Damages*, 17 J. Air L. & Com. 283 (1950), for a discussion of the policy arguments involved in making all accident information available to litigants or witholding such information in hopes of increasing the chance of discovering the cause of airplane crashes so as to help prevent future tragedy.

[16] Model Code of Evidence rule 515 (1942).

jury, there seems to be little danger in admitting this evidence. The reliability of the evidence can be weighed in considering its admission; a carefully prepared report, particularly one submitted by an expert agent hired to make an impartial investigation, should be admitted more readily than less creditable hearsay. A third factor should be the need for the evidence considering the chance of the plaintiff's recovery if it were excluded. A workable rule that should serve to balance the interests fairly is to admit such reports in the discretion of the trial court with consideration given to such factors as the personal knowledge and qualifications of the reporter, the concrete or inferential character of the findings, and the availability of persons who could testify to the facts. Thus the ruling on admission would be based on an appraisal of the relative needs for and dangers of admitting the evidence.[17] The need for evidence combined with the relative reliability of an expert hired to render an impartial report would allow admission of the investigator's summary crash report in a *Berguido*[18] type case under this test.

Philip Larmon, Jr.

[17] So decided (against admission) in Franklin v. Skelly Oil Co., 141 F.2d 156, 162 (10th Cir. 1944). The trial court approved this approach and weighed the balance against admission and this was approved on appeal.

[18] Berguido v. Eastern Airlines, Inc., 317 F.2d 628 (3rd Cir. 1963).

Wrongful Death—Limitation on Recovery—Conflict of Laws

In August, 1958, a Northeast Airlines passenger plane crashed at Nantucket, Massachusetts, after taking off from La Guardia Airport in New York, New York. This crash and others like it have generated numerous wrongful death actions against the airline companies. Because the group of people killed in such a crash typically includes domiciliaries of several states, the wrongful death actions resulting from these accidents are likely to be brought in several different states by the administrators or other representatives of the deceased passengers.

General conflict of laws rules require the application of the law of the place of the fatal injury to determine the right of the decedent's representative to recover. In these wrongful death actions the law of the place where the fatal injury occured has generally been applied to the measure of damages recoverable (or to limitations on damages recoverable) because the damages recoverable are considered to be as much a part of the substantive law as the *right* to recover.[1]

However, in *Kilberg v. Northeast Airlines, Inc.*,[2] a recent New York state court case involving a wrongful death action arising out of the Nantucket crash, and brought under the Massachusetts Wrongful Death Act,[3] the New York Court of Appeals stated in *dicta* that the limitation on the amount of damages recoverable under the Massachusetts statute was not binding on the New York state court. The *dicta* rested on the ground that the strong New York public policy against limiting the recovery of a New York domicilary in a wrongful death action demanded that the limitation not be recognized. The public policy is based on the interest of the state of New York in the nature and amount of recovery obtained by dependents of a decedent, regardless of the place of injury (which in airplane crashes may be a fortuitous circumstance), because the dependents are New York domiciliaries and should be awarded full indemnification for the loss of future support suffered as a result of the wrongful death. While the result in *Kilberg* is commendable in some respects, certainly it is contra to most other decisions on the conflict of laws question since it announces an exception to the general rule of *lex loci delicti* being determinative of the extent of the liability as well as the *right* to recover.

The *Kilberg* dictum was relied upon by the United States Court of Appeals for the Second Circuit in *Pearson v. Northeast Airlines, Inc.*[4] in affirming the district court's decision that the limitation in the Massachu-

[1] Northern Pac. R.R. v. Babcock, 154 U.S. 190 (1894); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). For general discussion of the substantive-procedural distinction see Stumberg, Conflict of Laws 152 (2d ed. 1951).

[2] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1962).

[3] Mass. Ann. Laws ch. 229, § 2 (1955). This act provides for minimum damages of $2,000 and maximum damages of $20,000 to be assessed with reference to the culpability of the defendant. It has since been amended to raise the limits to $3,000 and $30,000 respectively. Mass. Ann. Laws ch. 229, § 2 (Supp. 1962).

