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Comments

THE GROWTH OF AMERICAN JUDICIAL
HOSTILITY TOWARDS THE LIABILITY
LIMITATIONS OF THE WARSAW CONVENTION

RAY B. JEFFREY

It has been fifty years since the United States became a party to the Warsaw Convention (Convention), a treaty which regulates international air commerce and limits airline liability for deaths and personal injuries arising out of international air travel. During this time, American courts have been faced with two conflicting duties. First, in cases involving air travelers whose passenger tickets include a stopping place outside the United States, the courts have been compelled by the treaty to limit recoveries for wrongful death and personal injury, regardless of the severity of the plaintiff's injuries. Second, the courts have strived in other kinds of civil suits, including purely domestic air accident cases, to ensure full compensation for the established loss or injury incurred by


2 See, e.g., Ross v. Pan Am. Airways, 299 N.Y. 88, 85 N.E.2d 880 (1949) (limiting the recovery of well-known theatrical performer Jane Froman to $8,300, in spite of debilitating injuries which destroyed her lucrative career). The limitation on recoveries from international air accidents is found at Warsaw Convention, supra note 1, art. 22.
As a result of the steady development of American emphasis on full compensation for losses sustained, the dollar amount of recoveries in personal injury and wrongful death actions has been rising. Consequently, the courts have chafed under the restriction imposed by the Convention upon their ability to fully compensate the victims of international air accidents. There has been widespread criticism in the United States of the Warsaw Convention's liability limitations, and the courts, although bound by the treaty, have avoided enforcing its limitations whenever possible.

This comment will trace the development of the judicial hostility that has arisen over the last several decades in response to perceived inequities in the Warsaw Convention's liability limitations. The analysis begins with a historical com-

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1 See Kreindler, A Plaintiff's View of Montreal, 33 J. AIR L. & COM. 528 (1967). The author states:

[T]here is no country in the world to my knowledge,... where injured people or families of those who have been killed can get the kind of compensation, the degree of adequate compensation, the degree of tailor-made compensation scaled to the kind of loss sustained, as we do today in the United States.

Id. at 530.


5 See, e.g., In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982); Lisi v. Alitalia-Linee Aeree Italiane, S.P.A., 370 F.2d 508 (2d Cir. 1966); In re Aircrash at Kimpo International Airport, Korea on November 18, 1981, 558 F. Supp. 72 (C.D.Cal. 1983).

6 Some commentators have opposed the view that the Convention is inequitable. See, e.g., Hildred, Air Carriers, Liability: Significance of the Warsaw Convention and Events Leading Up to the Montreal Agreement, 33 J. AIR L. & COM. 521 (1967); Whitehead, Still Another View of the Warsaw Convention, 33 J. AIR. L. & COM. 651 (1967).
mentary on the Convention and its subsequent modifications. Next, judicial hostility to the Treaty is examined in the areas of constitutionality, ticketing requirements, and rejection of the Convention’s use of gold francs to convert judgments into domestic currency. In conclusion, there is an evaluation of the effect of recent judicial decisions on the future vitality of the Warsaw Convention’s liability limitations.

I. THE TREATY

In both Paris in 1925 and Warsaw in 1929, international conferences were convened to plan for the problems which would necessarily arise as the civil aviation industry emerged from its infancy.\(^9\) The conference participants sought to achieve two basic goals.\(^10\) First, they desired uniformity in documentation and rules governing the rights and liabilities of parties to contracts of international air carriage.\(^11\) Such uniformity was deemed necessary because air commerce would connect many countries with different languages, legal systems, and commercial practices.\(^12\) Second, the planners desired to protect the fledgling airlines from potentially devastating tort liability by placing limits on liability in exchange for a limit on the air carriers’ defenses.\(^13\) The 1929 conference culminated in “The Convention for the Unification of Certain Rules Relating to International Transportation by Air,”\(^14\) known as the “Warsaw Convention” (Convention).

The most important and controversial provision of the convention is article 22 which limits an airline’s liability for passenger injury or death to approximately $8,300.\(^15\) In exchange


\(^11\) *Id.*

\(^12\) *Id.*

\(^13\) *Id.*

\(^14\) See supra note 1.

\(^15\) Article 22 of the Warsaw Convention limits liability to 125,000 “Poincare francs,” a unit of account “consisting of 65 1/52 milligrams of gold at the standard of
for this limit on passengers' recoverable damages, the Convention created a rebuttable presumption that any accident resulted from the carrier's negligence. To rebut the presumption, the carrier must prove that all necessary measures were taken to avoid the accident, or that it was impossible to take such measures. The liability limitation may not be invoked, however, if the airline is found guilty of willful misconduct.

The Convention is applicable to "all international transportation . . . performed by aircraft for hire." International transportation is defined as:

any transportation in which . . . the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties [countries adhering to the

finesness of nine hundred thousandths." Warsaw Convention, supra note 1, art. 22. The dollar equivalent of this limitation has been set at roughly $8,300 since the United States devaluation in 1933. See Clare, Evaluation of Proposals to Increase the "Warsaw Convention" Limit of Passenger Liability, 16 J. Air L. & Com. 53, 54, 57 (1949). The Convention also contains limits on recovery for loss of baggage or cargo. See infra note 187. In 1982, a United States federal court of appeals held the Warsaw Convention's liability limitation on baggage loss prospectively unenforceable, because gold no longer has an official monetary function and Congress has not specified a unit of conversion to be used by American courts in translating judgments under the Convention into U. S. dollars. Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982).

Article 17 of the Warsaw Convention states:

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 on board the aircraft or in the course of any of the operations or embarking or disembarking.

Warsaw Convention, supra note 1, art. 17. Article 17, which allows injured passengers to rely on a presumption of fault against the airlines, was seen as a reasonable quid pro quo for limiting damages to a maximum of $8,300. Subsequent to the Convention, however, the increasing application by American courts of the doctrine of res ipsa loquitur to airplane crashes has substantially reduced the importance of this presumption of negligence to passengers suing in the United States. Res ipsa loquitur creates an inference of negligence, but does not shift the burden of proof, as does a presumption of negligence. See Rhyne, International Law and Air Transportation, 47 Mich. L. Rev. 41, 57 (1948).

Article 20 of the Warsaw Convention provides that: "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 . . . to take such measures . . . ." Warsaw Convention, supra note 1, art. 20.

Id. art. 25.

Id. art. 1(1).
Convention], or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory . . . of another power, even though that power is not a party to this convention."39

In addition, actions brought under the Warsaw Convention are subject to limitations. They must meet a two-year period of limitation,21 and must be brought where the carrier is domiciled or has its principal place of business, where the carrier has a place of business through which the contract of carriage was made, or at the place of destination.22 Any questions of whether or not the Warsaw Convention applies in a particular case are determined by the ticket issued to the passenger.23

The Convention went into effect in 193324 and the United States became a signatory of the Convention in 1934.25 The treaty is now in force in over ninety countries,26 and applies to virtually all international air transportation. Where applica-

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28 Id. art. 1(2). For a general discussion of issues and controversies related to determination of whether a flight is "international transportation" within the meaning of the Warsaw Convention, see S. Speiser & C. Krauss, supra note 10, § 11.8.

