THE WARSAW SYSTEM AND THE U. S.
CONSTITUTION REVISITED

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The Warsaw Convention and the Montreal Interim Agreement provide effective limits on recovery for wrongful death in international flights. In this article Mr. Donald M. Haskell argues for the validity of these international agreements under the United States Constitution. His analysis includes an examination of the supremacy clause and the treaty-making power of the federal government, the separation of powers and political question doctrines of judicial abstention, and the application of due process and equal protection principles to claims arising from international air tragedies.

IN VIEW of the elimination of monetary limitations in wrongful death actions by most states in this country, and the general trend toward the abolition of all monetary restrictions to recovery by an injured party, the constitutional validity of monetary restrictions in recovery for injury or death in international air travel becomes increasingly important both to passengers and to airlines. For many years, the United States has been a party to an international treaty, commonly known as the Warsaw Convention, that deals with the rights and obligations of passengers and airlines in international air travel. This article is addressed to the validity of this treaty, and the agreements related to it, under the United States Constitution.

I. HISTORICAL BACKGROUND OF THE TREATY

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly referred to as the “Warsaw Convention,” is an international treaty that governs the

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1 Convention for the Unification of Certain Rules Relating to International
liability of airlines in international air transportation. The Warsaw Convention was the result of international conferences held in Paris in 1925 and in Warsaw in 1929. Since it appeared at that time to many countries that international air transportation was going to bring together many different nations with differing languages, customs, and legal systems, it was deemed desirable to establish a certain degree of uniformity in international air transportation by international agreement. It was also deemed desirable to restrict air carrier defenses and to establish the principle of limitation of liability to afford a more definite basis of recovery, to lessen litigation, and to aid in the development and maintenance of international air transportation.

The Warsaw Convention applies to "all international transportation . . . performed by aircraft for hire." International transportation is defined as transportation between two contracting countries or, when the origin and destination are in the same contracting country, transportation with an agreed stopping place outside that country. Whether the Warsaw Convention is applicable to international air transportation is dependent on the ticket issued by the airline to the passenger.

For all practical purposes, the Warsaw Convention creates a presumption of liability of the airline to the monetary limit. The Treaty provides:

The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place onboard the aircraft or in the course of any of the operations or embarking or disembarking. 4

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures . . . . 5

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in ac-

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Transportation by Air, 49 Stat. 3000 et seq., T.S. No. 876 (1934) [hereinafter cited as Warsaw Convention].

4 Warsaw Convention, article 1.
4 Id. at article 17.
4 Id. at article 20.
cordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.6

In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [approximately $8,300] . . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.7

The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.8

The Warsaw Convention became effective on February 13, 1933, ninety days after its ratification by five of the high contracting parties of the Warsaw Conference.9 The United States was not a party to either the Paris conference of 1926 or the Warsaw Conference of 1929, although the United States did have an observer in attendance at the Warsaw Conference. After ratification of the treaty by several European countries, the United States began to consider the Convention; and, upon the recommendation of the Commerce Department and the State Department, President Roosevelt submitted the Treaty to the United States Senate. On June 15, 1934, the Senate gave its advice and consent. The United States then deposited its instrument of adherence on July 31, 1934, and President Roosevelt proclaimed adherence to the Treaty in October 1934.10

Thus the United States can be considered almost a charter member to the Treaty, having adhered to it about a year after it had come into force, and after it had been ratified by several European countries. The Treaty has, therefore, been in effect for over thirty-nine years, and has been implemented by the executive department of the United States Government continually since that time. Most

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6 Id. at article 21.
7 Id. at article 22.
8 Id. at article 25.
9 Id. at article 37.
of the major countries of the world have adhered to the Warsaw Convention for many years.\footnote{The following are the countries of the world that adhere to the Warsaw Convention Treaty: Algeria; Argentina; Australia including Papua, Norfolk Island, and trust territories of New Guinea and Nauru; Austria; Barbados; Belgium; Botswana; Brazil; Bulgaria; Burma; Cambodia; Canada; Ceylon; China, People's Rep.; Colombia; Congo (Brazzaville); Congo (Kinshasa); Cuba; Cyprus; Czechoslovakia; Dahomey; Denmark, not including Greenland; Ethiopia; Finland; France, including French colonies; Gambia; Germany, Dem. Rep.; Germany, Fed. Rep.; Ghana; Greece; Guinea; Guyana; Hungary; Iceland; India; Indonesia; Ireland; Israel; Italy; Ivory Coast; Jamaica; Japan; Kenya; Korea, Dem. Rep.; Laos; Latvia; Lebanon; Lesotho; Liberia; Lichtenstein; Luxembourg; Madagascar; Malawi; Malaysia; Mali; Malta; Mauritania; Mauritius; Mexico; Mongolian People's Republic; Morocco; Nepal; Netherlands, including Surinam and Curacao; New Zealand; Niger; Nigeria; Norway; Pakistan; Philippines; Poland, including Free City of Danzig; Portugal; Rumania; Rwanda; Senegal; Sierra Leone; Singapore; Somali Republic; South Africa, including Southwest Africa; Southern Yemen; Spain, including colonies; Swaziland; Sweden; Switzerland; Syrian Arab Republic; Tanzania; Trinidad and Tobago; Tunisia; Uganda; Union of Soviet Socialist Republics; United Arab Republic; United Kingdom; United States; Upper Volta; Venezuela; Viet-Nam; Western Samoa; Yugoslavia and Zambia. Listed in 1 L. KRIENDLER, AVIATION ACCIDENT LAW § 11.01[3] (1971).}

Following World War II the governments that had adhered to the Warsaw Convention began to consider revising it. Most of these discussions questioned whether the limit of liability had been set at the proper level.\footnote{For an exhaustive discussion of the background and history surrounding the Warsaw Convention Treaty, the Hague Protocol, and the Montreal Interim Agreement, see Symposium on the Warsaw Convention, 33 J. AIR L. & COM. 519 (1967); Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497 (1967).} After years of discussions and meetings, a diplomatic conference was convened at the Hague in 1955. The resulting Hague Protocol made certain changes in the Warsaw Convention, including a doubling of the monetary limits to $16,600.\footnote{For background information leading to the modifications of the Hague Protocol, see Beaumont, The Warsaw Convention of 1929 as Amended by the Protocol Signed at the Hague on September 28, 1955, 22 J. AIR L. & COM. 414 (1955); Calkins, Grand Canyon, Warsaw and the Hague Protocol, 23 J. AIR L. & COM. 253 (1956); Parker, The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929, 14 J. AIR L. & COM. 37 (1947); Wetter, Possible Simplification of the Warsaw Convention Liability Rules, 15 J. AIR L. & COM. 1 (1948).} Sufficient public pressure in this country was advanced in opposition to the low limit of liability so that the Hague Protocol was not ratified by the United States.

Finally, public pressure in opposition to the low limit of liability of the Warsaw Convention caused President Johnson to announce the decision of his Administration to withdraw from it; and, on No-
November 15, 1965, a formal intent to denounce the Treaty was filed. Under article 39 of the Treaty, the denunciation was to become effective six months after filing. The effect of the threatened denunciation by the United States was devastating, immediate and obvious to other countries. Since United States airlines carried a major portion of passengers who flew on international flights, and since the United States was either the point of origin or destination for many international flights, the effect of possible United States withdrawal from the Treaty was of definite and major concern. At the same time that the notice of denunciation was deposited, the United States let it be known that if the adherents to the Warsaw Convention were to agree to liability limits of about $75,000 per passenger, the United States was prepared to withdraw its notice of denunciation prior to the time it would go into effect. Under the threat of denunciation of the Treaty by the United States, the Montreal Conference convened in 1966.

