A NEW APPROACH TO AIRLINE RATES AND COMPETITION

As an exercise of the CAB's extensive powers of economic regulation, the case of Southern Service to the West presented a not uncommon problem. Six certificated air carriers were applying for various new routes or route extensions in order to provide one-carrier through service. The service was to be between points in southern and southeastern parts of the country, at one end, and points on the west coast at the other end. Voluntary interchange proposals were presented by the carriers and several specific proposals were offered by the Board. The Board took this opportunity...
to launch into a full-scale investigation of "the extent to which all through services found required in this area could be provided by means of interchange agreements." Such an analysis entailed a study of most of the basic economic factors of the industry. The following study is designed to highlight the Board's approach.

In order to determine whether interchange agreements or route extensions would better satisfy the test of "public convenience and necessity," the Board turned first to the economic results of the proposed extensions. The Board evinced particular concern about the cost of additional equipment, increased operating expenses and the diversion of revenue into areas where service is "adequate." To the extent that revenue from the additional service failed to cover costs, or resulted in diversion of revenue from more profitable routes of the carrier, or resulted in diversion of revenue from other carriers, higher mail rates would be required. The Board regards the imposition of restrictions as the only method of limiting the diversion. However, the Board was cognizant of the fact that these undefined restrictions are not a remedy but a palliative at best.

Was the interaction of these factors apparent to Congress in 1938? If so, to what extent does Congressional policy suggest an adjustment of this interaction?

6 Page 26 of the mimeographed opinion, docket No. 1102, order serial No. E-5090, decided Jan. 30, 1951. The Board denied all the applications for route extensions detailed in note 4. Instead the Board established three interchange agreements, i.e., agreements for single carrier service over the connecting routes of two or more carriers. These are concisely described in Member Lee's dissent, pp. 2-3:

"There are three different and separate interchange arrangements constituting the service from the southeastern states to the Texas points where they deliver the traffic to American. These are: (1) an interchange between Delta and American from Atlanta to Dallas and from New Orleans to Dallas; (2) an interchange between National, Delta and American from Miami through Tampa and New Orleans to Dallas; and (3) an interchange between Braniff, Continental, and American serving Houston and San Antonio and joining American at El Paso."

With regard to the substantive effects of the Board's opinion, Member Lee felt that the action created an improper inferior route structure. "The majority's decision in this case not only deprives Houston and San Antonio of any southern transcontinental service, while granting Dallas-Fort Worth two such services, but it also deprives Houston and San Antonio of single-plane service to Florida." Page 4 of his dissent. The Board adopted the gist of Member Lee's suggestions in a supplemental opinion. Southern Service to the West (supplemental opinion); Docket No. 1102. (Order Serial No. E-5531). Decided July 13, 1951. The present discussion will concern itself only with the questions of competition presented in the original opinion. For any earlier discussion of the same general topic, see Comment, 12 J. Air L. & Com. 280 (1941). For informative statements regarding interchanges, see Northwest Airlines, Inc., 2 C.A.B. 627 (1941); Northwest Airlines, Inc., 6 C.A.B. 217, 244 (1944) (dissenting opinion); Eastern Air Lines, Inc., 6 C.A.B. 429, 463 (1945) (dissenting opinion).

7 Underlying the Board's entire discussion of costs and diversion is the implicit assumption that there will be no significant increase in air travel as a result of the Board's action.

8 Beginning with the decision in the case of Mid-Continent Airlines, 1 C.A.A. 45 (1939), the Board has fixed mail rates so that needy carriers would obtain a total revenue somewhat in excess of their total costs. See Altschul, Economic Regulation of Air Transport, 12 J. Air L. & Com. 163 (1941) for discussion of mail rates.

9 "Some diversion might be eliminated by the imposition of restrictions but restrictions have been found to be at best only partially effective." Page 13 of the mimeographed opinion. Presumably these "restrictions" are to be limitations upon the amount of diversion that will be permitted.
A reading of the Civil Aeronautics Act will indicate that Congress was aware of the possible effect of competition on the "sound development of an air transportation system." Congress regarded competition as being in the public interest when it was used to achieve the "sound development" of the industry. This is not to say that Congress would regard competition for other purposes as inimical to the public interest.

The Board adopts the view that "competition" must be subordinate to the establishment of a "sound economic basis." The majority offers five reasons why the system must be economically sound. It is conceivable that the exigencies of national defense might require the development of the air system in a manner and to an extent that was not economically sound. Insofar as that is true, the contentions of the majority are invalid. Nevertheless, the other reasons presented argue strongly for the creation of an economically sound and self-sufficient air transport system.

**The Economics of C.A.B. Policy on Competition**

The statement that competition is to be subordinate to the quest for a "sound economic basis" suggests the basic issue. Efforts to promote competition may involve measures which the Board regards as economically unsound. Query: to what extent will "competition" be restricted by the "statutory mandate looking toward the development of an economically sound air transportation system"?

The Board has indicated that the restriction may be "insurmountable." The limits of this barrier appear to be outside of the Board's field of vision. Rather than face the issue and...

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10. 49 U.S.C. §402. "In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity . . .

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense. . . ." Section 2 contains the declarations of policy which are to guide all actions by the Board.

11. The section quoted in the preceding footnote indicates that "other things" are to be considered as being in the public interest. It would seem that competition which was designed to reduce rates and make the carriers self-sufficient might be one of the "other things." The qualifying phrase "to the extent necessary" does not defeat this construction of the term "competition." There is nothing in the attainment of lower rates and self-sufficient carriers that hampers the "sound development" of the system.

12. "This (§2 (b) (d)) is no mandate to seek competition merely for the sake of having competition. It is a recognition by the Congress that the provision of competitive service is subject, like all other aspects of the air transport business, to the paramount necessity that the system be developed on a sound economic basis." Page 21 of the mimeographed opinion.

13. Page 21 of the mimeographed opinion of Jan. 30, 1951: (1) "the many millions of dollars which have been and are being paid in the form of mail pay to air carriers"; (2) "the millions which have been and are being expended in connection with airway facilities"; (3) "the need for making this new transportation available to the greatest number of people through lower costs and fares"; (4) "the vital importance of air transportation to the national defense"; (5) the need for anticipating unfavorable economic conditions.

14. In the present case competition would have taken the form of a substantial expansion of routes. However, it would seem that the discussion by the Board is to be applied to all phases of the question of competition.

15. "... the conclusion would seem to be inescapable that, in light of present facts and conditions, the difficulty of reconciling any material route expansion with the statutory mandate looking toward the development of an economically sound air transportation system would seem to present to the applicant a major, if not insurmountable, task under such circumstances serious consideration should be given to interchange operations as an alternative measure for meeting the future air service needs." Pp. 25-26 of the mimeographed opinion.
attempt to define clear but tentative standards, the Board halted, turned sharply and retreated into a discussion of interchanges."\(^{16}\)

Interchange agreements are suggested as a means of providing the required service. However, even these agreements are subject to conditions.\(^{17}\) After stating these conditions which the agreements must satisfy the discussion is enigmatically summarized: "This is but another way of saying that an interchange to be in the public interest must not result in the creation of uneconomic competition."\(^{18}\)

This, then, is the Board's suggested solution. The Board believes that the demands of both economy and competition can be met by interchanges which do not result in "uneconomic competition." What does this proposal mean?

The mysterious cloud that surrounds the phrase "uneconomical competition" is not dispelled by the use of the words in the above context. However, the phrase is used while discussing another subject: monopoly.\(^{19}\)

In this context difficult problems which are peculiar to interchanges, such as possible conflicts of interest between the carriers, are removed. When the phrase is used in this latter context the clouds begin to lift. As the quotation in the footnote suggests, the Board believes that refusal to establish competition in this instance would be justified.\(^{20}\) Thus, the Board implies that it will establish competition only when the failure to do so cannot be justified. Board Member Lee declares in his dissenting opinion that competition should be promoted except when it cannot be justified. Is the choice necessarily limited to these two alternatives?

**A New Approach to Adequacy of Service**

While considering new routes, route extensions or interchange agreements, the Board has concerned itself with the effects of its decisions upon


\(^{17}\) P. 32-33 of the mimeographed opinion: "... (T)he interchanges which would best satisfy the public interest... would cause the minimum interference with the existing route pattern," would be "over reasonably direct routes... would leave substantially undisturbed the historical participation of the existing carriers... would not cause undue diversion."

\(^{18}\) P. 38 of the mimeographed opinion. (Emphasis added.)

\(^{19}\) P. 33 of the mimeographed opinion. (Emphasis added.)

\(^{20}\) It may be said that the difference is only one of degree. However, the question of whether competition is to be viewed affirmatively or negatively goes a long way in determining one's views on related questions. See the suggestions in this article, infra.
the other carriers as well as upon the applicants. It has considered the cost of whatever new equipment may be required, additional cost of operation, diversion of revenue, the effect on the mail rates and the added revenue to be obtained from the new service. The cities to be served were analyzed in terms of the population, value added by its manufacturers, the percentage increase of these factors in recent years, the nature of its industry, the number of air passengers per 10,000 persons per month, the location of universities or military installations in or near city, the volume of air express, air freight and trade in general. Certainly these are relevant considerations in determining the air traffic potential of any given area. No one can deny that such potential is limited. It could be argued, however, that the limit is not the one perceived by the Board.

After revealing much concern about diversion, mail rates, additional investment and expense, cost per passenger-mile, and financial reserves for adverse conditions, the Board went no further. The members failed to suggest anything more helpful than the avoidance of "uneconomic competition." Member Lee offered only a return to the Board's previous approach to competition. That is a start but a more positive plan suggests itself.

The Board's determination of the "adequacy of service" has been referred to previously.\(^2\) If most of the people desiring air transportation are being served then the Board is content to say that the service is "adequate."\(^2\)\(^2\) The Board itself has not undertaken to stimulate the demand for air service. Consequently, the service remained "adequate" until extraneous forces like population increases and increased industrial output stimulated the demand. Likewise, the Board has found the service to be "adequate" in instances where only a minor fraction of the potential traffic was being served.\(^2\)

One way to increase air travel and air freight would be to lower fares and rates.\(^2\)\(^4\) This does not mean the Board should provide for a universal reduction. It means that in selected instances the Board should seek reductions with an eye toward increasing the number of users in such a manner as to increase the total revenue.\(^2\)\(^5\) Where one carrier serves a locality, the applicability of this plan should certainly be considered. The same would apply where there are several carriers.