29 Warsaw Convention, supra note 1, art. 29.

30 Id. art. 28(1).

31 Id. art. 1(2). Applicability of the Warsaw Convention is unaffected by such considerations as the passenger's residence or nationality, which airline performs the carriage, or on which leg of the journey the accident takes place. See Lowenfeld & Mendelsohn, supra note 9, at 500-01. Thus, for example, a citizen of Dallas on a commuter flight between Dallas and Houston is subject to the terms of the Convention if his ticket includes an earlier or later stop outside the United States. It is likely that most such passengers would be surprised to learn that such a flight constitutes "international transportation."

32 Lowenfeld & Mendelsohn, supra note 9, at 501-02. Under the terms of Article 37 of the Warsaw Convention, the treaty became effective ninety days after its ratification by five of the contracting parties of the Warsaw Conference. Warsaw Convention, supra note 1, art. 37.


[U]pon 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.

Id.

34 The nations of the world which adhere to the Warsaw Convention are listed in 1 L. Kreindler, Aviation Accident Law § 11.01[3] (1971).
ble, the Convention supersedes domestic American law because it is a treaty of the United States and as such is the supreme law of the land.\textsuperscript{27}

Not long after the United States became a party to the treaty, debates began concerning whether the Convention should be revised.\textsuperscript{28} The debates focused on the provisions in the treaty for limiting liability. The fundamental and recurring issue at the various conferences was whether the limits had been set at the appropriate level.\textsuperscript{29} Opponents of the Convention limitations argued that generally in developed countries such as the United States, recoveries in personal injury and death actions far exceeded the amounts allowed by the Warsaw Convention.\textsuperscript{30} Also, air safety had greatly improved, reducing the cost of liability insurance to air carriers.\textsuperscript{31} In fact, because air transportation had outgrown its financially insecure beginnings, there was speculation as to whether the airlines still merited special protection from full tort liability.\textsuperscript{32}

After years of discussions and meetings, a diplomatic conference convened at the Hague in 1955 to amend the Warsaw Convention.\textsuperscript{33} The goal of the American representatives at the Hague Conference was to ensure maximum recoveries for the victims of air crashes.\textsuperscript{34} The delegates at the Hague adopted

\textsuperscript{27} U.S. Const. art. VI, cl. 2. The Ninth Circuit has noted that: "Treaties, under the Constitution are the supreme law of the land . . . As such, treaty provisions which create domestic law have the same effect as legislation, and supersede previous conflicting legislation." In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1309 (9th Cir. 1982) (reviewing the constitutionality of the Warsaw Convention and holding that the limitations on recovery might constitute a Fifth Amendment "taking").

\textsuperscript{28} See Lowenfeld \& Mendelsohn, supra note 9, at 502. As early as 1935, the Comite-International Technique d'Experts Juridique Aeriens (CITEJA) began discussing possible changes to the Warsaw Convention. Conferences on the proposed revisions were held in Cairo in 1946, Madrid in 1951, Paris in 1952, and Rio de Janeiro in 1953. Id. at 502-03.

\textsuperscript{29} Id. at 504.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} Id. at 504-05. For a discussion of the Hague Protocol and the events leading up to it, see Beaumont, The Warsaw Convention of 1929, as Amended by the Protocol Signed at the Hague, on September 28, 1955, 22 J. Am L. \& Com. 414 (1955).

\textsuperscript{34} Lowenfeld \& Mendelsohn, supra note 9, at 507. United States attendance at the Hague marked the first American participation in the Convention's drafting process.
an amendment to the Warsaw Convention, known as the Hague Protocol, which significantly changed two provisions of the Warsaw Convention. The Warsaw Convention’s ambiguous term “willful misconduct” was deleted and replaced by a provision which held that the carrier would be subject to unlimited liability if the plaintiff could prove “that the damage resulted from an act or omission of the carrier . . . done with intent to cause damage or recklessly and with knowledge that damage would probably result.” More importantly, the Hague Protocol doubled the Warsaw Convention’s liability limit to approximately $16,600.

Although the United States delegates to the Hague Conference strongly supported many of the Warsaw Convention modifications, the response from the American legal community was unfavorable. Opposition to the Hague Protocol in the United States was not focused on the adequacy of the precise limitations contained in the Protocol, but instead attacked the concept of limitations on liability in general. Arguments were made that, given the profitability and impressive safety records of the commercial air industry, there

The United States did not send an official delegation to either the Paris Conference of 1925 or the Warsaw Conference of 1929. Haskell, supra note 25, at 485.


The provision for recovery of legal fees proved to be unimportant because it was not mandatory and had no effect on courts which did not already award attorneys fees. See Lowenfeld & Mendelsohn, supra note 9, at 509-10.

See supra note 18 and accompanying text.

Hague Protocol, supra note 35, art. XIII. It is not clear whether the phrase introduced by the Hague Protocol embodied a subjective or objective standard, thus uncertainties remain concerning application of the exception. Lowenfeld & Mendelsohn, supra note 9, at 525.

See Calkins, Grand Canyon, Warsaw and the Hague Protocol, 23 J. AIR L. & Com. 253 (1956) (stating “[b]y far the most important issue considered by the Conference, and the one on which most debate was had, was the matter of limitation of liability for passenger death or personal liability”).

Hague Protocol, supra note 35, art. XI. The United States failed in its attempt to have the liability limit raised to $25,000 due to stiff resistance from less developed countries. See Loggans, supra note 4, at 545.

See Loggans, supra note 4, at 545-46 (stating “[t]he doubling of the Warsaw limit by the Hague Protocol failed to mollify an increasingly angry bar and bench”).

See Lowenfeld & Mendelsohn, supra note 9, at 510.
was no longer a need to provide it with special protection. Proponents of the Hague Protocol failed to muster enough support in the Senate to achieve ratification.

Opposition to the Warsaw and Hague liability limitations persisted in the ten years following the Hague Conference. Finally, in 1965, the United States formally denounced the Warsaw Convention. The denunciation was to become effective six months after the announcement. The State Department press release explained that the action resulted from dissatisfaction with the Convention's excessively low liability limits on personal injury and death claims of passengers. The announcement stated, however, that the denunciation would be withdrawn if all international air carriers would agree to an interim arrangement whereby they would waive the Warsaw Convention liability limitations up to $75,000 per passenger.

The threat of denunciation by the United States was of major importance to the continued survival of the Warsaw Convention because a majority of all international aviation carriers and passengers were American. Thus, a special meeting of the International Civil Aviation Organization (ICAO) was convened in Montreal in early 1966 to avert American withdrawal from the treaty. Negotiations at this special meeting

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43 For arguments pro and con regarding the Hague Protocol, see Hearings on the Hague Protocol to the Warsaw Convention Before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess. (1965).
44 Haskell, supra note 25, at 486.
45 Id. at 486-87.
46 Id.
47 Lowenfeld & Mendelsohn, supra note 9, at 550-52, citing Dep't St. Bull. 923 (1965). Article 39 of the Warsaw Convention states that any member country may denounce the Convention upon six months notice. Warsaw Convention, supra note 1, art. 39.
48 Id. Supra note 47, 923.
49 Id. For a full explanation of the denunciation and the reasons for it, primarily the low limitation on liability, see Montreal Agreement, infra note 53.
50 Haskell, supra note 25, at 487.
51 The origin and functions of the ICAO are discussed in S. Speiser & C. Krause, supra note 10, § 11.3.
52 Loggans, supra note 4, at 546. For a comprehensive discussion of events leading to the Montreal Conference, as well as the negotiations which occurred there, see Lowenfeld & Mendelsohn, supra note 9.
resulted in the Montreal Agreement, which was signed by the major airlines of the world.

