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NATIONAL TRANSPORTATION SAFETY BOARD
AIRCRAFT ACCIDENT REPORTS: THE LONG LOST
LEGISLATIVE HISTORY OF SECTION 701(E)

JOHN T. COCKLIN*

I. INTRODUCTION

THE CIVIL AERONAUTICS ACT of 1938's Title VII, Section 701(e) (701(e)) has generated a large number of cases and law review articles for what is essentially a small footnote to the federal laws concerning aircraft safety and investigation. The attention is understandable. Section 701(e) as currently codified reads: "[n]o part of a report of the [National Transportation Safety] Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." National Transportation Safety Board (NTSB or Board) reports are the product of exhaustive investigations into aircraft accidents. To carry out its investigations, the NTSB has unique access to evidence including testimony and wreckage. NTSB investigators perform analysis of the evidence such as micro-coding of cockpit communication and metallurgical tests on wreckage. The reports include the facts of the accident as well as NTSB opinions and conclusions concerning the acci-

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1 Civil Aeronautics Act of 1938, ch. 6.01, § 701(e), 52 Stat. 978, 1013 ("[N]o part of any report or reports of the [Air Safety] Board or the [Civil Aeronautics] Authority 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.").


4 See id. at 4, 25, 33–34, 36.

5 See id. at 1.
dent's causes. They are a potential wealth of evidence for attorneys litigating for, or against, parties involved in the accident, and attorneys and courts have worked hard over the years to narrow 701(e).

This article uncovers the long lost legislative history of 701(e) and reviews the history of 701(e) in the courts. Previous courts and law review authors (save one) found no direct legislative history for the section. Notable among these law review authors were attorneys working for the NTSB and its predecessor agencies: John Simpson in 1950 (Attorney, Bureau of Law, Civil Aeronautics Board), Lawrence Galardi in 1965 (Administrative Assistant to G. Joseph Minetti, Member of the Civil Aeronautics Board), C.O. Miller in 1981 (Director, Bureau of Aviation Safety, NTSB), and Walter Welch in 1982 (U.S. Administrative Law Judge, Civil Aeronautics Board and NTSB). Also notable was an oft cited law review comment written by Roy Tress Atwood in 1987. In 1952, however, a second-year law school student at the University of California named R. Bruce Hoffe discovered the legislative history of 701(e). His article never landed on the citation trail and his research sat quietly on the pages of the California Law Review for fifty years. While the analysis of the legislative history contained herein is entirely the author's own, credit goes to Hoffe for finding the missing pieces first.

The point of this article is not to weigh the merits of the courts' interpretations of the clause, nor is it to advocate for the courts to reevaluate their interpretations based on the legislative history. The legal precedents at this point are clearly set, and courts have given due deference to the NTSB's own interpretation of the statute.

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6 See id. at 44-45.
11 Id.
to the law five times in seventy years without further clarification or any indication that the courts were not following congressional intent. This article merely sheds light on the origin of 701(e) and indicates that the courts' interpretations of the section were based on something of a legal fiction.

II. COURT INTERPRETATION—THREE CATEGORIES

In 2003, Easton and Mayer divided the cases involving 701(e) into three broad categories. The first category, which they called the "majority rule," admits facts from NTSB reports into evidence but not opinions from NTSB reports (fact v. opinion). The court in Universal Airline, Inc. v. Eastern Air Lines, Inc. allowed the factual testimony of a Civil Aeronautics Board (CAB—the predecessor to the NTSB) investigator into evidence, but not his conclusions or opinions. Another court in Lobel v. American Airlines, Inc., expanded on the Universal decision and allowed the factual portion of a CAB report into evidence, but, again, not the opinions or the conclusions from the

Where Congress, through express delegation or the introduction of an interpretive gap in a statutory structure, has delegated policymaking authority under a statute to an administrative agency, the extent of judicial review of the agency's policy determinations is limited. If a policy determination is not in conflict with the plain language of the statute, the reviewing court must give deference to the agency's interpretation of the statute, although the traditional deference which courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress. Judicial deference to an agency's interpretation of ambiguous provisions of a statute it is authorized to implement reflects a sensitivity to the proper roles of the government's political and judicial branches; the resolution of ambiguity in a statutory text is often more a question of policy than of law.

Id.


16 188 F.2d 993, 1000 (D.C. Cir. 1951). A lengthy discussion of the court’s reasoning in Universal can be found in the Court Interpretation—Initial Majority Rule Cases section below.
report. From these cases flowed the "majority rule." Lee S. Kreindler, in his treatise *Aviation Accident Law*, noted that a long line of cases followed the *Lobel* precedent.