At the Conference, the United States delegation took the position that although the continued maintenance of an international treaty system in international air transportation was desirable, the limitation of liability per passenger must be raised. Several plans were proposed and discussed, resulting in an eleventh hour agreement among the participating governments that the monetary limitation contained in the Warsaw Convention would, in effect, be increased to $75,000 per passenger. The United States then agreed to withdraw its denunciation.¹⁵

¹⁴ Any party could withdraw under article 39.

¹⁵ In addition to most United States air carriers, the following foreign air carriers are among the signatories to the Montreal Interim Agreement: Aer Lingus Teoranta; Aerlínte Éireann Teoranta; Aerolineas Argentinas; Aerolineas Peruanas, S.A.; Aerovias de Mexico, S.A.; Aerovias Nacionales de Colombia, S.A.; Air Afrique; Air Canada; Air France (Compagnie Nationale Air France); Air India; Air Jamaica (1968) Ltd.; Air New Zealand Ltd.; Air Panama International, S.A.; ALIA—The Royal Jordanian Airlines; Alitalia-Linee Aeree Italiane—S.p.A.; All Nippon Airways Company, Ltd.; ALM Dutch Antillean Airlines; Area Ecuador Airlines; Austrian Airlines; Bahamas Airways, Ltd.; British European Airways Corporation; British Overseas Airways Corp.; British United Airways (Services), Ltd.; British West Indian Airways, Ltd.; Caledonian Airways (Prestwick), Ltd.; Canadian Pacific Airways, Ltd.; China Airlines; Compañía Mexicana de Aviación, S.A.; Cyprus Airways Ltd.; Czechoslovak Airlines; El Al Israel Airlines, Ltd.; Empresa Guatemalteca de Aviación; Ethiopian Airlines S.C.; Finnair, Aero O/Y; Flightexec, Ltd.; Flugfélag Islands, H.F. (Icelandair); Fowler Aircraft Rentals, Limited; Great Lakes Airlines, Ltd.; Great Northern Airways, Ltd.; Harrison Airways, Ltd.; Iberia Air Lines of Spain; Icelandic Airlines, Ltd. (Loftleider); Iraqi Airways; Japan Air Lines; Jugoslovenski Aero-
The Montreal Interim Agreement relates only to flights which include a point of origin, destination, or agreed stopping place in the United States (according to the ticket issued). The Agreement provides that the limit of liability of the air carrier shall be $75,000 inclusive of legal fees and costs, and further provides that the air carriers shall not avail themselves of any defenses under Article 20 of the Convention or as amended by the Hague Protocol. The Agreement further provides that it does not affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage that resulted in death, wounding, or other bodily injury of a passenger.

The net effect of the Montreal Interim Agreement is to create almost absolute liability on the part of the adhering airline (regardless of the airline's innocence) and to establish a per passenger limit of liability of $75,000, breakable only by proof of wilful and wanton misconduct on the part of the airline.

The Montreal Interim Agreement did not amend the text of the Warsaw Convention or the Hague Protocol, and the Warsaw Convention remains intact as an international treaty. Under the Montreal Interim Agreement, the participating air carriers, in accordance with Article 22(1) of the Warsaw Convention, provided for an increase in a higher limit of liability—to $75,000, and further agreed to waive certain defenses that were provided in the Warsaw

transport (JAT); KAR-AIR oy; KLM Royal Dutch Airlines; Korean Air Lines, Inc.; Lebanese International Airways; Leeward Islands Air Transport Services, Ltd.; Linea Aerea Nacional—Chile (LAN); Lineas Aereas Costarricenses, S.A.; Lineas Aereas de Nicaragua, S.A.; Lloyd International Airways, Ltd.; Lufthansa German Airlines; Luftverkersunternehmen Atlantis AG; Malaysian Airways, Ltd.; Malta Airways Company, Ltd.; Martin's Air Charter; Middle East Airlines Company, S.A.L.; Midwest Airlines, Ltd.; Millardair, Ltd.; Moore Aviation, Ltd.; Nordair, Ltd.—Nordair, Ltd.; Olympic Airways, S.A.; Pacific Western Airlines, Ltd.; Pakistan International Airlines (PIA); Philippine Air Lines, Inc.; Polynesian Airlines, Ltd.; Qantas Airways, Ltd.; Sabena Belgian World Airlines; Scandinavian Airlines System (SAS); Seagreen Air Transport; Servicio Aereo de Honduras, S.A.; South African Airways; Sudan Airways; Sudflug Suddeutsche Fluggesellschaft Mbh; Swiss Air Transport Co., Ltd.; TACA International Airlines, S.A.; TAN Airlines; Transair, Ltd.; Transavia Holland, N.V.; Transglobe Airways, Ltd.; Union de Transports Aeriens; United Arab Airlines; Varan Air-Siam Air Co., Ltd.; Varig Airlines (S.A. Empresa de Viacao Aerea Rio Grandense); Venezolana Internacional de Aviacion, S.A.; Wardair Canada, Ltd.; Zambia Airways. Listed in 1 L. KRIENDLER, AVIATION ACCIDENT LAW § 12A.03 (1971).
Convention as they apply to international transportation involving the United States.\footnote{The Agreement was embodied in Agreement CAB 18900 and filed with the Civil Aeronautics Board pursuant to § 412(8) of the Federal Aviation Act of 1958 and Part 261 of the Board's Economic Regulations. See 49 U.S.C. § 1502, "Liability Limitations of Warsaw Convention and Hague Protocol, Order Appointing Settlement."}

In its order approving the Agreement entered into pursuant to the Warsaw Convention, the Civil Aeronautics Board stated:

The signatory carriers provided by far the greater proportion of international transportation to, from, and within the United States. The agreement will result in a salutary increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The United States government has concluded that such arrangements warrant withdrawal of the notice of denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefit to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States . . . .

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.\footnote{Id.}

Although the Warsaw Convention and Montreal Interim Agreement are in full force and effect today, it is worth noting that another amendment to the Treaty has been signed. In February 1971, representatives of many governments, including the United States, convened in Guatemala City to consider additional revisions to the Warsaw Convention. These revisions, now known as the Guatemala Protocol, will, if ratified by the United States, raise the airlines' limit of liability to at least $100,000, unbreakable for any reason, and make the airlines' liability absolute—that is, on a "no-fault" basis.\footnote{See Mankiewicz, Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention, 38 J. AIR L. & COM. 519 (1972); Fitzgerald, Guatemala City Protocol to Amend the Warsaw Convention, 9 CAN. YEARBOOK INT'L L. 219 (1971); Guatemala City Protocol to the Warsaw Convention and the Supplemental Plan under Article 25-A; A Proposal to Increase Liability and Establish a No-fault System for Personal Injuries and Wrongful Death in International Aviation, 5 NYU INT'L L. AND POLITICS 313 (1972); Mankiewicz, WARSAW CONVENTION: 1971 PROTOCOL OF GUATEMALA CITY, 20 AM. J. COMP. L. 335 (1972).} In addition, other proposals relating to supplementary
payments to United States citizens are also being considered.  