The Montreal Agreement contained three principal terms. First, the air carriers agreed to waive the liability limitation of Article 22 of the Warsaw Convention up to $75,000, including legal fees and costs. Second, the carriers were required to provide tickets notifying passengers of the liability limitations imposed by the Warsaw Convention, the Hague Protocol, and the Montreal Agreement. Third, the airlines gave up their defenses under Article 20 of the Convention, leaving them with virtual strict liability for air crashes. Pursuant to the signing of the Montreal Agreement, the United States withdrew its denunciation of the Warsaw Convention.

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Member nations of the Convention did not sign the Montreal Agreement because it is not a protocol or formal amendment to the Convention. The Montreal Agreement is a “special contract” under Article 22(1) of the Warsaw Convention, which states: “Nevertheless, by special contract the carrier and the passenger may agree to higher limit of liability.” Warsaw Convention, supra note 1, art. 22(1). A passenger is contractually bound by accepting a ticket containing reasonable notice therein of the terms of the Montreal Agreement. See Comment, From Warsaw to Tenerife: Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention, 45 J. Air L. & Com. 653, 669 (1980). Note, however, that passengers were not actually represented at the Montreal Conference:

The meeting of the Panel of Experts according to the report was a closed meeting. It is true that there were representatives of the airlines (IATA) there. And representatives of the insurers were there through the IUAI. So, it was “closed” only in the sense that passengers were not there, or passenger’s representatives were not there.

Kreindler, supra note 3, at 529.

See Comment, supra note 54, at 669.

See supra note 15.

Montreal Agreement, supra note 53, § 1(1).

Id. § 2.

See supra note 17.

Montreal Agreement, supra note 53, § 1(2). The only defense left to the airlines under the Montreal Agreement is contributory negligence of the passenger under Article 21 of the Warsaw Convention, which states: “If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with provisions of its own law, exonerate the carrier wholly or partly from his liability.” Warsaw Convention, supra note 1, art. 21.

Although the Montreal Agreement is in full force today, it was intended merely as an interim measure which would be superseded by a formal amendment to the Warsaw Convention. Consequently, the member nations met in Guatemala City in 1971 to once again increase the liability limitation. The Guatemala Protocol, produced at the Guatemala City Conference, limits liability, without any exceptions, to $100,000 and imposes strict liability on the airlines. Article 20 of the Guatemala Protocol provides, in effect, that the Protocol will not become effective unless ratified by the United States. That ratification has not been forthcoming.

In 1975, the ICAO met in Montreal and drafted an amendment to the Convention known as Montreal Protocol No. 3. The new agreement, which is essentially the same as the Guatemala Protocol, provides for strict liability, encouragement of settlements, an inflexible liability limit of approximately $117,000, and an optional Supplemental Compensation Plan.

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53 Dep't State Bull., supra note 47 at 923 (1965).
54 Guatemala Protocol, supra note 64, art. VIII.
56 See S. SPEISER & C. KRAUSE, supra note 10, at § 11:20. The authors state that "[a]rticle 20 of the Protocol requires that it be ratified by thirty nations, and that those nations comprise 'forty per cent of the total international scheduled air traffic of the airlines of the member states of the International Civil Aviation Organization in 1970.'" Id. at n.35. The American percentage of international air traffic makes compliance with Article 20 impossible without United States ratification. See Comment, supra note 54, at 675.
57 See Comment, supra note 54, at 677.
61 Id. § 1(a). The Montreal Protocol sets the limit in terms of 100,000 Special Drawing Rights (SDR's) rather than in Poincare francs, as did the Warsaw Convention and the other protocols. This change was due to the stability of SDR's and the fluctuating role of gold in the international monetary system. For a full explanation of the SDR system, see Effros, Maintenance of Value in the General Account and Valuation of the SDR in the Special Drawing Account of the IMF 6 Ga. J. Int'l &
Passage of Montreal Protocol No. 3 was defeated in 1983, when it failed to garner the support of two-thirds of the Senate. In view of the fact that the Senate has not ratified a single protocol to the 1929 Warsaw Convention, perhaps plaintiffs attorney Lee Kreindler was correct when he stated in 1967 that:

[N]o convention with a limitation of damages can possibly pass the Senate of the United States . . . . [W]hen anyone or anything, be it an international organization or an outdated treaty, attempts to impose an arbitrary or artificial limitation of any kind on this concept [of just compensation], there is going to be a clash of ideology. And I do not think in this day and age you will see any further ratification of limitations.

II. CONSTITUTIONAL REVIEW OF THE WARSAW CONVENTION

It is a well-established principle of American law that treaties must conform to the guidelines set by the Constitution, and the courts are empowered to strike down a treaty which violates constitutional provisions. The United States Supreme Court, however, has shown tremendous deference to the executive and legislative branches of the federal government with regard to the treaty-making power. Never in its history has the Supreme Court declared a treaty to be unconsti-

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72 See Comment, supra note 54, at 678-81. Montreal Protocol No. 3 provides for the right of each party to the treaty to establish its own SCP. Ratification of Montreal Protocol No. 3 is contingent, however, on United States approval of an SCP for its own citizens. Id. at 678. The SCP, which was considered by the Senate in 1983, would require each passenger to pay a surcharge of $2.00 per ticket for an additional $200,000 of liability insurance. Hollings, *The Montreal Protocols: A Threat to the American System of Jurisprudence*, Trial Sept. 1982, at 69.


74 Kreindler, supra note 54, at 529, 531.


76 Haskell, supra note 25, at 494. The power to make treaties is granted to the President in Article II of the United States Constitution. This power is conditioned, however, on the advice and consent (by a majority of two thirds) of the Senate. U.S. Const. art. II, § 2, cl. 2.
This judicial reluctance to declare treaties unconstitutional has been reflected in half a century of cases dealing with the Warsaw Convention. In the face of an increasing number of constitutional challenges to the Convention in recent years, lower American courts have likewise been largely unresponsive. Numerous courts have managed to sidestep any direct decision on the Warsaw Convention's constitutionality, and thus no clear consensus has emerged concerning the Convention's constitutionality.

At the outset, a review of cases on the Convention reveals that the United States Supreme Court, which is the court of last resort on any treaty question, has never decided a case dealing with the constitutionality or any other aspect of the Convention. As the following cases will illustrate, the small number of lower court decisions which have examined the Convention's constitutional status have done so with varying degrees of thoroughness. In 1944, in a case arising out of an international air crash, a New York trial court rejected a constitutional attack on the Warsaw Convention without analyzing, or even revealing the nature of the plaintiff's argument.