In the second category, the "minority rule" cases, the courts have strictly construed the statute and have allowed no part of the accident reports into evidence. A string of cases from the Northern District of Illinois and the Ninth Circuit fill this category. Since they are in a very small minority, Kreindler felt that these cases warranted criticism.

The third and final category of cases followed the District of Columbia Circuit's ruling in *Chiron Corp. v. NTSB* based on regulations promulgated by the NTSB. This category is actually a narrowing of the fact v. opinion majority rule. In 1974, the NTSB promulgated regulations that allowed the use of investigator's factual accident reports at trial but not the Board's accident report. In 1998, the NTSB redefined its accident reports and formally recognized separate factual reports emanating from its accident investigations. The NTSB accident report could not be allowed as evidence even if only a few pages were devoted to opinions and conclusions. The factual accident reports prepared for each investigation, however, could be allowed into evidence consistent with the case law. The court in *Chiron* cited these regulations and allowed the factual accident

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17 192 F.2d 217, 220 (2d Cir. 1951) (a discussion of the court's reasoning in *Lobel* can be found in the Court Interpretation—Initial "Majority Rule" Cases section below).

18 KREINDLER, supra note 13, at § 19.01[2].

19 Easton & Mayer, supra note 14, at 223.

20 Id. at 223–24. See also Gibson v. NTSB, 118 F.3d 1312, 1314 (9th Cir. 1997); Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1384–85 (9th Cir. 1985); Benna v. Reeder Flying Serv., Inc., 578 F.2d 269, 271 (9th Cir. 1978); *In re Air Crash Disaster at Sioux City, Iowa*, 780 F. Supp. 1207, 1208–09 (N.D. Ill. 1991) ("The unequivocal wording of Sections [701(e)] and 1903(c) appears to leave no room for creative interpretation. The language, on its face, states an absolute bar to the use of NTSB reports in the present action.").

21 KREINDLER, supra note 13, § 19.01[2] ("A minority of courts have interpreted [701(e)] as a bar to admission of all materials produced by the NTSB. In the face of longstanding contrary precedent, their holdings are open to criticism." Kreindler gives as an example, *Sioux City*, 780 F. Supp. at 1207.).

22 198 F.3d 935 (D.C. Cir. 1999); Easton & Mayer, supra note 14, at 225–26.


25 *Chiron*, 198 F. 3d at 940.

26 Id.
III. COURT INTERPRETATION—INITIAL MAJORITY RULE CASES

To find the genesis of the fact v. opinion majority rule and the beginnings of the NTSB regulations reflecting it, one need look no farther than the initial cases dealing with 701(e). The first known decision using 701(e) was *Ritts v. American Overseas, Inc.* 28 The court held that 701(e) barred reports, but not the “use of the testimony of a witness examined by the Board in the course of the investigation.” 29 The court, without citing any source, stated the most likely reason for the ban was the inability of parties in an investigation to rebut evidence as they would at a civil trial. 30

The court in *Tansey v. Transcontinental & Western Air, Inc.* allowed into trial the records collected by the defendant airline during an investigation of an accident involving one of its aircraft. 31 The court specifically allowed those records used by the company when self-reporting the accident to the CAB as well as those used by the company in assisting the CAB in its investigation. 32 The court agreed with the *Ritts* decision to bar final reports from admission in court and followed the same reasoning. 33 As to the investigation records, the court mentioned the similar Interstate Commerce Commission (ICC) im-

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27 Id.

A factual report is an investigator’s report of his investigation of the accident. Because this report is not a “report of the Board,” it is not barred by the statute and is therefore admissible. As counsel for NTSB made clear during oral argument, the only reports that are admissible are the factual reports that investigators do, not the Board’s findings, either factual or probable cause, but what individual investigators find . . . [T]hose reports of these factual developments are made part of the record and parties can get that. Thus, because investigators’ reports are now plainly admissible under agency regulations, victims have access to necessary factual information. Therefore, courts no longer need to employ an “exception” to the statute to protect parties in litigation.

*Id.* (internal quotation marks and citations omitted).


29 *Id.* at 458.

30 *Id.*


32 *Id.* at 460.

33 *Id.* at 460–61.
munity for witnesses in railroad accident reports and the cases citing that immunity. While the court said the reasoning for this immunity—protection to allow for frank disclosure by individuals and companies—was not "without persuasion," they went on to dismiss it. Neither the language of the ICC nor the CAB acts, the court felt, indicated this purpose. And, the court found no legislative history to support this purpose. Without clear expression of congressional intent, the court held that the rules used for all other tort cases should apply.