II. JUDICIAL PRECEDENT AND THE CONSTITUTIONALITY OF THE WARSAW CONVENTION TREATY

There has been no reported case in which a court of review has held the Warsaw Convention to be unconstitutional on any ground. Of the four reported cases which have considered the constitutional issue, three appellate courts have specifically rejected arguments of unconstitutionality, and one case at the trial court level did not really decide the issue because that court ruled the Treaty was inapplicable on other grounds.

The trial court in Garcia v. Pan American Airways, specifically rejected the argument of unconstitutionality presented by the plaintiff, stating:

Under the facts and the law, I am impelled to reject plaintiff's contention that the treaty resulting from the said Convention is unconstitutional . . . .

The power to declare a law unconstitutional should be exercised cautiously by a lower court and avoided, if possible; and unless it appears clearly, without the slightest doubt, that the law is unconstitutional, it is the better practice for the lower court to assume its constitutionality until the contrary is declared by a court of appellate jurisdiction. This policy is especially desirable where the law is of great importance and far-reaching effect; or, if the law has been effective for an appreciable period of time.  

On appeal, the plaintiff apparently argued that the Convention's limitation was invalid on grounds of public policy, rather than on constitutional grounds. The appellate court stated that the Warsaw Convention overrides the public policy of the State of New York, and held that no constitutional provision existed requiring higher liability limits than those contained in the Treaty.  

Since the Guatemala Protocol amends the 1929 treaty (Warsaw Convention) the United States Constitution requires ratification by the President with the advice and consent of the Senate, before the revisions become effective. U.S. Const. art. II § 2. As an aside, the new Massachusetts "no-fault" bill in automobile matters has been held constitutional. Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971).  


50 N.Y.S.2d 250 (1944).  

Id. at 251.  

The district court in *Indemnity Insurance Company of North America v. Pan American Airways*, also rejected a challenge to the constitutionality of the Warsaw Convention. The court stated that the Treaty did not impinge on Congress' power to regulate commerce or deprive the plaintiff of his property without due process because "statutes for the limitation of liability are no novelty." The court in *Pan American* cited, in support of its statement, two United States Supreme Court decisions that upheld the validity of the liability limitation provisions of the Federal Maritime Act and the Workmen's Compensation statute of the State of Washington.

In *Pierre v. Eastern Airlines*, the plaintiff contended that the Warsaw Convention deprived him of his constitutionally guaranteed right to trial by jury. The court rejected this contention, concluding that the limitation of damages was not in contravention of the Bill of Rights contained in the Constitution. The court stated:

In many instances, such as the limitation of liability in admiralty cases . . . and the construction of various State Workmen's Compensation Acts, it has been held that there was violation of neither due process clause . . . nor the right to trial by jury . . . of the Amendments to the Constitution. In all such modifications of legal practice, it would seem, analogically at least, that the assessment of damages is not to be considered an exclusive function of the jury.

In *Burdell v. Canadian Pacific Airlines, Ltd.*, a decision of the Circuit Court of Cook County, Illinois, Judge Nicholas J. Bua rendered an opinion in 1969 (later withdrawn) in which he stated, in dictum, that the damage limitations of the Warsaw Convention were unconstitutional. Judge Bua, however, did not consider the Treaty's foreign policy ramifications, and, in general, glossed over

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84 Id. at 340.
87 WASH. REV. L. ARM. §§ 51.04.010 - 51.98.050 (1972).
89 Id. at 488.
90 10 Av. Cas. 18,151 (1st opinion); 11 Av. Cas. 17,351 (2nd opinion).
the Convention's status as a Treaty of the United States, stating, per dictum, merely that the limitation contained in the Warsaw Convention ($8,300) was "arbitrary, irresponsible, capricious and indefensible." Before an order was entered pursuant to this opinion, a motion for rehearing was granted and a new opinion filed in which the court merely held that the Warsaw Convention was inapplicable on the facts of the case. The case was later settled.

Thus there has not been any final decision by any court, either trial or appellate, that the limitation of liability provisions contained in the Warsaw Convention are unconstitutional. There are at least three decisions, Garcia, Indemnity Insurance Company, and Pierre, in which appellate courts specifically have held that the Treaty limitation is not in contravention of the due process and equal protection clauses of the United States Constitution. Nor has any court held the Montreal Interim Agreement, enacted pursuant to the Warsaw Convention, unconstitutional or invalid on any grounds.

III. TREATY POWER OF THE UNITED STATES AND INTERNATIONAL AIR TRANSPORTATION

A. International Treaty Versus State Public Policy

A public policy of a state clearly must bow to the overriding policy of a treaty of the United States. The leading case on this point is Block v. Compagnie Nationale Air France, in which the court relied upon and quoted extensively from both Garcia, and Indemnity Insurance Company. In rejecting the plaintiff's contentions, the court stated:

Georgia public policy does not control these actions. Federal public policy controls, and Federal public policy authorizes limitations of liability in international transportation by aircraft as shown by the United States' adherence to the Warsaw Convention. Federal public policy authorizes limitation of liability in international air transportation by aircraft in the amount of $8,300.00. Regardless of the consequences, this Court is bound by the

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31 Id. at 18,161.
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Treaty, the decisions, and the public policy established by the Treaty.\textsuperscript{25}

In \textit{Kelley v. Sabena}\textsuperscript{26} the court, in determining that the Warsaw Convention Treaty overrode state law stated that:

Although plaintiffs have made some reference to New York's strong public policy against monetary limitation in wrongful death actions, it is clear that this state policy is irrelevant. Even if the Kilberg doctrine were not otherwise inapplicable, it is well settled that it would be inapplicable in light of the fact that the Convention, and the limitations contained therein, is the Law of the Land and must be applied, notwithstanding contrary state law or public policy.\textsuperscript{27}

\textbf{B. Separation of Powers}

The legal effect of an international treaty entered into by the United States stems from the United States Constitution,\textsuperscript{28} which states that the laws of the United States shall be made pursuant to the Constitution "and . . . all treaties made . . . under the authority of the United States, shall be the supreme law of the land . . . ."\textsuperscript{29} In an effort to determine just how "supreme" a treaty may be, the courts have litigated not only problems involving the counterbalancing of treaties with constitutional provisions, but have also considered the exact wording of the Constitution's clause itself.

Despite abundant opportunity to do so, the Supreme Court of the United States has never declared a treaty unconstitutional, and has refused to enforce only one executive agreement.\textsuperscript{30} The controversy over the wording in the Constitution about the supremacy of treaties has been minimized in a conceptual sense, by declaring

\textsuperscript{25} Id. at 810-11.
\textsuperscript{27} Id. at 145.
\textsuperscript{28} U.S. Const. art. 6, cl. 2.
\textsuperscript{29} Id.
treaties to be "subject to" the Constitution. The manner in which the case law has developed, however, is significant because this development has flavored several important judicial expressions of the treaty-making power of the executive and legislative departments of the government.

The controversy originally arose from the language of the Constitution that the laws of the United States have to be made "pursuant to the Constitution" and that the treaties are "under the authority of the United States." In the words of James Madison, "this insertion was meant to obviate all doubts concerning the force of treaties pre-existing . . ."41 the drafting of the Constitution. In other words, the constitutional language does not put treaties beyond the Constitution, but rather gives effect to treaties entered into during the early days of the republic. The United States Supreme Court has agreed with this analysis.42

Nevertheless, close analysis of the long line of Supreme Court cases involving international treaties discloses that although the Supreme Court has accepted this principle, it has minimized it by consistently refusing to find a constitutional violation in an international treaty properly entered into by the legislative and executive departments of the government. Or, to put it another way, the Supreme Court has always found that the executive and legislative departments of the federal government have not violated constitutional prohibitions in the furtherance of international affairs and treaty obligations. The reasons for this historical development are well defined.