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77 Haskell, supra note 25, at 493.
78 See infra notes 83, 86, 94, 111, 115, 121 and accompanying text.
79 See Loggans, supra note 4, at 560.
80 S. Speiser & C. Krause, supra note 10, § 11:5. See also Molitch v. Irish International Airlines, 436 F.2d 42 (2d Cir. 1970) (plaintiff did not properly raise constitutional question at trial, therefore the court of appeals refused to address the issue); In re Pago Pago Aircrash, 419 F. Supp. 1158 (C.D. Cal. 1976) (on motions raising the constitutional issue, court ruled that it would be improper to decide constitutionality before a jury determination on the question of willful misconduct); Eck v. United Arab Airlines, 15 N.Y.2d 53, 203 N.E. 2d 640, 255 N.Y.S.2d 249 (1964) (court found for plaintiff on other grounds, without discussing constitutional issues). For additional examples of judicial evasion of the issue of the Warsaw Convention's constitutionality, see S. Speiser & C. Krause, supra note 10, § 11:5, n.31.
81 See S. Speiser & C. Krause, supra note 10, § 11.5. Although Supreme Court review has been sought in many Warsaw Convention cases, certiorari has been denied in all cases except one. In that case, Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508 (2d Cir. 1966), which raised no constitutional issues, the eight sitting Supreme Court justices split four-to-four, and thus the lower court was affirmed without an opinion. Alitalia-Linee Aeree Italiane v. Lisi, 390 U.S. 455 (1968).
82 Garcia v. Pan American Airways, 183 Misc. 258, 50 N.Y.S.2d 250 (1944), aff'd per curiam, 295 N.Y. 352, 67 N.E.2d 257 (1946) (on appeal, affirmance was made without any comment on the merits).
The court in *Garcia v. Pan American Airways*\(^8\) ruled that unless a law is clearly and unquestionably unconstitutional, it must be accepted as constitutional until an appellate court holds otherwise.\(^9\) According to the court, this reasoning is even more compelling in the case of a law such as the Warsaw Convention, which has "great importance and far-reaching effect."\(^8\)

*Indemnity Insurance Co. of North America v. Pan American Airways,*\(^6\) decided in the same year as *Garcia* and involving an aircrash covered by the Warsaw Convention, contains a slightly more developed constitutional analysis. The plaintiff in *Indemnity Insurance* contended that the Warsaw Convention usurped the exclusive power of Congress to regulate commerce,\(^7\) and that application of the Warsaw Convention would deprive the plaintiff of its claim to full compensation without due process of law.\(^8\) The court responded to the first contention by observing that the Warsaw Convention had been duly ratified under the terms of the Constitution.\(^9\) Furthermore, no treaty had ever been challenged on the ground of a conflict with the Congressional commerce power.\(^9\) "While the novelty of an argument is not to be taken against it," the court noted, the "uninterrupted uniformity of the practice by which treaties of commerce . . . have been made" merits deference to their validity.\(^9\) According to the court, the longstanding acceptance of duly ratified commerce treaties as well as the broad nature of the treaty-making power were sufficient.

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\(^8\) *Id.*

\(^9\) *Id.* at 259, 50 N.Y.S.2d at 251. The court failed to mention which constitutional grounds were being asserted by plaintiff. *Id.*

\(^6\) *Id.*


\(^7\) *Id.* at 339. The commerce power is granted in Article I of the United States Constitution: "The Congress shall have Power . . . to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, sec. 8, cl. 1, 3.

\(^8\) 58 F. Supp. at 339. The fifth amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

\(^9\) 58 F. Supp. at 339.

\(^9\) *Id.*

\(^9\) *Id.* at 339-40.
reasons to uphold the Convention. The \textit{Indemnity Insurance} court summarily dismissed the plaintiff's more predictable due process argument merely by stating that "[s]tatutes for the limitation of liability are no novelty." In \textit{Pierre v. Eastern Air Lines} the plaintiff, in his motion to strike the defendant's assertion of the Convention's liability limitation, made the argument that the Convention deprived the plaintiff of his constitutional right to a jury trial by limiting the jury's determination of damages. The court examined whether the jury's exclusive right to determine the fact of liability necessarily includes the right to assess damages. Analogizing to the Longshoremen and Harbor Workers Compensation Act, and to various unspecified state Workmen's Compensation Acts, the court found that assessing damages is not an exclusive function of the jury, but is instead "a matter of practice rather than of right." In dictum, the court also placed great importance on the fact that the Convention provided a "reasonable quid pro quo" for its liability limitation by establishing a presumption of negligence against airlines.

Although a presumption of the constitutional validity of treaties has been widely accepted by American courts, as of

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\footnote{Id. at 340.}

\footnote{Id. The court's reasoning was inadequately developed because the presence of other such statutes establishes only that liability limitations are not \textit{per se} invalid. Curiously, the court did not consider whether or not significant differences exist between the Warsaw Convention and other statutes which limit liability. Although some liability-limiting statutes are valid, only statutes which do so in a rational manner are constitutional. See generally Hay, \textit{Comments on Burdell v. Canadian Pacific Airlines and the Constitutionality of the Warsaw Convention}, 58 ILL. B.J. 26, 37 (1969).

\footnote{152 F. Supp. 486 (D.N.J. 1957).}

\footnote{Id. at 487. The seventh amendment provides, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." \textbf{U.S. Const.} amend. VII.

\footnote{152 F. Supp. at 488.}

\footnote{33 U.S.C. \S\ 901 (1976).

\footnote{152 F. Supp. at 488. The court recognized, "[i]n civil actions within the contemplation of the Constitution, the fact of liability for damages was unquestionably within the sole province of the jury," but it distinguished between determination of liability and assessment of damages. \textit{Id.}

\footnote{Id. at 489. This point is not well taken because the doctrine of \textit{res ipsa loquitur} has virtually nullified the importance of the presumption of negligence. See supra note 16."}
1968, only one court had demonstrated its willingness to closely scrutinize the Warsaw Convention in the light of the Constitution. In *Burdell v. Canadian Pacific Airlines* the court held that the Convention unconstitutionally violated the plaintiff's right to due process and equal protection of the laws. The court began its analysis with an extensive series of quotations from legal authorities in support of judicial review of treaties on constitutional grounds. Various facts and statistics regarding the low cost of insurance to airlines, the industry's impressive safety record, and the great financial resources of modern air carriers were cited in *Burdell* to support the finding that "the preferential treatment accorded airlines has no economic, moral or legal justification at the present time." Thus, the court held that the Convention violated the plaintiff's right to due process because it deprived him of full compensation for damages, without a rational justification. Similarly, the court found the Convention to be in violation of the plaintiff's right to equal protection of the laws, because it continued, without sufficient reason, to provide preferential treatment to airlines, even though such treatment was unavailable to other aircrash defendants such as manufacturers or the United States Government.

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100 *Burdell v. Canadian Pacific Airlines*, 10 Av. Cas. 18,151 (Ill. Cir. Ct. 1968). The decision was later revised by the trial judge at 11 Av. Cas. 17,351 (Ill. Cir. Ct. 1969).

101 *Id.*

102 See *supra* note 88.

103 See *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (holding that the guarantee of equal protection of the laws is impliedly, though not expressly, found in the fifth amendment).