A highly influential decision was written by the District of Columbia Circuit in *Universal.* The CAB had a regulation in place barring expert testimony of its accident investigators in civil actions. For justification, the CAB cited 701(e). The court in *Universal* held that accident investigator testimony was admissible when the CAB investigator was the sole source of evidence "reasonably available to the parties." However, the court also held that the CAB's reports, orders, or private papers were inadmissible. According to the court, conclusions or opinions of administrative agencies, if admitted, would "usurp the function of the jury." It went on to say "[i]t is quite clear that Section 701(e) reveals the intention to preserve the functions of court and jury uninfluenced by the findings of the Board or investigators."

The *Universal* court's reasoning on this point of law was followed in *Lobel v. American Airlines.* The *Lobel* decision differed slightly from *Universal,* however, by allowing the CAB investigator's factual report of his examination of the plane wreckage into evidence as well as his deposition based on this report. Section 701(e), the court wrote, was intended to guard against the introduction of CAB opinions or conclusions "which are

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34 *Id.* at 461.
35 *Id.*
36 *Id.*
37 *Id.*
39 *Id.* at 997.
40 *Id.* at 997–98.
41 *Id.* at 999–1000.
42 *Id.* at 1000.
43 *Id.*
44 *Id.*
46 *Id.*
within the functions of courts and juries to decide.” No such views were in the investigator’s factual report.

As Kreindler wrote, a long line of cases followed the *Lobel* court’s precedent. Congress is aware of the current law, including case law, when it passes legislation. Since Congress has not changed 701(e) significantly over time, Kreindler presumed that the majority rule cases followed congressional intent.

IV. COURT INTERPRETATION—CIVIL AERONAUTICS BOARD AND *UNIVERSAL V. EASTERN*

The primary source for the *Universal* court’s decision was a CAB brief to the court justifying its regulations and advocating a bar of CAB reports and CAB investigator testimony from admission in civil trials. This brief was used by the court and continues to be cited as the basis for the *Universal* and *Lobel* decisions.

One reason to bar CAB reports from admission in court, stated

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47 Id.
48 Id.
[T]he report consisted wholly of the investigator’s personal observations about the condition of the plane after the accident. There were in the report no opinions or conclusions about possible causes of the accident or defendant’s negligence; there were no findings based on interviews or anything but personal observations. Nothing in the report offends either the opinion or the hearsay rule. Sec. 701(e) was designed to guard against the introduction of C.A.B. reports expressing agency views about matters which are within the functions of courts and juries to decide. No such views are reflected in this factual report.

Id. (citations omitted).
49 KREINDLER, *supra* note 13, at § 19.01[2].
50 Id.
51 Id.
52 *Universal*, 188 F.2d at 997–98.
53 Id. at 998.

The Board [CAB] advances the following five reasons for its policy of withholding information and refusing to permit its investigators to appear as witnesses:

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

‘(2) the belief that the refusal to release information encouraged frank disclosures on the part of the persons involved and that such disclosures were in the public interest,
the CAB, was the fear that conclusions from the CAB reports would determine the civil liabilities of the parties involved in the accident.\textsuperscript{54} This reasoning can be found in an article published the same year as the \textit{Universal} decision written by John W. Simpson, an attorney for the CAB.\textsuperscript{55} He wrote that there was almost no legislative history for 701(e) and that this led to great uncertainty in the interpretation of the clause.\textsuperscript{56} He cited Rhyne’s legislative history for the Civil Aeronautics Act of 1938 (1938 Act).\textsuperscript{57} Rhyne and Simpson did not mention any legislative history for the 1934 Amendment to the Air Commerce Act of 1926.\textsuperscript{58} They both mentioned that testimony given at a 1938 hearing was actually unhelpful in discerning congressional intent.\textsuperscript{59} Simpson

\begin{itemize}
\item[(3)] the obvious undesirability of releasing a particular investigator’s conclusions which might differ from the subsequent final determination by the Board of the cause of the accident,
\item[(4)] the fact that the conclusions of its investigators often subsequently embodied in the Board’s reports would, as a practical matter, influence the determination of the civil liabilities of the parties involved if testified to in damage suits, contrary to the plain purpose and intent if not the letter of section 701(e) of the Act, and
\item[(5)] the number of accidents involving aircrafts was such as to require the full time of its experts in investigating them and the public interest dictated that the time of these experts not be consumed by appearance in courts to give testimony in private damage suits.
\end{itemize}

What the Board sets forth as to its regulations and the provisions of Section 701(e) of the Civil Aeronautics Act is correct. And the reasons assigned by the Board for its policy are sound so far as the Board and its work are concerned, but the Act and regulations referred to must be considered with reference to the governmental function of administering justice, the judicial power, and the established practice and precedents of our system of jurisprudence.