[4] 309 F.2d 553 (1962). This wrongful death action also arose out of the Nantucket crash.

setts statute was not binding.[5] Under *Erie R.R. v. Tompkins*[6] and *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[7] the court in *Pearson* found the New York choice of law rule to be that announced in the *Kilberg dicta.* The court dismissed the full faith and credit argument against *Kilberg,* and found *Kilberg* to be a valid exercise of New York's power to make choice of law rules. Thus the court in *Pearson* applied the Massachusetts statute giving the plaintiff a cause of action, and at the same time refused to apply the damage limitation in the statute.

In *Richards v. United States*[8] the United States Supreme Court stated that the whole law, including choice of law rules, of the place of the wrongful act or omission was to be applied in multistate tort actions brought under the Federal Tort Claims Act.[9] In Oklahoma, where the act of negligence occurred in the *Richards* case, the choice of law rules required application of the Missouri Wrongful Death Act;[10] by its terms the plaintiffs had not stated a basis for relief. Therefore, the federal court sitting in Oklahoma and applying Oklahoma law, gave effect to the policy of the forum state as developed in its choice of law rules. The tenor of *Richards* indicates the Court's leaning toward flexibliity in conflict of laws rules that will allow the forum to examine the substantial interests of all the states involved in multistate tort actions and apply the law which appears appropriate and equitable.

Montellier v. United States,[11] a New York federal district court case, allowed the plaintiff, a New York administratrix, to recover 168,000 dollars in compensatory damages in an action brought under the Massachusetts Wrongful Death Act[12] and the Federal Tort Claims Act. Under the Federal Tort Claims Act, as interpreted in *Richards,* Massachusetts law was made determinative of the liability of the United States because the negligence occurred in Massachusetts. Compensatory damages were substituted for punitive damages because the Federal Tort Claims Act[13] expressly provides for compensatory damages, in lieu of punitive damages, when the law of the place of the wrongful act or omission provides for damages only punitive in nature.

The district court decision was affirmed by the United States Court of Appeals for the Second Circuit.[14] The Court of Appeals stated that the application of Massachusetts law was precluded by the Federal Tort Claims Act only to the extent the Massachusetts law provided for punitive damages. After the court had determined the correctness of awarding compensatory damages it ignored the question of the 20,000 dollars maximum limit in the Massachusetts statute. The fact that the government chose not to seek enforcement of this limitation would seem to indicate the government's belief that the district court and court of appeals would

[5] Pearson v. Northeast Airlines, Inc., 100 F. Supp. 539 (S.D.N.Y. 1961).

[6] 304 U.S. 64 (1938). See Keeffe, *Piercing Pearson,* 29 J. Air L. & Com. 95, 108 (1963). The author, while agreeing with the result in *Kilberg* and *Pearson,* attacks the applicability of *Erie R.R. v. Tompkins* to the *Pearson* case.

[7] 313 U.S. 487 (1941).

[8] 369 U.S. 1 (1962).

[9] 62 Stat. 933, 28 U.S.C. § 1346 (1948).

[10] Mo. Rev. Stat. § 537.090 (1949).

[11] 202 F. Supp. 384 (E.D.N.Y. 1962).

[12] Mass. Ann. Laws ch. 229, § 2 (1955). See *supra* note 3 for punitive nature of the statute.

[13] 62 Stat. 983, 28 U.S.C. § 2674 (1948).

[14] 315 F.2d 180 (1963).

distinguish the cases applying the limitation just as was done in the *Pearson* case.

In *Gore v. Northeast Airlines, Inc.*,[15] a 1963 New York federal district court case involving a wrongful death action brought by the executor of the decedent's estate, the court denied plaintiff's motion to strike the affirmative defense that the Massachusetts Wrongful Death Act, pursuant to which the action was brought, limited the recoverable damages to 15,000 dollars. The court refused to apply the rules of *Kilberg* and *Pearson* in the *Gore* case, which arose out of the same crash, stating that the fact situation was quite dissimilar with respect to the status of the beneficiaries of the decedent. The decedent in *Gore* was survived by two infant children and a widow who moved from New York to Maryland about a month after the crash, and two teen-age children (by a prior marriage) who at all times were domiciled in California. The court stated that New York had no legally recognizable interest in the California domiciled children, and that New York had no basis for disregarding the damage limitation since the California Supreme Court had shown restraint in defining and asserting its domestic interest in securing full compensation for its domiciliaries deprived of their future support by an injury outside the State.[16] The court determined that the jurisdiction with the strongest interest in the widow and two infant children was Maryland, the state which was their freely chosen domicile. If suit had been brought in Maryland the court there would have been required to apply the Massachusetts statute as though it were the law of Maryland.[17] Thus the court in *Gore* refused to subordinate the interests of Massachusetts[18] in order to allow the dependents of the decedent better treatment than they would have received in Maryland, the state of their domicile.