104 10 Av. Cas. at 18,160. The *Burdell* court has been criticized for failing to keep its due process and equal protection arguments separate. See *Hay, supra* note 93, at 37. This criticism is more formalistic than substantive, since the court's forceful language clearly bases both arguments on the irrationality and arbitrariness of the Warsaw Convention as applied in 1968. 10 Av. Cas. at 18,160-61.

105 10 Av. Cas. at 18,156-57.

106 *Id.* at 18,158-60.

107 *Id.* at 18,160.

108 *Id.* at 18,160-61. The court recognized that there was adequate justification for the Warsaw Convention's liability limitation when the commercial aviation industry was in its infancy, but progress had eradicated any such justification by the 1960's. *Id.* at 18,158-60.

109 *Id.* at 18,161. For helpful opposing discussions of *Burdell* compare *Hay, supra* note 93, with *Kennelly, Response to Comments on Burdell v. Canadian Pacific Air-
Burdell marked the first time that an American court had attempted to thoroughly analyze the Warsaw Convention's constitutional status. The case has little precedential value, however, because the court ruled that the Convention was inapplicable to the facts before it. Thus, its discussion of constitutionality was merely dictum. In 1969, the Burdell court published a revised opinion in which it omitted all constitutional analysis as unnecessary in light of its decision that the Convention did not apply to the case. The court nonetheless reaffirmed its view that the Convention is unconstitutional.

In 1974, the Convention survived a challenge in United States federal court that it unconstitutionally deprived the American plaintiffs, who had been passengers on a flight from Kenya to London, of the right to litigate claims arising from their flight. In McCarthy v. East African Airways the plaintiffs were precluded by the court under article 28(1) of the Convention from maintaining suit in the United States because that was not the place of the defendant's domicile, principal place of business, or where it had sold the airline ticket. In addition, the plaintiffs also failed to satisfy article 28(1) because their ticketed destination was not the United States. The court dismissed the case for lack of treaty jurisdiction and stated that federal court jurisdiction extended only as far as Congress permitted by law. Thus, because treaties have the same force and effect as domestic laws, the

\[\text{lines, } 58 \text{ ILL. B.J. 454 (1970).}\]
\[10 \text{ Av. Cas. at } 18,155. \text{ The decedent's flight originated in Singapore, which did not adhere to the Convention until after the accident. Thus, the flight was not "international transportation" as defined by article 1(2) of the Warsaw Convention, supra note 1. 10 Av. Cas. at 18,155.}\]
\[11 \text{ Id. at } 17,351 (1969).\]
\[12 \text{ Id.}\]
\[13 \text{ Id.}\]
\[15 \text{ Id.}\]
\[16 \text{ See supra note 20 and accompanying text.}\]
\[17 \text{ Id. at } 17,386.\]
\[18 \text{ Id. The contract of carriage specified London, not the United States, as the plaintiffs' destination. } \text{Id.}\]
\[19 \text{ Id.}\]
Warsaw Convention was held to constitutionally restrict federal subject matter jurisdiction.\(^{120}\)

The most important case yet decided on the issue of the Convention’s constitutionality, *In re Aircrash in Bali, Indonesia on April 22, 1974*, involved multiple wrongful death actions arising out of an aircrash in Indonesia.\(^{122}\) Three arguments were advanced by the plaintiffs in *Bali*.\(^{123}\) First, the plaintiffs asserted that the Convention’s limitation on liability was so arbitrary and unreasonable as to deprive them of substantive due process.\(^{124}\) Second, for the same reasons, it was argued that the limitation deprived them of equal protection of the laws.\(^{125}\) Third, the plaintiffs contended that the limitation impermissibly burdened their constitutional right to travel.\(^{126}\)

The *Bali* court began its analysis by asserting its judicial power to review the constitutionality of the Warsaw Convention which it declared, “must withstand essentially the same tests as would domestic legislation against a claim that it denies rights guaranteed by the Constitution.”\(^{127}\) After identifying the plaintiffs’ constitutional arguments, the court referred to *Duke Power Co. v. Carolina Environmental Study Group*, a 1978 United States Supreme Court case, which set the standard of review for due process and equal protection attacks on economic regulations under the commerce clause.\(^{128}\) The standard of review established by the Supreme

\(^{120}\) Id.

\(^{121}\) 684 F.2d 1301 (9th Cir. 1982).

\(^{122}\) Id. at 1304.

\(^{123}\) Id. at 1309.

\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) Id. The right to travel was first implied from the United States Constitution in Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (holding that a tax on travelers unconstitutionally violated the right to travel).

\(^{127}\) 684 F.2d at 1309.

\(^{128}\) 438 U.S. 59 (1978). The plaintiff in *Duke Power* challenged the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210 (1976), which limits liability for injury resulting from nuclear power plant accidents. The Supreme Court held that the Act did not violate plaintiffs’ due process or equal protection rights because there was sufficient need for the limitation of liability. Id. at 86-87.

\(^{129}\) 684 F.2d at 1309. The commerce clause is quoted supra at note 87.
Court for such cases would invalidate economic regulations which are arbitrary or irrational. In *Bali*, the Ninth Circuit held that the Convention's limitation on liability is an economic regulation subject to the prohibition against irrationality and arbitrariness.

The *Bali* court next turned to the plaintiffs' right-to-travel argument, noting that international travel, like interstate travel, is a fundamental right protected by the Constitution. An economic penalty, such as the Convention's liability limitation, was declared by the court to be equivalent to a direct restriction on the exercise of one's right to travel. Accordingly, the Convention would be invalid if it could be shown that it was not "carefully tailored to serve a substantial and legitimate government interest." The basis for all three of the plaintiffs' arguments was the contention that the Convention's liability limitation no longer serves any legitimate or rational governmental purpose. In support of this claim, the *Bali* court reviewed information which demonstrated the airline industry's safety and insurability. The court also indicated that the United States Government's failure to assert "any national interest in limiting liability per se" was further evidence of the lack of any valid governmental purpose. The plaintiffs' argument that the Warsaw Convention provides no procedural benefits to American plaintiffs in exchange for the liability limitation was

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100 438 U.S. at 83.
101 684 F.2d at 1309.
102 Id.
103 Id. at 1309-10. This argument is not very substantial, however, because it is doubtful that any individual would be deterred from traveling by an economic "penalty" which is imposed only retrospectively.
104 Id. at 1309. The court noted that there was a question as to whether the plaintiffs had standing to assert their decedents' constitutional right to travel. It concluded, though, that this "may be one of the cases in which constitutional rights can be successfully protected only if interested third parties are permitted to raise them." Id. at 1310.
105 Id.
106 Id.
107 Id. The United States contended that acceptance of limitations on liability is a necessary concession in achieving international agreement concerning regulation of international air travel. Id.
found by the court to be "persuasive." \textsuperscript{138}

Although the \textit{Bali} court appeared persuaded by what it termed the plaintiffs' "substantial" constitutional arguments, \textsuperscript{139} it declined to rule on the Convention's constitutionality because the question was not ripe for decision. \textsuperscript{140} In the court's view, the plaintiffs' contentions were expressed prematurely because a remedy was available which might provide them with full compensation for any damages not recoverable under the Convention. \textsuperscript{141} According to the court, the plaintiffs could argue under the Tucker Act\textsuperscript{142} to the Court of Claims that the Convention's limitation on their recoveries amounted to a "taking"\textsuperscript{143} for which the United States must give just compensation. \textsuperscript{144}