\textit{Id.}

\textsuperscript{54} \textit{Id.}
\textsuperscript{55} Simpson, \textit{supra} note 8, at 287.
\textsuperscript{56} \textit{Id.} at 284.
\textsuperscript{57} \textit{Id.} at 284 n.3.
\textsuperscript{58} \textit{Id.} at 284; see \textsc{Charles S. Rhyne, The Civil Aeronautics Act Annotated} 41–51 (1939).
\textsuperscript{59} Simpson, \textit{supra} note 8, at 284 n.3.

The only legislative history on this section is a statement by Mr. Henry Allen Johnston of the Committee on Aeronautics, Association of the Bar, New York, N.Y., to the effect that accident investigation records could not be used for any purpose in any litigation. Since there is no evidence that Congress, or even the Subcommittee, did or did not agree with his statement, it would seem to have little or no probative value in determining the intent of Congress. Furthermore, S. 3659 did not become law and S. 3845, which even-
surmised that Congress enacted 701(e) for the reason cited by the Tansey court—administrative fact finding procedures do not have safeguards for parties found in judicial procedures and formal rules of evidence. More importantly, Simpson also used the "usurp the function of the jury" terminology found in the Universal decision. "Congress may have made Board reports inadmissible in evidence so that the Board would not usurp the function of the judge and jury to decide civil liabilities." His reasoning was based on a discussion of this point during the 1909 debates concerning the ICC accident report clause.

In 1901 Congress passed an act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the ICC. The history of section 701(e) begins with a clause from this 1901 act. As early as 1907, it became apparent

Id. (citations omitted).

Id. at 286.

Id.

Id.

Id. at 286 n.17; see also Rhyne, supra note 58, at 157, n.550.


Id. ("Neither said report nor any part thereof shall be admitted as evidence or used for any purpose against such railroad so making such report in any suit or action for damages growing out of any matter mentioned in said report."); Act of May 6, 1910, ch. 208, 36 Stat. 350, 351 ("Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."); Air Commerce Act of 1926, ch. 654, 48 Stat. 1113 (amending 49 U.S.C. 172(e)) ("Neither any such statement nor any report of such investigation or hearing, nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action growing out of any matter referred to in any such statement, investigation, hearing, or report thereof."); Civil Aeronautics Act of 1938, ch. 601 § 701(e), 52 Stat. 973, 1013 ("No part of any report or reports of the [Air Safety] Board or the [Civil Aeronautics] Authority 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."); Federal Aviation Act of 1958, Pub. L. No. 85-726, § 701(e), 72 Stat. 731, 781 ("No part of any report or reports of the [Civil Aeronautics] Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."); Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966) (701(e) not included); Independent Safety Board Act of 1974, Pub. L. No. 93-633, 88 Stat. 2156, 2171 (1975) ("No part of any report of the [National Transportation Safety] Board, relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report
to Congress that this self-reporting was insufficient for the most serious accidents, so in 1910, Congress passed a law requiring railroads to continue making reports of all accidents and authorizing the ICC to investigate the most serious accidents.\textsuperscript{66} Along with this responsibility, Congress authorized the ICC to write and make public its investigation's conclusions and recommendations.\textsuperscript{67} The 1901 clause was included in the 1910 law and covered both the railroad's self-reported accident reports and the ICC's accident reports.\textsuperscript{68} It was during a 1909 debate of this clause on the House floor that Representative Marlin Edgar Olmsted (R - Penn.) expressed his concerns that without the clause the reports would "substitute the finding of the Interstate Commerce Commission—its declaration of responsibility—for the finding of a court and jury in a damage case."\textsuperscript{69}

Simpson did not say so explicitly, but without a legislative history for 701(e) he did not have a clear link between 701(e) and the ICC clause. Rhyne, Simpson, Kreindler, the Tansey, Universal, and Lobel courts, and all subsequent judges and law review article authors, save one, missed the legislative history for 701(e) from the 1934 Amendment to the Air Commerce Act of 1926. A University of California second year law student named R. Bruce Hoffe discovered this legislative history and wrote about it in 1952.\textsuperscript{70} The following analysis is the author's own, but Hoffe should be credited for finding what so many others missed.