The United States has had a long history of permitting the executive department of the federal government, with or without consent of the Senate, to have an enormous amount of discretion in this government's relations with foreign countries. The opinion of the Supreme Court of the United States in United States v. Curtis Wright Export Corporation,43 is perhaps the leading expression of this attitude. In Curtis Wright, the President requested Congress to pass a special resolution prohibiting American citizens from providing arms to the Chaco Rebellion. The Supreme Court reversed a

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42 Reid v. Covert, 354 U.S. 1 (1957).
43 299 U.S. 304 (1936).
lower court decision that had held that no authority existed to limit the activities of American citizens under the factual situation presented to the court. In a sweeping opinion the Supreme Court affirmed the principle that the federal government, especially the executive, possessed strong powers involving external sovereignty. Since treaties and executive agreements are the means by which the authority of the federal government is exercised, the Supreme Court made it clear that international agreements that may impinge on certain domestic rights of United States citizens can nevertheless be constitutionally valid; and, in *Curtis Wright*, held it constitutionally valid for the federal government to prevent American businessmen from making a profit from the Chaco Rebellion. The Supreme Court has upheld the validity of many other treaties and executive agreements. They will be considered invalid only if they are declared to contain the most blatant constitutional violations, and, to date, this has not happened.44

*DeGeofroy v. Riggs*45 provides one of the earliest expressions of the Supreme Court’s attitude toward the treaty making power:

The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its department, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids . . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.46

Although there are many other Supreme Court opinions that indicate this same point of view, the Court has invariably refused to hold any treaty to be in violation of the Constitution. For example, in *State of Missouri v. Holland*,47 Justice Holmes upheld the constitutionality of a treaty that regulated migratory birds in contravention of certain state statutes. The State of Missouri alleged an unconstitutional interference with its tenth amendment right to

45 133 U.S. 258 (1890).
46 *Id.* at 297.
47 252 U.S. 416 (1920).
regulate affairs that were not explicitly granted to the federal government in the Constitution. The Supreme Court rejected these allegations, holding that the treaty did not conflict with any prohibitions contained in the Constitution and that no "invisible radiation" existed from the tenth amendment. Although the Court stated that "we do not mean to imply that there are no qualifications to the treaty-making power . . .," it explained that the presumption of validity of a treaty was extremely heavy because "here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power."  

In United States v. Pink  the Supreme Court rejected allegations of deprivation of property without due process of law from expatriated Russian nationals after the United States Government entered the Litvinov Assignment with the newly recognized Soviet Government. This agreement, in effect, deprived the nationals of their financial interest in a defunct Russian insurance company. The Supreme Court ruled that the foreign policy considerations of the assignment outweighed the expatriots' claims. In Pink, the claimants clearly, although constitutionally, were deprived of their property rights by the terms of an international agreement enacted in the interests of the United States.

The restraint with which the courts of the United States have considered the validity of an international treaty on constitutional grounds is consistent with normal judicial practice. It is well settled, for example, that a court will not declare a statute unconstitutional if the statute before the court is otherwise deemed inapplicable under the facts presented to the court.  

Whenever the Warsaw Treaty's limitation has actually been held not to apply, it has been because of certain procedural defects, not because the Treaty, in and of itself, is in violation of the United States Constitution. For example, in Lisi v. Alitalia Airlines, the court held that the limitation of the Treaty did not apply because

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48 Id. at 433.
49 Id. at 435.
50 315 U.S. 203 (1942).
52 370 F.2d 508 (2d Cir. 1966), aff'd, 390 U.S. 455 (1968).
of the lack of proper notice on the ticket given to the passenger. In dissenting, however, Judge Moore stated that:

The majority of their opinion indulge in judicial treaty making . . . the original limitations in the Convention may well be out-moded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts. Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislature and executive branches of Government. . . .

The ticket notice requirements are now spelled out in the Montreal Interim Agreement, adopted after the accident involved in Lisi. Thus, although American courts have been concerned with the Warsaw Convention, they have taken the attitude that the liability limitation of "... ($8,300) is small recompense for the loss of human life. But so long as our political branches choose to be bound by this Convention, the judiciary has no choice but to enforce its restrictive provisions."

C. The Treaty Involves Non-Judicial Political Questions

It is submitted that a constitutional challenge to the Warsaw Convention, properly entered into by the executive and legislative departments of the federal government and administered for over thirty-nine years by the executive department, falls within the classification of "political questions" as recently defined by the Supreme Court. In Baker v. Carr, the Supreme Court described the factors that would identify such a "political question:"

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of govern-

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83 Id. at 515.
ment; or an unusual need for unquestioning adherence to a political
decision already made; or the potentiality of embarrassment from
multifarious pronouncements by the various departments on one
question. 56

The Court in Baker emphasized the need, however, for a case
by case inquiry into the issue. The Court of Appeals for the Second
Circuit echoed this need in United States v. First National City
Bank. 57

Mechanical or overbroad rules of thumb are of little value; what
is required is a careful balancing of the interests involved and a
precise understanding of the facts and circumstances of the par-
ticular case. 58

Any challenge to the constitutionality of the Warsaw Convention
meets the criteria laid down by the Supreme Court in Baker.

The Constitution has relegated the treaty-making power to the
executive and legislative branches of the federal government. The
overriding interest in the provisions of the Warsaw Convention is
in the executive department which produces policies in interna-
tional affairs that the judiciary should not attempt to regulate. In-
dependent "denunciation" of the Warsaw Convention by the judi-
ciary would show lack of respect due to the executive and legis-
lative branches that have worked for over thirty-nine years to de-
velop and administer international air transportation under the
Warsaw arrangements. And, finally, a judiciary that attempts to
negate the important liability and limitation features of the War-
saw Convention would not only reverse necessary political decisions
that have already been made by the executive department in its
dealings with foreign countries in international air transportation,
but also would cause substantial embarrassment to the United
States Government in its long standing commitments to other coun-
tries under the Treaty. 59

Foreign policy "conflicts" between the executive and judicial
branches of the government have historically been held to be po-
itical questions, and the courts have emphasized separation of
power concepts in this area. The Court in Baker 60 stated that al-

56 Id. at 217.
57 396 F.2d 897 (2d Cir. 1968).
58 Id. at 901.
59 See Bishop, Unconstitutional Treaties, 42 Minn. L. Rev. 773 (1958).
though some foreign relations matters lie within the judicial cognizance, a "single voiced statement of the government's views" is usually demanded. The Court in *Baker* also cited and quoted from *Oetjen v. Central Leather Company,*\(^1\) stating that:

The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.\(^2\)

The courts have also maintained that historical development and prior governmental action in dealing with foreign countries is of prime importance when considering the validity of international treaties. The Supreme Court in *Baker* stated that "Governmental action . . . must be regarded as of controlling importance."\(^3\) In *Sayne v. Shipley,*\(^4\) provisions of a treaty regulating extradition between the Canal Zone and Panama were in dispute. The State Department advised the court that the Treaty was still in effect. The court then stated:

Because we recognize that the conduct of foreign affairs is a political, not a judicial function such advice, while not conclusive on this Court is entitled to great weight and importance.\(^5\)

The Supreme Court has also recognized that there are many illustrations in the area of the executive department's conduct of foreign relations that involve "considerations of policy, considerations of extreme magnitude, . . . entirely incompetent to the examination and decision of a court of justice."\(^6\) As the Supreme Court has recognized, such policy matters should be considered not only when

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\(^1\) 246 U.S. 297 (1918).