The Ninth Circuit considered the \textit{Bali} situation to be analogous to that faced by the Supreme court in \textit{Dames & Moore v. Regan}. \textsuperscript{145} In \textit{Dames & Moore}, the Court was faced with the issue of whether the executive order which released Iranian assets held by American creditors in order to secure the release of American hostages was a constitutional exercise of presidential power. \textsuperscript{146} The court upheld the President's order, but stated that if the release of assets amounted to a fifth amendment taking of property, compensation would be available through the Court of Claims. \textsuperscript{147}

The \textit{Bali} court followed \textit{Dames & Moore} by holding that the Court of Claims is the proper forum to determine whether

\begin{itemize}
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} 28 U.S.C. § 1491 (1976). The Tucker Act provides: "[t]he Court of Claims shall have jurisdiction to render judgment on any claim against the United States founded either upon the constitution, or any Act of Congress or any regulation of an executive department . . . ." Id.
  \item \textsuperscript{143} The fifth amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
  \item \textsuperscript{144} 684 F.2d at 1310. Neither party raised the fifth amendment "taking" issue. The question was raised by the court \textit{sua sponte}. The \textit{Bali} court explained that claims for compensation are "property" within the meaning of the fifth amendment. \textit{Id.} at 1310, 1312.
  \item \textsuperscript{145} 453 U.S. 654 (1981).
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} \textit{Id.} at 689-90.
\end{itemize}
the Convention limitation, once applied, constitutes a taking of the plaintiffs' claims, and if so, to enforce the plaintiffs' right to full compensation.\textsuperscript{148} Although the Ninth Circuit did not strike down the Convention in \textit{Bali}, its decision may possibly have far-reaching effects. If the court's Tucker Act analysis proves to be correct, the United States will be placed in the position of reimbursing Convention plaintiffs for damages left uncompensated because of the treaty's liability limitation. In addition, the tone and legal analysis\textsuperscript{149} of the \textit{Bali} decision may encourage action by the lower courts, which have evaded the issue of the Convention's constitutionality while awaiting guidance from the appellate courts. If the Tucker Act analysis fails, some court, perhaps the Ninth Circuit, may employ the reasoning in \textit{Bali} to invalidate the Convention limitations on due process or equal protection grounds.

III. JUDICIAL ENFORCEMENT OF TICKETING REQUIREMENTS

The hostility of American courts towards the Warsaw Convention's limitation on liability has been demonstrated by their rigid enforcement of the Convention's delivery and notice requirements for airline tickets.\textsuperscript{150} Article 3 of the Convention requires that the carrier deliver a ticket to the passenger, and that the ticket contain a statement notifying the passenger that any loss arising from the transportation is subject to the Convention's liability limitation.\textsuperscript{151} Furthermore,

\begin{enumerate}
  \item \textsuperscript{148} 684 F.2d at 1313.
  \item \textsuperscript{149} The part of the \textit{Bali} opinion which preceeds the Tucker Act analysis is remark-
\item \textsuperscript{150} See Comment, supra note 5 at 142.
\item \textsuperscript{151} Article 3(1) provides:
\begin{enumerate}
  \item The place and date of issue;
  \item The place of departure and of destination;
  \item The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international
Article 3 also provides that failure to deliver a passenger ticket precludes the air carrier from utilizing the limitation on liability.\textsuperscript{182}

In the early days of the Convention, in cases such as Ross \textit{v. Pan American Airways},\textsuperscript{183} the Convention's limitation on recoveries was applied in spite of circumstances which involved extremely tenuous compliance with delivery and notice requirements.\textsuperscript{184} In Ross, Jane Froman, a well-known entertainer, was severely injured in a plane crash while on a U.S.O. trip to Europe to entertain American servicemen.\textsuperscript{185} Froman never received possession of the ticket, nor was she aware of the Warsaw Convention's liability limitation.\textsuperscript{186} Instead, an employee of the U.S.O. tour made all transportation arrangements and handled her ticket.\textsuperscript{187} The court found that Froman had seen the ticket on a table, and thereafter by boarding the plane she impliedly consented to the ticket's contract of carriage, including the Warsaw Convention's liability limitation.\textsuperscript{188}

By the 1960's many courts had impliedly rejected the Ross approach with regard to delivery and notice.\textsuperscript{189} In Mertens \textit{v.}

\begin{itemize}
  \item character;
  \item (d) The name and address of the carrier or carriers;
  \item (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
\end{itemize}

\textit{Warsaw Convention, supra note 1, art. 3(1).}

\textsuperscript{182} Article 3(2) provides:

The absence, irregularity, or loss of the passenger ticket shall not effect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

\textit{Warsaw Convention, supra note 1, art. 3(2).}

\textsuperscript{183} 299 N.Y. 88, 85 N.E.2d 880 (1949).


\textsuperscript{185} 85 N.E.2d at 883.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{Id.} at 884.

\textsuperscript{189} See, e.g., Mertens \textit{v. Flying Tiger Line}, 341 F.2d 851 (2d Cir. 1965); Warren \textit{v. Flying Tiger Line}, 352 F.2d 494 (9th Cir. 1965); Seth \textit{v. BOAC}, 329 F.2d 302 (1st Cir. 1964).
Flying Tiger Line, a delivery case, a plane chartered by the United States to transport military personnel crashed in Japan, killing the plaintiffs' decedent. The plaintiffs argued that the passenger ticket had never been delivered to the decedent; therefore, the case was not subject to the Convention's liability limitation. On appeal, the Second Circuit agreed, holding that delivery to the decedent after boarding the plane, moments before take off, and after loading of the material which the decedent was under military orders to accompany, was insufficient delivery as a matter of law. The court formulated the rule that delivery must be adequate to allow a passenger an opportunity to take protective measures to avoid the Convention's limitation of liability.

In the same year as Mertens, the Ninth Circuit reached a similar conclusion regarding ticket delivery in Warren v. Flying Tiger Line. Warren involved the disappearance of a flight chartered by the United States en route to Vietnam. The Warren court concluded that delivery of tickets to the passengers as they boarded the plane did not allow them sufficient opportunity to buy insurance or otherwise protect themselves, and therefore the delivery was inadequate to satisfy the Convention requirement. In addition to the timing of delivery, both the Warren court and the Mertens court noted that the small print on the passenger tickets was both unnoticeable and unreadable.