V. 701(E) 1934 LEGISLATIVE HISTORY

701(e) found its first form in the 1934 Amendment to the Air Commerce Act of 1926.\textsuperscript{71} The original 1926 Act gave the Secretary of Commerce the duty "[t]o investigate, record, and make public the causes of accidents in civil air navigation in the United States."\textsuperscript{72} This clause gave the Secretary great latitude in how to perform this duty, and the Secretary began issuing full or reports."); Act of Jul. 5, 1994, Pub. L. No. 103-272, 108 Stat. 745, 758 (1994) ("No part of a report of the [National Transportation Safety] Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.").

\textsuperscript{66} § 2, 36 Stat. at 351.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} 45 CONG. REC. 153 (1909).
\textsuperscript{70} Hoffe, supra note 10, at 152-53.
\textsuperscript{71} Act of June 19, 1934, ch. 654, 48 Stat. 1113.
\textsuperscript{72} Air Commerce Act of 1926, ch. 344, § 2(e), 44 Stat. 568, 569 (1926).
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reports to the public on major accidents. However, the airline industry reacted negatively and the Secretary reverted to simply issuing statistical reports on accidents. Congress found this unsatisfactory and began working on legislation for full reports in 1929. In 1934, the legislation became law.

Among other things, the 1934 Amendment set out to clarify how the Secretary of Commerce was to fulfill the duty of accident investigation reporting. At the end of any aircraft accident investigation involving a serious or fatal injury, or when the Secretary felt it would be in the public interest, the Secretary would make a public statement of the “probable cause or causes of the accident.” The 1934 Amendment went on to state: “[n]either any such statement nor any report of such investigation or hearing, nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action growing out of any matter referred to in any such statement, investigation, hearing, or report thereof.”

The legislative history for 1934’s 701(e) is contained in four congressional publications:

1. The House Report for the House version (H.R. 9599) of the 1934 Amendment.
2. The Senate Report for S. 3526 which became the 1934 Amendment.
3. The testimony from a House committee hearing on H.R. 9599.
4. The Congressional Record.

All four of these publications contain variations of a letter written by Daniel C. Roper, the Secretary of Commerce at the time. The House Report from the Committee on Interstate

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74 Id. at 179.
75 Id.
76 Id. at 278.
78 Id.
79 H.R. REP. No. 73-1931 (1934).
80 S. REP. No. 73-1142 (1934).
81 Air Commerce Act, 1926: Hearings Before a Subcomm. of the Comm. on Interstate and Foreign Commerce on H.R. 9599, 73d Cong. (1934) [hereinafter Hearings].
82 78 CONG. REC. 12,203 (1934).
83 Hearings, supra note 81, at 3–4; H.R. REP. No. 73-1931, at 1–2; S. REP. No. 73-1142, at 1–2; 78 CONG. REC. 12,203.
and Foreign Commerce recommends the bill for passage, as does the Senate Report from the Committee on Commerce. According to the Congressional Record (Record), Representative Paul Herbert Maloney (D - La.) from the House Committee on Interstate and Foreign Commerce either read from the letter verbatim or had the text entered into the Record to answer the question, "[w]hat section does it amend?" The Record mistakes the Secretary's words for Maloney's own. Maloney also had the letter inserted into the public record of the House Committee on Interstate and Foreign Commerce hearing on the 1934 Amendment.

There are three sections in the letter relevant to 701(e). First, the letter makes clear that the amendments as a whole were not new. The accident report clause was similar to the one under which the ICC functioned and which dated back to 1901. This is best understood in the context that the ICC already regulated certain aspects of civil aviation, and there were even those (such as Air Line Pilots Association President David L. Behncke) who thought that some functions of the CAB should be transferred to the ICC.

Second, the letter tied justification for the accident report clause to another clause protecting witnesses who testified or produced evidence for an aircraft investigation. As the letter pointed out, this witness protection clause was also not new. It was the immunities clause from the Securities Act of 1933.

Third, there was a new clause which specifically stated that no official or employee of the Commerce Department could be required to testify based on his official role or as an expert wit-

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86 78 Cong. Rec. 12,203.
87 Id.
88 Hearings, supra note 81, at 3-4.
90 Nick A. Komons, The Cutting Air Crash: A Case Study in Early Federal Aviation Policy 68-9 (1973); Komons, supra note 73, at 278.
91 Hearings, supra note 81, at 4.
92 Id.
93 Securities Act of 1933, ch. 38, § 22(c), 48 Stat. 74, 87 (1933); Air Commerce Act of 1926, ch. 654, § 8(2), 48 Stat. 1113, 1114 (1934) (amending 49 U.S.C. 172(e)). This immunities clause was extended to all Civil Aeronautics Authority investigations (in addition to aircraft accident investigations) in 1938. Civil Aeronautics Act of 1938, ch. 601, § 1004(i), 52 Stat. 973, 1022-23.
ness. This third provision was new to both the House and Senate bill, and would have provided the specific wording that the trial courts later found lacking in the legislation. Hoffe found where this text came from and why it was removed. In a hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce, John H. Geisse, Chief, Manufacturers Section, Aeronautic Branch, Department of Commerce, testified that the language was based on language included in the ICC legislation. He gave the following as the reason for the provision:

[The ICC] desired to prevent the use of their employees as witnesses if possible, because of the amount of time that would be spent which would seriously disrupt their performing their regular duties, if they are subjected to being called here and there and elsewhere at procedures involving accidents.

A long exchange ensued between Geisse and Representative Joseph Patrick Monaghan (D – Mont.). Monaghan, an attorney, had several concerns about how this provision would prevent important, relevant evidence from being presented at trial. It might be said he was the first in a long line of attorneys to argue this sentiment. Geisse, not an attorney, could only respond that the ICC had been using this provision for some time, and the courts had supported it. He promised that he would research the question with his department’s attorneys and would report back to the Committee.

On June 1, he reported back to the committee. There was no provision barring investigators from testifying in civil actions in the ICC legislation. Geisse discussed the issue with the ICC and the ICC did not like its investigators testifying and avoided it when possible. In fact, the ICC had “educated” the railroads not to call the investigators. However, the ICC confirmed to

94 Hearings, supra note 81, at 2.
95 Hoffe, supra note 10, at 152–53.
96 Hearings, supra note 81, at 2.
97 Id.
98 Id. at 12–24.
99 Id. at 13.
100 Id.
101 Id. at 24.
102 Id. at 25.
103 Id.
104 Id.
105 Id.
Geisse that if called, the investigators did indeed have to testify.106

Geisse and the committee then discussed the impact striking this clause from the proposed legislation would have on the admissibility of accident reports in civil litigation.107 The exchange between Maloney, who would eventually report the 1934 Amendment to the House, Geisse, and Representative Pehr Gustav Holmes (R – Mass.) would have been helpful to the courts studying 701(e) over the years. Holmes stated that he was puzzled by the remaining provision concerning the admissibility of accident reports in civil litigation.108 Geisse replied that the provision did not prohibit the investigators from testifying, and the courts upheld this interpretation of the ICC provision barring the admission of railroad accident reports.109 Maloney summed it all up by asking, “And [the Secretary of Commerce] does not have to submit that [accident] report as evidence. Now, the man that makes the investigation, if they choose to call him to testify that is all right?”110 Geisse replied yes, it was all right.111

Senator Hubert Durrett Stephens (D – Miss.) reported the bill on behalf of the Senate Committee on Commerce with the clause barring investigator testimony intact, but he immediately moved to strike this provision on the floor of the Senate.112 The Senate approved, and the bill was passed without the provision on June 13, 1934.113 The House passed the bill without the provision on June 16, 1934.114 Thus, both the Senate and the House voted to enact the law without the specific wording barring investigator testimony.

The Senate committee report on the bill was ordered to be printed May 10, 1934,115 and Geisse testified his correction to the House committee on June 1.116 Due to this timeline, it is probable that Senator Durrett and the Committee on Commerce were notified of the discussions between the House committee and Geisse—possibly by Geisse himself. In his correction

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106 Id.
107 Id.
108 Id. at 26.
109 Id.
110 Id.
111 Id.
112 78 Cong. Rec. 11,326 (1934).
113 Id.
114 78 Cong. Rec. 12,204 (1934).
115 Hearings, supra note 81, at 1.
116 Id. at 25.
to the House committee, Geisse stated, "I have talked this section over with everybody concerned and the consensus of opinion is that we will introduce no more testimony in favor of it."\textsuperscript{117}

One reason for the importance of the investigator testimony clause is that it is included with the other two clauses (the accident report clause and the witness protection/immunities clause) in the Secretary of Commerce's justification for amendments to the law concerning aircraft investigations:

Without the provisions contained in this amendment, the Department of Commerce cannot require the submission of evidence required to determine the causes of accidents and such evidence as is voluntarily submitted must be treated confidentially to protect the interests of the witnesses. This necessity of refusing to give out the results of our findings in important accident cases tends to shroud such accidents in an undesirable atmosphere of mystery whereas in most cases the causes are well known. Were the Department enabled to issue a statement of the causes of such accidents it could dispel this air of mystery and could make available to aircraft manufacturers and operators much valuable information which would be used in the prevention of subsequent accidents.\textsuperscript{118}