\(^2\) Id. at 302. See also Velvel v. Johnson, 287 F. Supp. 846 (D.C. Kan. 1968), where the district court said:

Among the questions which have been recognized as political rather than judicial in nature, none comes more clearly within the form of classification than those which involve the propriety of acts done in the conduct of the foreign relations of our government . . . . Indeed, it appears that the courts have unanimously agreed to refrain from interfering with that great group of matters involving foreign relations of the United States with other nations.

Id. at 850.


\(^4\) 418 F.2d 679 (5th Cir. 1969).

\(^5\) Id. at 684. See also Kelley v. Sabena, 242 F. Supp. 129 (E.D.N.Y. 1965).

clearly definable criteria are available for decision, but also when possible international consequences are important.77

When the various policies, criteria, and international consequences involved in a challenge to the constitutionality of the Warsaw Convention are considered, the applicability of all these factors to the tests indicated by the Supreme Court in Baker become apparent. Judicial consideration of these matters would not only violate separation of power concepts, internationally embarrass the executive and legislative departments of the government (after their having adhered to and administered the Treaty and Agreement under it for many, many years), but also would result in substantial and adverse consequences to the credibility of the United States and the direction its foreign policy has taken in its dealing with other countries in international air transportation.

There can be no doubt that the Warsaw Convention and the Montreal Interim Agreement enacted pursuant to its provisions, are of utmost concern to United States foreign policy in its relations with other countries. The Warsaw Convention was signed by the President, the Senate gave its advice and consent, and the Treaty has been administered by the executive branch of the government for over thirty-nine years. The commercial air fleet of the United States is the largest and most important one in the world; regulation of its international air operations, as well as the international air operations of other countries has, for the past thirty-nine years, revolved around the Warsaw Convention and the institutions and agreements springing from it. There have been innumerable statements by courts, government officials, air transport experts, and foreign policy diplomats and functionaries that show the very real importance of this Treaty to the stability of international air transportation, and the intensity of concern surrounding it by all countries.

The Department of State has called the Warsaw Convention "one of the principal multi-lateral agreements applicable to international air transportation. It . . . creates a uniform body of law with regard to the rights and responsibility of passengers, shippers, and air carriers in international transportation."88 The legal committee of the International Air Transport Association listed the

"... good features of Warsaw ... [including] ... choice of courts, government law ... and standard forms of traffic documents. Uniformity is of great importance to carriers and their customers."68

The courts have reiterated that the Treaty's purpose is "to effect a uniformity of procedure and remedies."70

Leonard Meeker, legal advisor to the Department of State, in testimony given before the Senate Foreign Relations Committee in May 1965, indicated the official attitude of the Department of State toward the Warsaw Convention:

On the whole, the Department of State believes the Warsaw convention has been beneficial to air transportation and to travelers ... if we had no Convention, many victims of air disasters would have great difficulty in pursuing effective remedies and securing prompt recovery in a case of accident occurring over the high seas or in foreign countries with laws different than our own.71

When the United States withdrew its denunciation to the Warsaw Convention in May 1966, the note sent by the United States to the Polish government further reflected the United States Governments' strong belief in the Convention's importance: "The United States of America believes that its continuing objective of uniformity of international law and adequate protection for international passengers will be best assured within the framework of the Warsaw Convention ..."72

Besides these general statements of the importance of the Warsaw Convention internationally, federal officials and commentators in the field have emphasized the Convention's importance to American air commerce, and the negative effect destruction of the Convention's system would have on United States' relations with foreign governments.

In the Senate Foreign Relations Committee Hearings, Mr. Meeker stated that "perhaps the most serious effect of denunciation would be the damage that such action would have upon the position

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68 IATA Bull. No. 34 at 18.
and prestige of the United States as a world leader in the promotion of international co-operation in aviation matters.” He further forecast economic disadvantages: “Such retaliations could take both political and economic form. For one thing, the billion dollars in annual aircraft exports from this country could be in danger.”

Others have forecast technical disadvantages which would result from any destruction of the Warsaw system. For example, in a letter to Undersecretary of State Thomas Mann, on March 25, 1966, William F. Mackee, IGIA chairman, stated:

The Federal Aviation Administration feels it extremely important that the high level of cooperation . . . be continued in the future . . . denunciation of the Warsaw Convention could result in deterioration of international cooperation in technical aviation matters. The benefits to the traveling public which have resulted from the technical agreement achieved in the ICAO have been substantial and have made significant contributions to air safety.

John E. Steven, general counsel for the ATA, commented that the United States Government cannot unilaterally modify the Warsaw Convention or impose higher liability limits without undermining the system and “destroying the world aviation co-operation and United States aviation leadership.”

Andreas Lowenfeld and Allan I. Mendelsohn, Chairman and delegate, respectively, of the United States delegation to the Montreal Conference in 1966, reported that the dominant attitude at Montreal was “that if the United States withdrew from Warsaw, the whole treaty would unravel, with a resultant setback for the uniformity of documentation and legal rules achieved through the Convention.” As exhaustively reported by both Mr. Lowenfeld and Mr. Mendelsohn, world governments and airlines worked frantically to reach an agreement on higher liability limits in order to prevent the United States’ denunciation of the Treaty. Even after the Montreal Conference was dissolved, work continued, and agreement was finally reached only shortly before the denunciation was

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77 Supra note 71, at 49.
74 Id. at 71.
77 Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497, 590 (1967).
to take effect. These efforts by the United States Government, other governments, and aviation representatives from around the world, show conclusively that the Treaty and Agreement are of vital importance in inter-governmental relations involving international air transportation.

The Montreal Interim Agreement was certainly not a unilateral agreement resulting from a "conspiracy" to cheat injured passengers. The Montreal Interim Agreement resulted from the threat of denunciation of the Warsaw Convention by the United States, the world's greatest power in international air transportation. As a result of the substantial pressure the United States placed upon other countries and foreign airlines, an agreement was reached not only to increase the limit of liability of air carriers to $75,000, but also to require those carriers to waive certain defenses they otherwise would have had under the Treaty.

There can be little doubt that destruction of the Warsaw system would also have negative effects on conflict of laws problems involving international air transportation. For example, local limitations of liability could be inflicted on international air travelers. While American travelers would probably be less affected by conflicts problems, the airline industry would certainly be seriously affected. The rights of an American citizen engaged in a journey between two foreign points on an American flag carrier are not clear in the absence of the Treaty. The status of an American citizen injured while on a journey between two foreign points on a foreign flag carrier is even more in doubt. Damages might be governed by local law. Choice of law in an accident involving a foreign resident engaged in a journey to or from the United States on a United States carrier may or may not depend on a "contacts" theory with all of its inherent problems of interpretation and proof. A claim on behalf of a foreign resident engaged in a journey to or from the United States on a foreign carrier, a claim on behalf of the foreign resident engaged in a journey between two foreign points on an American carrier, and a claim on behalf of a foreign resident engaged in a journey between two foreign points on a foreign carrier would also involve conflicts problems. Virtually all of these problems are uniformly covered by the Warsaw Convention.18

A report of the New York City Bar Association asserted that, in

18 See note 1 supra.
the absence of the Warsaw Convention, the market structure and general need for uniformity would force governments of the world to bargain about routes, rates, capacity and frequency of flights. The report also pointed out that in resolving these matters, "bargaining position" would not necessarily depend on adherence to agreements, but rather would depend upon potential air markets and willingness or ability to offer reciprocal benefits or retaliation for another government's restrictions. And, again, the practice of each nation would obviously be to construe its own rules and regulations to its own advantage.