The Second Circuit in Lisi v. Alitalia-Linee Aeree Italiane, S.P.A. went even further than Mertens and Warren by

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160 341 F.2d 851 (2d Cir. 1965).
161 Id. at 853.
162 Id. at 856.
163 Id. at 857.
164 Id. at 856. The court stated that "such self-protective measures could consist of, for example, deciding not to take the flight, entering a special contract with the carrier, or taking out additional insurance for the flight." Id. at 856-57.
165 352 F.2d 494 (9th Cir. 1965).
166 Id. at 495.
167 Id. at 498.
168 Id. at 497; 341 F.2d at 857.
169 370 F.2d 508 (2d Cir. 1966).
170 341 F.2d 851 (2d Cir. 1965).
171 352 F.2d 494 (9th Cir. 1965).
requiring notice rather than mere physical delivery to passengers. In *Lisi*, which arose out of the crash of one of the defendant’s planes in Ireland, the plaintiffs’ decedents had received physical delivery of their tickets from 3 to 36 days before departure. Although a literal reading of Article 3(2) of the Convention requires only that “delivery” be made, the *Lisi* court held that delivery must include adequate notice of the liability limitation. After examining the extremely small print documenting the conditions of contract on page four of the ticket booklet, the *Lisi* court concluded that the decedents had not received sufficient notice, and therefore their recovery of damages would not be limited by the Warsaw Convention.

The reasoning in *Lisi* was subsequently embraced and applied by other American courts to prevent airlines from asserting the Warsaw Convention liability limitation. The Montreal Agreement of 1967, however, has established uniform ticket standards which comply with the notice requirement of *Lisi*, thus eliminating much of the litigation based on ticket “readability.” Nonetheless, plaintiffs have continued to escape the Warsaw Convention’s liability limitations in cases where passenger tickets violate the requirements of the

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172 370 F.2d at 513.
173 Id. at 510.
174 Id. at 515.
175 See supra note 152.
176 370 F.2d at 513. The court stated that the ratio decidendi of the Mertens and Warren cases, which held that delivery must be made in such a manner as to allow passengers to protect themselves, requires that delivery give actual notice to passengers. Id.
177 Id. at 514.
179 See supra note 53.
180 The Montreal Agreement, supra note 53, provides that notice be given: (1) in 10 point modern type; (2) in contrasting color; (3) on each ticket, each piece of paper attached to the ticket, or on the ticket envelope.
181 See Loggans, supra note 4, at 557.
Montreal Agreement\textsuperscript{183} or where physical delivery of the ticket is faulty.\textsuperscript{183} It thus appears that the courts will continue to use the delivery and notice requirements whenever possible to avoid application of the Warsaw Convention's low ceiling on airline liability.

IV. INADEQUACY OF THE POINCARE GOLD FRANC AS THE WARSAW CONVENTION'S UNIT OF CONVERSION

The most devastating action ever taken by a court against the Warsaw Convention occurred in 1982 in Franklin Mint Corp. v. Trans World Airlines.\textsuperscript{184} Franklin Mint involved a suit for the loss or destruction of the plaintiff's cargo on an international flight from the United States to England.\textsuperscript{185} The plaintiff's claim was subject to the Convention's limitation on liability for loss of cargo.\textsuperscript{186} The Second Circuit held that "the Convention's limits on liability for loss of cargo are unenforceable in United States courts."\textsuperscript{187} The reason for the court's holding was that the Convention's liability limitations, which employ gold as a unit of conversion, no longer specify a method for the courts to translate judgments into domestic currency.\textsuperscript{188}

The difficulty that the Franklin Mint court recognized in

\textsuperscript{183} See In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980, 535 F. Supp. 833 (E.D.N.Y. 1982) (use by airline of 8.5 point rather than 10 point type in advising passengers of applicable, limitation of liability constituted material breach of Montreal Agreement, and therefore limitation of liability was inapplicable).


\textsuperscript{185} 690 F.2d 303 (2d Cir. 1982) cert. granted, 51 U.S.L.W. 3883 (U.S. June 13, 1983) (No. 82-1186).

\textsuperscript{186} Id. at 304.

\textsuperscript{187} Id.

\textsuperscript{188} Id. at 311. The ruling was made prospective and applies only to "events creating liability occurring 60 days from the issuance of the mandate in this case." Id.

\textsuperscript{189} See supra note 15. The Warsaw Convention's liability limitation for checked baggage and other cargo is fixed at 250 gold francs per kilogram, unless the parties make separate arrangements for increased liability. Warsaw Convention, supra note 1, art. 22(2).

\textsuperscript{188} 690 F.2d at 311.
applying the Warsaw Convention's limitations arises from the fact that gold no longer has an official monetary function.\textsuperscript{190} When the Convention was drafted, gold was chosen as the unit of conversion because of its uniform, stable, and easily calculable value, which was due to its international monetary function and legally established price.\textsuperscript{191} The court noted that until 1978, when gold lost its official monetary function, the courts had no difficulty in applying the Convention's liability limitations in a consistent and regular fashion.\textsuperscript{192} In contrast, since 1978, the courts have been forced to choose among alternative units of conversion in order to enforce the limitations on recoveries.\textsuperscript{193}

In \textit{Franklin Mint}, the parties asked the court to choose among four alternatives: (1) the last official price of gold in the United States; (2) the free market price of gold; (3) the International Monetary Fund's "SDR";\textsuperscript{194} and (4) the exchange value of the current French franc.\textsuperscript{195} The court refrained from selecting a new unit of conversion, however, and held that such a decision constitutes a nonjudicial, political question, which may not be resolved by the courts.\textsuperscript{196} Accordingly, the court held that until a new unit of conversion is selected "either through treaty approval by the Senate or by legislation passing both Houses of the Congress . . . the Convention's limits on liability for loss of cargo are unenforceable in United States courts.\textsuperscript{197} Although the ruling in \textit{Franklin Mint}...

\textsuperscript{190} Id. at 305. This problem was foreseen by Allan I. Mendelsohn, one of the foremost authorities on matters relating to the Warsaw Convention. See Mendelsohn, \textit{The Value of the Poincare Gold Franc in Limitation of Liability Conventions}, 5 J. Mar. L. & Com. 125 (1973).

\textsuperscript{191} 690 F.2d at 305.

\textsuperscript{192} Id. at 307.

\textsuperscript{193} Id. at 308-09. \textit{See In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980}, 535 F. Supp. 833 (E.D.N.Y. 1982)(choosing the last official price of gold as the method of conversion); \textit{Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways}, 531 F. Supp. 344 (S.D. Tex. 1981) (adopting the free market price of gold to convert Warsaw Convention judgments). In addition, various foreign courts have opted to use the current French franc and the SDR, a unit of account established by the International Monetary Fund. 690 F.2d at 308-09.

\textsuperscript{194} \textit{See supra} note 71.

\textsuperscript{195} 690 F.2d at 305.

\textsuperscript{196} Id. at 307.

\textsuperscript{197} Id.
Mint was directed towards the liability ceiling on recoveries for loss of cargo, the same rationale should apply to cases involving limitations on death or personal injury recoveries arising from international air travel, because the latter limitation is also expressed in terms of gold Poincare francs. In 1983, this logical extension of the Franklin Mint holding was applied by a federal district court in California, in In re Air crash at Kimpo International Airport, Korea on November 18, 1980. If Franklin Mint is controlling, for the first time in fifty years airlines may be forced to pay full compensation to passengers injured or killed on international flights.

V. CONCLUSION

The Warsaw Convention’s limitation on airline liability has outlived its usefulness now that the airline industry has outgrown its infancy to establish itself as a powerful, safe, easily insurable, and stable enterprise. There is no longer any need to provide special protection to an industry which is capable of reimbursing customers for the damages it causes them. The Convention’s liability limitations, unaccompanied by any meaningful quid pro quo to benefit passengers, is an affront to the American ideal of full and adequate compensation to injured plaintiffs by those responsible for the harm.