This exact paragraph\textsuperscript{119} appears in all four versions of the letter including those in the Senate and House reports.\textsuperscript{120} What can be determined from the published record is that Congress voted on the two provisions, the immunities clause, and 701(e), with the idea of protecting witnesses so they could provide evidence and testimony to the CAB investigation without fear of litigation. The justification for this protection of investigation witnesses was that such testimony and evidence would benefit the public interest by removing the "mystery" surrounding aircraft accidents and would also make available to the aircraft industry (manufacturers and operators) the information necessary to prevent future accidents occurring from the same or similar events. This can be simply stated in three main points:

\begin{itemize}
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Hearings, supra note 81, at 4; H.R. Rep. No. 73-1931, at 2 (1934); S. Rep. No. 73-1142, at 2 (1934); 78 Cong. Rec. 12,203 (1934).
\item \textsuperscript{119} The exact wording in the House Report and Subcommittee hearings starts with "without the provisions contained in sections 2 and 9" instead of "without the provisions contained in this amendment." Compare Hearings, supra note 81, at 4 and H.R. Rep. No. 73-1931, at 2 (1934) with S. Rep. No. 73-1142, at 2 (1934); 78 Cong. Rec. 12,203.
\item \textsuperscript{120} Hearings, supra note 81, at 4; H.R. Rep. No. 73-1931, at 2; S. Rep. No. 73-1142, at 2; 78 Cong. Rec. 12,203.
\end{itemize}
1. Full and frank disclosure—Protect investigation witnesses;
2. Transparency—Provide accident information for the public interest;

The Commerce Department and its aircraft investigation successors would later argue that the exclusionary rule included federal employee testimony concerning investigations, and the courts would wrestle with this issue into the future. However, as noted clearly above, Congress declined to incorporate this exact wording in 1934.

VI. CONCLUSION

CAB attorney John W. Simpson and the Tansey court dismissed the “full and frank disclosure” reasoning as a possible congressional intent. The Tansey court stated that there was nothing in the legislative history to suggest Congress intended for 701(e) to have the same affect in the courts as the ICC clause which had successfully precluded companies’ own accident reports from being used in a number of trials. Simpson added that Congress could have done the same by simply stating so clearly in the Civil Aeronautics Act. This is true, but it is also true that Congress barred the accident reports produced by the Secretary of Commerce and enacted the legislation based in no small part on Secretary Roper’s letter that clearly articulated the “full and frank disclosure” argument.

The Secretary wanted to protect investigation witnesses, and I believe the intent was to assure investigation witnesses that, while they would have to testify during an investigation, any conclusions or opinions based on this testimony could not be used against them in civil litigation. If their testimony and evidence would be used at trial, they would still be able to present their side. The Department of Commerce would get what it wanted—

121 See Universal Airline, Inc. v. E. Air Lines, Inc., 188 F.2d 993, 998 (D.C. Cir. 1951) ("[T]he [Civil Aeronautics] Board interprets as precluding the admission in evidence in damage suits of expert and opinion testimony by Board investigators with respect to aircraft accidents investigated by them."); Simpson, supra note 8, at 288–89.
124 Id.
125 Simpson, supra note 8, at 286.
126 H.R. REP. No. 73-1931, at 1–2 (1934).
full and frank disclosure—and the witnesses would get what they wanted: some protection regarding the use of their testimony.\textsuperscript{127}

This argument goes hand in hand with the idea that Congress's intent was to prevent the accident investigation reports from usurping the function of the jury (\textit{Universal})\textsuperscript{128} or from usurping the function of the judge and jury (Simpson).\textsuperscript{129} However, Congress and the Department of Commerce did not mention this reasoning in the House Hearings, the House Report, the Senate Report, or on the Senate or House floors when debating the 1934 Amendment.\textsuperscript{130} Simpson was correct to point out that this was discussed in the 1909 debates leading up to the 1910 ICC clause from which Section 701(e) evolved.\textsuperscript{131} In fact, his argument is strengthened by Geisse's testimony indicating the 1934 Amendment clause came directly from the ICC clause.\textsuperscript{132} However, this only indicates that usurping the function of the judge and jury and the concern for full and frank disclosure were parallel arguments and not mutually excluding ones—at least as far as Congress was concerned the two times it discussed and justified the clause (1909 and 1934).