Therefore, if the Warsaw Convention did not exist, a trend away from uniformity and stability in international air law would certainly result. Concern by the United States Government in the Warsaw Convention has been and continues to be intense. The United States Government, other governments, and all major world airlines have been working for years to modify and compromise the sometimes conflicting interests involved in the administration of the Treaty. The mere existence of these continuing efforts by the executive and legislative branches of the government is the strongest of reasons for judicial restraint.

In view of the comprehensive character of the Warsaw Convention and the inter-relations of each party to it, it is difficult to understand how the constitutionality of the monetary limitation can rationally be challenged separately from the rest of the Treaty. The Treaty has always been considered as an integral whole revolving around the liability provisions and monetary limitations. The United States Government never ratified the Hague Protocol because it was dissatisfied with the low limits. At the Montreal Conference most negotiations hinged around a revision of the monetary limitation. The proposal of virtually absolute liability contained in the Montreal Interim Agreement was closely linked to the monetary limitation itself, and was the reason the airlines originally disagreed with the proposal, as well as the reason the United States executive department eventually found it acceptable.

A treaty is primarily a contract between two or more independent nations. For any court to judicially abrogate the monetary

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limitation would be the worst kind of contractual breach to a foreign country or to a foreign airline. Such a breach would result in an extreme embarrassment to the executive department of the United States, and would also throw the status of all international air agreements into substantial doubt.

Nor can the monetary limitations be considered separable from the rest of the treaty in the way some clauses are separable from statutes. In Williams v. Standard Oil Company of Louisiana, the Supreme Court stated the general rule in this regard:

The general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that standing alone, legal effect can be given to it, and that the Legislature intended the provision to stand in case others included in the act and held bad should fall.

The Supreme Court added that the primary question is whether the legislative intent overcomes the heavy presumption that a statute was to be effective only in its entirety. If the provision complained of is independent in the sense that its removal will leave the purposes of the statute substantially unaffected, then it can be inferred that the provision was intended to be separable. Another test is whether the statute would have been enacted if the provision complained of had been struck out at the time of passage.

In reviewing the intent of the participating governments and the activities surrounding the passage of the Warsaw Convention and the Montreal Interim Agreement, there can be no doubt that the explicit intent was that the liability provisions and monetary limitations could not be separable from the rest of the arrangement. Furthermore, removal of these provisions would undoubtedly eliminate uniformity of international air transportation rules and thus drastically and adversely affect the purposes of the Treaty.

IV. MONETARY LIMITATION OF RECOVERIES AND THE DUE PROCESS CLAUSE

Statutes in this country that limit liability to various monetary sums have been part and parcel of American law for many years.


278 U.S. 235 (1929).

Id. at 117.

See also, Carter v. Carter Coal Co., 298 U.S. 238 (1936).
The constitutionality of the Illinois Wrongful Death Act, for example, has been upheld by the Illinois Supreme Court:

The legislature took away no right when it enacted the statute. It created both the right and the remedy, and we think that its power to limit the maximum recovery in the action that it created cannot be questioned. The fact that most States place no limit upon the amount recoverable, or that the legislative limit may seem unduly low when contrasted with recoveries in other actions, does not affect the power of the legislature or the validity of its action. 86

Other examples of constitutional limitations of liability are the Illinois Dram Shop Act,88 and the Illinois Workmen's Compensation laws.87

Though limited in recent years, the concept of immunity or limitations on liability of charitable institutions has been widely followed both nationwide and in Illinois. It is true that Darling v. Charleston Community Memorial Hospital,88 said that charitable immunity in Illinois can no longer stand in light of Molitor v. Kaneland Community Unit District 302.89 As in Molitor, however, the Darling court did not hold the immunity concept itself unconstitutional, but said it had been applied in an arbitrary and capricious manner, and was no longer justified by public policy. The charitable immunity had allowed charitable institutions to limit their liability according to the amount of insurance they held, their trust fund being immune from tort liability.90 This self-serving feature of charitable immunity caused its demise in Illinois. Another factor was the modern structure of liability insurance that enabled charitable institutions to obtain full protection.

Other states, however, have continued to validly implement the immunity by more evenhanded administration and retention of a more paternal attitude over charitable institutions. For example,

87 Ill. S. H. A. ch. 43, § 135. The Illinois Supreme Court in Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961), held that the $20,000 monetary limitations contained in the Dram Shop statute were constitutionally valid.
88 Ill. S.H.A. ch. 48, § 138.7 et seq. The Illinois Supreme Court held this statute constitutionally valid, including all of its monetary limitations. See Keeran v. Peoria B & C Traction Co., 277 Ill. 413, 115 N.E. 636 (1917).
89 33 Ill.2d 326, 211 N.E.2d 253 (1965).
90 18 Ill.2d 11, 163 N.E.2d 89 (1959).
Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, revealed the growth of a viable scheme of charitable immunity. The court noted that the public policy of protection of institutions that are for the benefit of the whole community constitutionally justifies the retention of charitable immunity. It added that the government should affirmatively encourage the development of such institutions using any means necessary, with the reasonableness of the means and ends sought the only limit to that power. The court in Sanner noted that although the charitable institutions scheme was not unconstitutional, a better plan could be found; it then pointed to the features of a Maryland statute. This statute limits a charitable institution's liability to the limits of its insurance policies, and sets the minimum size for the policy at $100,000. The court noted that the new statute leaves the basic right to bring suit unimpaired, but still gives protection to charitable institutions.

Sovereign immunity is another valid limitation of liability. This immunity takes many forms. In Illinois, the State was once protected by art. 4, section 26 of the (old) constitution, but state sub-units and local government units were not. They once were immune according to common law, but Molitor v. Kaneland Community Unit District 302 extinguished this immunity, not on basic constitutional grounds, but on the grounds of arbitrary and capricious administration of the doctrine. Before Molitor a morass of statutory and common law had developed that regulated governmental sub-unit liability in many different ways. The court ruled that the resulting hodge-podge itself violated the fourteenth amendment of the United States Constitution. After Molitor, the state legislature passed a number of bills limiting or extinguishing the liability of certain units of local government. The Illinois Supreme Court declared many of these bills to be unconstitutional on grounds similar to those in Molitor. That court has refused to rule whether the State's sovereign immunity provided by article 4, section 23, con-

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3 See Md. Code Annot. art. 43, § 556A (1966 Supp.), which did not apply to the case because of its recent passage.
flicted with the fourteenth amendment of the federal constitution. The new Illinois Constitution abolishes sovereign immunity.

Another well known constitutionally valid limitation to causes of action is the automobile guest statute that prevents actions against the driver of an automobile unless wilful and wanton conduct contributed to cause the injury. It should be noted, however, that the California Supreme Court recently held that the California guest statute violated the equal protection clause because it was discriminatory and contained irrational exceptions and classifications.

Besides the various state limitations to liability, the federal government limits liability in admiralty and maritime matters. These statutes generally limit liability in proportion to the tonnage of the ship and similar factors. The constitutionality of these limitations has been upheld. Likewise, the Supreme Court in Old Dominion Steamship Co. v. Gilmore, upheld a policy provision limiting recovery for loss of life and bodily injury according to the tonnage of the ship involved. Another federal limitation to liability is the Longshoreman and Harbor Workers Compensation Act.