More generally, however (as several of the cases examined here indicate) a maximum limitation on damages in wrongful death statutes appears to be looked upon with increasing disfavor because such a limitation is considered fundamentally unjust and unreasonable in that it seeks to measure the value of all lives by an arbitrary and outmoded standard.[19] Thirteen of the twenty-six states that had maximum recovery limitations

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[15] 222 F. Supp. 50 (S.D.N.Y. 1963).

[16] California gave early impetus to the "contacts" approach to choice of law problems in tort cases in *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953). But in post-*Grant* cases the California Supreme Court has been reluctant to assert the interest of California in the protection of its domiciliaries. See Bernkrant v. Fowler, 55 Cal.2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961). The court in *Gore* stated that California has given no indication that its courts would not apply the *lex loci delicti* as to damages in a suit arising under a wrongful death statute.

[17] Md. Ann. Code, art. 67, § 2 (1957).

[18] The defendant, Northeast Airlines, is a Massachusetts corporation, and presumably intended to benefit from the policy of limited liability in Massachusetts.

[19] Chief Justice Desmond in *Kilberg* made the following statements:

> Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters. New York's original Wrongful Death law . . . had no restriction as to damages. The legislature later imposed such limits but the Convention which drew the 1894 Constitution rejcted and forbade them. "The argument which evidently controlled the convention in its action consisted of the claim that the arbitrary limitation was absurd and unjust, in measuring the pecuniary value of all lives to the next of kin, by some arbitrary standard." The absurdity and injustice have become increasingly apparent in the six decades that have followed.

in 1893 have abolished them, and no state has added such a limitation to its wrongful death act since 1893.[20]

Not surprisingly, therefore, state courts, as in *Kilberg*, have refused for reasons of public policy to recognize such limitations in the statutes of other states; federal courts, as in *Pearson*, have given effect to the policy of the forum state by invoking choice of law rules that defeat the damage limitation in the statute of another state. The Supreme Court in *Richards* did not discourage this tendency toward flexibility in choice of law rules, and the reluctance of the Court to grant certiorari in cases invovling questions in this area would seem to be another indication of the Court's acceptance of the trend toward favoring the policies of a forum state having substantial contact with the litigation. The *Montellier case*, in which the *lex loci delicti* was applied in order to give the plainitff a cause of action, but not applied to the damage limitation, shows that the courts will not allow the *lex loci delicti* to limit the amount of recovery. While the court in *Gore* refused to strike down a maximum recovery limitation, the refusal came only after an examination of the involved states' interests in, and connections with, the outcome of the litigation. The foregoing line of cases indicates that when the forum state has significant interests in the litigation the general rules of conflict of laws are subordinated to the public policy of the forum state as manifested in that state's choice of law rules.

Larry J. Miller

[20] See the following statutes for limitations of damages recoverable. Colo. Rev. Stat. Ann. § 41-1-3 (Supp. 1960), $25,000; Ill. Rev. Stat. ch. 70, § 2 (1961), $30,000; Kan. Gen. Stat. Ann. § 60-3203 (Supp. 1961), $25,000; Me. Rev. Stat. Ann. ch. 165, §§ 9, 10 (Supp. 1961), $20,000; Mass. Ann. Laws. ch. 229, § 2 (Supp. 1962), $30,000; Minn. Stat. Ann. § 573.020 (Supp. 1962), $25,000; Mo. Rev. Stat. § 537.090 (Supp. 1961), $25,000; N.H. Rev. Stat. Ann. ch. 556, § 13 (Supp. 1963), $40,000; Ore. Rev. Stat. § 30.020 (1953), $25,000; S.D. Code § 37.2203 (Supp. 1960), $20,000; Va. Code Ann. § 8-636 (Supp. 1962), $35,000; W.Va. Code Ann. ch. 55, § 7 (1961), $20,000; Wisc. Stat. § 331-04 (1961), $22,500. Most of the states that have retained damage limitations have amended the statutes periodically to raise the amount of the limitation.