Hoffe, in his 1952 law review article, indicated that he believed congressional intent concerning accident investigator testimony was muddled by the fact that the letter either read on the House floor or entered into the \textit{Congressional Record} by Representative Maloney still contained the following passage:\textsuperscript{133} "Provision is also made that employees of the Department of Commerce shall not be called upon to testify in any suit or action involving aircraft."\textsuperscript{134}

This, he thought, may have led members of the House to believe they were voting to preclude investigators from testifying at civil trials.\textsuperscript{135} While possibly true for some Representatives on the House side, on the Senate side, the Senators were very clear—the provision was struck on the floor of the Senate prior

\textsuperscript{127} Id. at 1–2.
\textsuperscript{128} Universal Airline, Inc. v. E. Air Lines, Inc., 188 F.2d 993, 1000 (D.C. Cir. 1951).
\textsuperscript{129} Simpson, \textit{supra} note 8, at 286.
\textsuperscript{130} Hearings, \textit{supra} note 81, at 4; H.R. REP. No. 73-1931, at 2 (1934); S. REP. No. 73-1142, at 2 (1934); 78 CONG. REC. 12,203 (1934).
\textsuperscript{131} Simpson, \textit{supra} note 8, at 285 n.8.
\textsuperscript{132} Hearings, \textit{supra} note 81, at 12.
\textsuperscript{133} Hoffe, \textit{supra} note 10, at 153.
\textsuperscript{134} 78 CONG. REC. 12,203 (1934).
\textsuperscript{135} Hoffe, \textit{supra} note 10, at 153.
to their vote.\textsuperscript{136} One can also find evidence to indicate that House intent was not muddled. The Senate vote occurred before the House vote, and the House was voting on the same piece of legislation (S. 3526).\textsuperscript{137} The text of the bill presented on the floor of the House did not have this provision and Maloney and his fellow House Committee on Interstate and Foreign Commerce members were clear on the matter by this time.\textsuperscript{138} In any case, the main point is that all legal arguments after 701 (e) passed have been based on the idea that no meaningful legislative history existed. One can now argue about the degree of intent based on the understanding of all members of the House—but this is a question of degree, not of existence.

Whether or not the \textit{Universal} and \textit{Lobel} courts made good policy can be (and frequently is)\textsuperscript{139} argued. The fact is that the courts in a series of cases and the NTSB in its regulations have more or less incorporated the \textit{Universal} and \textit{Lobel} decisions and made them the modern legal interpretation of 701 (e) in most situations. However, \textit{Universal} and \textit{Lobel} are founded on the myth that there was no discernible legislative history for 701 (e). Due to the timing of the Simpson article (Simpson was a CAB attorney at the time) and the \textit{Universal} court’s explicit reliance on the CAB brief, I believe this myth emanated from the CAB itself.\textsuperscript{140} I am not intimating the CAB created the myth deliberately, I just believe they relied on Rhyne’s readily available legislative history of the 1938 Act, which, unfortunately, failed to mention the legislative history of the 1934 Amendment.\textsuperscript{141} Neither the CAB brief nor Simpson’s influential article mentioned the legislative history of the 1934 Amendment.

Without that legislative history, the formal interpretation of 701 (e) took on a legal life of its own. It started with the courts in \textit{Ritts} and \textit{Tansey}, which stated that the protection of witnesses interviewed during CAB investigations did not appear to be the intent of 701 (e).\textsuperscript{142} This was solidified by the court in \textit{Universal}, which, using the CAB brief, stated that 701 (e)’s purpose was to

\textsuperscript{136} 78 \textit{Cong. Rec.} 11,324 (1934).
\textsuperscript{137} 78 \textit{Cong. Rec.} 12,204; 78 \textit{Cong. Rec.} 11,326.
\textsuperscript{138} 78 \textit{Cong. Rec.} 12,203–04.
\textsuperscript{139} See, e.g., Atwood, \textit{supra} note 9, at 477–78 (critiquing the \textit{Lobel} court’s misapplication of the \textit{Universal} court’s holding).
\textsuperscript{141} See generally Rhyne, \textit{supra} note 58, at 153–58.
prevent the replacement of the conclusions of the judge and jury with the conclusions of the CAB. The Lobel court cited the Universal decision, and the justification for Universal became the justification for the prevailing law. Congress has left the substance of 701(e) untouched over the years, and the majority rule fact v. opinion interpretation stands as the broad law today with infrequent and criticized exceptions.

The court in Tansey wrote, “nothing has been found by way of legislative history.” This can no longer be claimed as true. Hoffe “found” Section 701(e)’s legislative history in 1952.

143 Universal, 188 F.2d at 1000.
146 Tansey, 97 F. Supp. at 461.