Finally, the federal government limits its own liability by exempting certain activities from coverage under the Federal Tort Claims Act or the federal jurisdictional statute. These exemptions are diverse in nature. Sub-section (a) pre-empts application of strict liability principles to government employees if due care has been used in the execution of a statute or regulation. Under other

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88 Brown v. Merlo, 106 Cal. Rept. 388, 8 Cal.3d 855, 506 P.2d 212 (1973) held the California automobile guest act as violative of the equal protection guarantees of the California and United States Constitutions because it was discriminatory and contained irrational exceptions and classifications.
91 207 U.S. 398 (1907).
sub-sections claims arising out of the mail carriage,\textsuperscript{107} collection of customs duty,\textsuperscript{108} detention of goods,\textsuperscript{109} and imposition of quarantine are exempted.\textsuperscript{110} Sub-section (h) exempts "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abusive process, liability, slander, misrepresentation, deceit, or interference with contract rights."\textsuperscript{111}

Claims in connection with military service are also exempted from the Federal Tort Claims Act. In \textit{Feres v. United States}\textsuperscript{112} the government was held not liable for the wrongful deaths of several servicemen suffered in the course of their military service. The deaths were caused by government negligence involving a barracks fire and medical malpractice during an operation. The court in \textit{Hale v. United States},\textsuperscript{113} explained the justification for this doctrine:

The more fundamental reasons for excluding tort actions against the United States for injuries in active military service pertain to such factors as military discipline and government immunity from the results of errors of military judgment.\textsuperscript{114}

The Judicial Code and Judiciary Act\textsuperscript{115} also exempt claims arising in a foreign country,\textsuperscript{116} claims arising from the activity of the Panama Canal Company,\textsuperscript{117} claims in regard to the activities of a federal land bank,\textsuperscript{118} and activities arising from the operations of the Tennessee Valley Authority.\textsuperscript{119}

It is therefore clear that legislative enactments that limit liability, not only to the amount of damages awarded, but also to the cause

\textsuperscript{109} Id.
\textsuperscript{111} Id.
\textsuperscript{112} See Blitz v. Boog, 328 F.2d 596 (2d Cir.), \textit{cert. denied}, 379 U.S. 855 (1964), where damages were denied for physical harm allegedly suffered as a result of false imprisonment and unrequested treatment in a Veteran's Administration Hospital.
\textsuperscript{113} 340 U.S. 135 (1950).
\textsuperscript{114} 416 F.2d 355 (6th Cir. 1969).
\textsuperscript{115} \textit{Id.} at 357.
of action itself, have been part and parcel of American jurisprudence for many years.

V. THE WARSAW CONVENTION AND EQUAL PROTECTION OF PASSENGERS

The historical developments leading up to the ratification of the Warsaw Convention, the subsequent developments resulting in the Montreal Interim Agreement enacted pursuant to the Treaty, and the substantial concern currently expressed by other governments and the international air transportation industry concerning the importance of the Treaty in international air travel, demonstrate that substantial justification existed for the enactment of the Treaty and Agreement. Neither the Warsaw Convention nor the Montreal Agreement creates an unconstitutional classification of passengers to the airlines or manufacturers. They are based on policies determined by the executive and legislative branches of the government, and do not deprive international air travelers of equal protection of the law because they are rational and in line with the ends they are designed to meet. They apply equally to the entire class of international air travelers.

In Levy v. Louisiana the Supreme Court set the rule for equal protection attacks on limitations of liability. In Levy, five illegitimate children sued for the wrongful death of their mother. The state court denied recovery because it interpreted the word “child” in the Louisiana Wrongful Death Statute to include only legitimate offspring. The Supreme Court emphasized the intimate familial relationship between a child and his own mother, and held that in cases such as this the biological relationship should rule over the legal, since any other rule would not be “rational.” Levy involved discrimination within one class of plaintiffs.

Passengers, as international air travelers, are members of the class affected by the Warsaw Convention and Montreal Interim Agreement, and therefore there is no rational basis for them to contend that they are being discriminated against. They are treated the same as all other similarly situated persons of the same class. The fact that airplane manufacturers, airport authorities, and

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120 391 U.S. 68 (1968).
121 192 So.2d 193 (1966).
122 See Levy v. Louisiana, 391 U.S. 68 (1968) where plaintiffs did have grounds for claiming discrimination.
governmental units do not come within the scope of the Warsaw Convention or Montreal Interim Agreement does not make the Treaty discriminatory to passengers. No case exists in which either airplane manufacturers, airport authorities, or governmental units have contended that the Warsaw Convention and the Montreal Agreement are unconstitutional simply because liability rules affecting them are not restricted or limited in the same manner as those applied to international air carriers.

Furthermore, the Supreme Court in Levy qualified its opinion by stating that “in applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classification.” In Levy the social classification was “invidious” since it forced the plaintiff to operate under social handicaps. On the other hand, the classification of international air travelers under the Treaty is a purely economic classification and the passenger's social status is totally irrelevant.

The general rule about classification was further articulated by the Supreme Court in McLaughlin v. State of Florida, when the Court stated that the legislative classification must not be arbitrary and:

... must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily; and without any such basis ... [A]rbitrary selection can never be justified by calling it classification.128

The Court added that classification must always be viewed in light of its purpose, and ruled that “normally the widest discretion is allowed the legislative judgment ... normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious.”129

In McLaughlin, the Supreme Court reversed a conviction of an unmarried black man and unmarried white woman who had been living together in violation of a Florida statute. Since the statute

128 391 U.S. at 71.
128 Id. at 190.
129 Id. at 191.
imposed heavier burdens on inter-racial couples than on couples of the same color, the Court ruled that such discrimination on the basis of race was socially "invidious" and therefore was an illegal classification. No socially "invidious" issue is involved in any case involving an international air traveler. Only economic classifications are involved; and each passenger has the same rights under the treaty as all other passengers.

The concept of "invidious" or "social classifications" as compared to "economic classification" was further explained by Judge Marovitz in *Karczewski v. Baltimore & Ohio Railroad Co.*

The Supreme Court has been noticeably more reluctant to interfere with state policy where economic interest as distinguished from the 'basic civil rights of man’, are involved. This reluctance has prompted at least one writer to state that the Equal Protection Clause has 'two sides' — one imposing a definition of reasonableness for classifications involving economic interests which is 'comfortably loose’, and the other rigorously scrutinizing any classification which impinges upon the 'basic civil rights of man'.

In *Morey v. Doud*, the Supreme Court articulated certain standards involving economic classification while declaring unconstitutional an Illinois special interest statute which gave one company an economic advantage over others.

Taking all . . . factors in conjunction—the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by the singling out of the money orders of a named company, with accompanying economic advantages—we hold that the application of the act to appellees deprives them of equal protection of the laws.

In *Morey*, the Supreme Court stated that the legislative classification in that case deserved especially careful scrutiny because the discrimination indicated in the legislation was of "an unusual character." No such situation even remotely exists in a case involving a passenger.