The executive and legislative branches have repeatedly expressed disapproval of the injustices caused by the present Warsaw system. Nonetheless, the Warsaw Convention has remained intact for fifty years, virtually untouched by either branch. It has been the task of the judiciary to enforce this outdated and inequitable Convention against injured passen-

188 See supra note 15. Although the currently enforceable Montreal Agreement is expressed in terms of United States dollars, it is not an amendment to the Warsaw Convention, but instead constitutes a “waiver” of the Warsaw Convention’s limitation up to $75,000. Thus, if the original Warsaw Convention is unenforceable, the airlines cannot claim a limited waiver of a defense which they are not otherwise allowed to assert.

193 See Lowenfeld & Mendelsohn, supra note 9, at 504.
194 See generally Kreindler, supra note 3, at 529-31.
195 See supra notes 9-74 and accompanying text.
gers, most of whom were never aware that such a treaty even existed.\footnote{See, e.g., supra note 153 and accompanying text.}

It is not surprising that the courts have become hostile to the Warsaw Convention, and have circumvented the liability limitations whenever possible. In 1982, for example, there were at least four reported cases in which courts interpreted and applied the Convention to benefit plaintiffs restricted by the treaty provisions.\footnote{See In re Aircrash in Bali, Indonesia, discussed supra at notes 121-44 and accompanying text; In re Air Crash Disaster at Warsaw, Poland, discussed supra note 182; Manion v. Pan American Airways, discussed supra note 183; Franklin Mint Corp. v. Trans World Airlines, discussed supra notes 184-97 and accompanying text.} Two of those cases may prove to have a devastating effect on the Convention's liability limitations. The Bali\footnote{See supra notes 121-144 and accompanying text.} court's constitutional analysis of the Convention has laid the groundwork for a ruling that the liability limitations constitute: (1) a "taking" which requires just compensation under the fifth amendment;\footnote{See supra note 143 and accompanying text.} or (2) a violation of the equal protection\footnote{See supra note 103 and accompanying text.} and due process\footnote{Cf. Burdell v. Canadian Pacific Airlines, 10 Av. Cas. 18,151 (Ill. Cir. Ct. 1968) (trial court ruled Warsaw Convention unconstitutional, but later withdrew that portion of its opinion.).} guarantees of the fifth amendment. Bali marks the first time that an appellate court has acknowledged the serious possibility that the Convention is in violation of the United States Constitution.\footnote{690 F.2d 303 (2d Cir. 1982).}

In Franklin Mint,\footnote{Id. at 311.} the Second Circuit ruled that the Convention's limitation on damages for loss of cargo is prospectively unenforceable in United States courts.\footnote{Id. at 311.} This holding would logically apply to the liability limitations on wrongful death and personal injury suits as well, because the rationale was based upon the inadequacy of the Convention's use of the gold franc as its unit of conversion for translating judgments into domestic currency. Absent any action by the executive or legislative branches, it appears that the judiciary may be in the final stages of dismantling the liability limitations of the
Warsaw Convention.

It is unclear whether the courts’ actions with regard to the Convention are appropriate conduct for the judiciary. The Supreme Court has consistently indicated that the treaty-making power should be given great deference by the courts. In spite of widespread criticism of the Convention, it is the duty of the courts to apply the laws of the United States, unless there are compelling reasons for not enforcing them. Thus, it may be argued that the Bali and Franklin Mint courts have disregarded their judicial function and have invaded the jurisdiction of the executive and legislative branches by attempting to change the terms of the Convention.

The Convention is adhered to throughout the world and has brought a degree of order and cooperation to international air commerce. Thus, criticism may be directed at the courts for tampering with the complexities of international relations—complexities which are beyond the competence of judicial resolution. Any modification of American participation in the Convention is arguably a matter exclusively for executive or legislative action, and the courts should not second guess the wisdom of these two branches.

In defense of judicial activism towards the Convention, the equitable function of the courts is an important consideration. American tort law is designed to provide full and adequate compensation to injured plaintiffs by imposing the cost of damages on the responsible parties. The courts strive to administer this compensatory system, but they are frustrated in those cases in which the Convention imposes its low ceiling on liability. In order to enforce the Convention the courts are required to deny full compensation to injured plaintiffs for any damages which exceed the Convention limits. Thus, the airlines receive a windfall at the expense of injured travelers who are generally unaware that their legal rights have been limited by international treaty.

As a general rule, American tort law does not shield healthy, insurable industries from the duty to compensate persons injured in the course of business. The development of strict products liability and other doctrines shows a judicial
concern for protecting individuals at the expense of industry. The Convention, on the other hand, sacrifices the needs of injured passengers in order to lower the operating costs of airlines. This protection of air carriers is unacceptable because of the commercial air industry’s excellent safety record, which would make full liability insurance a miniscule portion of operating costs. Unfortunately, the American political process is inadequate for changing the Warsaw system. International air travelers, whose interests are affected only upon the rare occurrence of an aircrash, and the general American populace, which is unaware of the Convention’s existence, do not compose a cohesive lobbying force in Congress.

Although the courts are not empowered to redraft the Convention as they see fit, they should not be faulted for their reluctance to enforce the treaty at the expense of fairness and justice. If the judiciary blindly enforces unjust and inequitable laws, it does so at the expense of its persuasive force upon which it relies for its influence in the governmental system. Therefore, the courts have a duty to use the tools of statutory construction, constitutional review and judicial restraint to nullify the impact of laws which violate fundamental principles of equity, and cause significant harm to the public. Decisions such as *Bali* and *Franklin Mint* may instigate executive or legislative action to finally correct the Convention’s shortcomings.

The Supreme Court has been conspicuously withdrawn from the controversy surrounding the Treaty, and may perhaps continue its historical refusal to rule on the validity of the Convention. The need, however, for an authoritative ruling by the Court is urgent, and should not be ignored. It is no longer clear that the Convention’s liability provisions will be enforced in American courts. This uncertainty will obstruct the expectations of litigants and weaken United States participation in the regulation of international air commerce.

The Court has granted *certiorari* in the *Franklin Mint* case \(^{212}\) and the outcome of that dispute will certainly be influ-

enced by its long-standing policy of upholding duly-enacted treaties. In *Franklin Mint*, the Court might agree with the Second Circuit that the Convention's limitation on liability is judicially unenforceable without corrective legislative action, because the Court's policy towards treaties has been based on such deference to legislative and executive decision making. This rationale could, therefore, provide a means for the Court to lay the Warsaw Convention to rest in the name of judicial deference rather than judicial activism.

The Warsaw Convention as it now exists, is facing a very uncertain future. Supreme Court action is urgently needed to settle the question of the Convention's continuing validity, and to resolve the conflicting decisions of various federal courts. The Senate has continued its fifty-year history of irresponsibility toward the issues surrounding the Convention, and the President has announced no plans to withdraw the United States from the treaty. Thus, the Supreme Court must overcome its institutional reluctance to deal with matters of international relations, and provide guidance to lower courts which have been struggling for half a century to administer justice under uncertain laws.