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128 District Judge, Northern District of Illinois.
130 354 U.S. 457 (1957).
132 354 U.S. at 469.
133 *Id.* at 464.
The Supreme Court in *Lindsley v. National Carbonic Gas,*\(^{134}\) upheld a New York statute that created rules which treated one class of mineral water well operators differently from another. The Supreme Court in *Lindsley* reiterated the rules for testing discrimination or unconstitutional classification under the fourteenth amendment:

1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of policy laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.
3. When the classification in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.\(^{135}\)

The Supreme Court has consistently upheld legislative classifications involving economically-based rules.\(^ {136}\)

Uninhibited economic classification is even more widespread in the dealings of the United States with foreign governments. Tariffs effectively discriminate against different goods within the same class—domestic versus foreign textiles, for example. Consumers who have nothing to do with the creation of the classification are nevertheless often constitutionally "penalized" in the inter-

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134 220 U.S. 61 (1911).
135 Id. at 78-79.
est of economics and foreign affairs. Likewise, American manufacturers who sell to certain countries, e.g., Cuba, when the United States forbids the sale of certain goods, are discriminated against, as compared to manufacturers who sell the same goods to other countries, such as Canada. This form of classification has been deemed constitutional.\footnote{See, e.g., DeGeofroy v. Riggs, 133 U.S. 258 (1890).}

It is therefore clear under United States Supreme Court rulings that economic classifications are invested with a heavy presumption of validity, especially when they are made in the context of this country's relations with other countries. The liability restrictions to air carriers, and the liability limitations to international air travelers under the Warsaw Convention and the Montreal Interim Agreement are legitimate implementations of legitimate and necessary ends determined by the executive. They are not arbitrary, having been developed over a period of thirty-nine years through extensive diplomatic conferences among various governments and worldwide representatives of the international airline industry.

It is sometimes alleged that the Montreal Interim Agreement and Warsaw Convention resulted from some sort of airline conspiracy to cheat international air travelers. It is submitted that such an argument borders on the ridiculous. The Montreal Interim Agreement was authorized by the Treaty's Article 22(1) which sets out the liability and adds: "Nevertheless, by special contract, carrier and the passenger may agree to a higher limit of liability." The Montreal Interim Agreement not only complies precisely with the Warsaw Convention, but its form, and the process by which it was concluded, adopted, and approved, give it many of the attributes of an executive agreement. Most major airlines in the world, including those that fly into and out of the United States, have adhered to it. Most foreign airlines are government owned, so that their adherence to the Agreement has the effect of agreements of their respective governments. Also, each participating foreign government was required to transmit approval of the Agreement to the State Department at this government's request. The United States formally approved the Montreal Interim Agreement through a Civil Aeronautics Board order.\footnote{CAB Order No. E-23680, CAB Agreement No. 18900 (May 13, 1966), 31 Fed. Reg. 7301, 7302 (1966).}
Moreover, the historical events leading up to the Montreal Interim Agreement reveal clearly the roles played by both the United States and other governments. As of 1961, the United States had not ratified the Hague Protocol, that had initially been proposed in 1955. Since the United States Government wished higher liability limits, the State Department attempted to have the Hague Protocol ratified in combination with a required program of insurance. Although studies of desired compensation and the feasibility of higher limits were made by the State Department, no successful action by Congress could be obtained, so that in 1965 denunciation of the entire Warsaw Convention was considered in order to pressure such an agreement. The United States Government formed a high level working group composed of representatives from the Department of State, the Civil Aeronautics Board, and the Federal Aviation Administration. These groups developed the opinions and proposals that were discussed at the Montreal Conference, which convened under the threat of United States' denunciation of the Warsaw Convention. The Montreal Convention was convened with delegates from fifty-nine nations of the world. After much debate, the Conference foundered, and it appeared that the threatened denunciation by the United States would become effective. The International Air Transport Association, working closely with the United States State Department, however, managed to hammer out a compromise agreement. Consent was obtained from the carriers, and at the State Department's request, from other governments involved in the Conference. There is no doubt that at all times, the United States Government was the pivotal party from which sprang substantive suggestions, modifications, and, even more important, approval by various foreign governments and the international air carriers.129

With reference to the monetary limitation contained in the Montreal Interim Agreement, at the conclusion of their monumental work, Lowenfeld and Mendelsohn state:

We have seen that the limit in the interim agreement was set as the result of a political compromise, and only quite indirectly in response to economic analysis. But the available statistics, for ex-

ample the figures shown in Tables 1-2 above, may well not be a meaningful guide in terms of the real value of recoveries, since they do not reflect experience with the settlement techniques suggested above. On the other hand, the trend in accident compensation may soon outstrip these figures, making the $75,000 figure appear too low. All that can be said here is that a $75,000 limit per person looks reasonable at this time.\footnote{140 Lowenfeld & Mendelsohn, supra note 139, at 602 (emphasis added).}

Moreover, the United States and other governments as well as the international air industry are presently engaged in considering additional revisions to the Warsaw Convention including an increase in the limits of liability.\footnote{141 See notes 18-19 supra.}

**VI. CONCLUSION**

American courts have specifically upheld the validity of the Warsaw Convention under the United States Constitution. Even though the United States Supreme Court has indicated that international treaties may be subject to some constitutional limitations, no properly enacted treaty has yet been declared unconstitutional.

In practice, the Supreme Court has treated questions of the validity of international treaties in much the same manner as it has treated non-justiciable political questions. The same policies that restrain the judiciary from considering certain political questions are applicable to constitutional issues involving international air transportation under the Treaty. Judicial restraint is essential because the Warsaw Convention and the Montreal Interim Agreement are vital elements in the scheme of international air transportation and thus equally vital elements in the scheme of American foreign relations. Statements and actions of political leaders of the United States and other governments over the years regarding the Treaty and Agreement overwhelmingly support this view.

The appropriateness of judicial review of the Treaty aside, neither the Warsaw Convention nor the Montreal Interim Agreement in any event deprives a passenger of his property without due process of law. Monetary limitations on damages awarded, as well as limitations to causes of action themselves, are not novel to American jurisprudence. There is substantial judicial precedent for imposing constitutional limits to liability on otherwise valid causes
of action: e.g., actions for wrongful death, dram shop, workmen's compensation, admiralty and maritime, actions against the government, charities, etc. The United States Constitution requires only that such limitations on liability comply with equal protection and due process principles through their application by rational and nonarbitrary means. The policy behind the Warsaw system, and the implementation of the Treaty during the past thirty-nine years, meet those requirements.

Nor does the Warsaw Convention or the Montreal Interim Agreement deny a passenger equal protection under the law. The classification of all international air travelers is economic in character and sufficiently reasonable and just in relation to the end it is designed to meet to withstand all constitutional tests established by the United States Supreme Court. All international air travelers subject to the Warsaw Convention and Montreal Interim Agreement are treated similarly.

Since the stability of world air travel hinges to a large extent on the stability of the Warsaw Convention and the Montreal Interim Agreement, they are both of paramount importance in furthering the relations of the United States with foreign governments in international air commerce. Statements and actions of the executive branch of government over the years clearly reflect this importance. Given the foreign policy ramifications of the entire Warsaw system, it is not rationally possible to eliminate the limitation of liability provisions without torpedoing the entire system, thus incurring far-reaching and adverse effects on world air commerce. Considering the Treaty both in contract and in statutory terms, the liability limitation is a vital and inseparable part of it.

The Montreal Interim Agreement, in effect an executive agreement, was made pursuant to, and is itself a valid part of, the larger Warsaw Convention that authorizes international air carriers to contract specially with passengers in order to set higher liability limits if they wish. The Montreal Interim Agreement is certainly not a private "plot" by international air carriers to deny passengers any rights. Indeed, the entire history and background of the Montreal Interim Agreement clearly reveal the leadership role played by the executive department of the United States in its development.
Notes and Comments