In an area served by several airlines, the larger carriers have an advantage over the smaller carriers by virtue of the former's prestige. This competitive advantage might be offset somewhat if the smaller carrier were permitted to offer lower rates for similar service. If the plan were well executed it would increase the total revenue of the smaller airline. Also, it might increase the general demand for air transportation in the area and,

\(^2\)\(^1\) See note 7, supra.

\(^2\)\(^2\) Apparently this would be true even if only one carrier served the area. The presumption would be that the service is "adequate" and that there is no need for competition. See p. 12 of the mimeographed opinion.

\(^2\)\(^3\) This is not meant to imply that the traffic potential in any given area is unlimited. However, it is suggested that the limit is considerably beyond the one the Board employs in ascertaining whether the service is "adequate."

\(^2\)\(^4\) For a different view, see Jones & Davis, The "Air Coach" Experiment and National Air Transport Policy, 17 J. AIR L. & COM. 1, 418 (1950). "But if the trend toward coach fares is allowed to grow unchecked to the point where the basic structure is substantially reduced, then it seems clear that progress toward economic stability will be reversed and government funds will be needed on a larger and longer basis if our airline system is to be maintained in its present form."

\(^2\)\(^5\) In some instances this may mean that rates will have to be lowered to a point that will appreciably increase the load factor required to cover costs. With regard to the determination of these costs, see Comment, 16 J. AIR L. & COM. 354 (1949). See Western Air Express Corp., Mail Rate, 1 C.A.A. 341 (1939).
Thus, redound to the benefit of all the carriers concerned. Should all the carriers serving a given area be reluctant to adopt the plan, the Board might do well to introduce a new carrier that was more susceptible to the advantages.

This course of action is not intended to be a panacea. The economic difficulties are formidable but not insurmountable. First, if the market for air freight and travel has been exhausted, there is little justification for a plan that assumes the contrary. But can it be denied that the air transport market generally, or, at least, certain specific markets therein have not been fully explored? Second, as suggested, where feasible the exploration might take the form of lower rates by one of the smaller carriers. To prevent losses to this carrier, a competing carrier would not be permitted to offer reduced rates until the market can support both carriers without loss to either. Third, reduced rates may require less luxurious service and accommodations. The prime asset of the airlines is their ability to provide safe, rapid transportation. This service is unique. The airlines should seek to provide it at the lowest possible rates. They should not divert their resources in an effort to emulate a first-class hotel. Fourth, service at reduced rates need not be limited to the larger cities. It is conceded that such service requires planes with increased seating capacity and high load factors. However, a basic premise of this article is that in some cases the reduction in fares will be more than offset by the number of additional users who are attracted by the reduction. If the premise is sound, the plan is applicable to cities both small and large and especially to "loss routes" which are unprofitable but which the C.A.B. requires. Fifth, the nature of the equipment to be used presents another problem. To compensate for the rate reduction the seating capacity must be increased about 25% where possible equipment like the DC-6 should be used. In any event the equipment should be equal to that used in standard service between the points to be served. No additional equipment should be purchased until the trial proves successful. Where major traffic centers are to be served, only off-peak operations should be permitted. Where less traffic is available, regular schedules should be used. In either event it would seem that presently available equipment could be used. Where this is not the case, it may be desirable to eliminate or replace one or more of the standard flights and use the equipment for the purposes of the experiment. Sixth, any computation of costs must include not only variable costs due to the reduced rate service but also a liberal provision for diversion of revenue and fixed costs attributable to the purchase of new equipment, when necessary.

Viewed in the terms stated above, the question of reduced rates goes to the heart of the airline industry. If carriers do not regard rates as a challenge, if they do not seek to meet the challenge, they are not truly competitive. In the absence of such competition the public is the loser.

If the goal is the attainment of an economically sound air transportation system, competition can be an aid, not an obstacle. Competition must be viewed affirmatively. Competition must be defined as a genuine effort to establish a self-sufficient air industry while providing the best possible service for the greatest number of persons at the lowest rates.

The possible benefits of the plan suggested herein are numerous. First, the airline industry would become aroused to what the public demands from it. The public has a right to expect a return on its investment. This return should take the form of an opportunity for increasing numbers of persons to make use of constantly improving air transport facilities at gradually lowering rates. The public is justified in demanding that the return be
paid by the industry, not the government. The industry cannot expect the
government to continue to plan, perform and provide for it. Second, the
Board could view its role with clarity. Appraisal and planning are feasible
only when goals are defined with reasonable precision. Only then would the
Board have the perspective that would enable it to lay down a broad, long-
term plan for the industry. Intermediate objectives like "competition," "adequate service" and "honest, economical and efficient management"
would acquire meaning when placed against the background of the ultimate
goal to be attained, namely, the best possible service for the greatest number
of persons at the lowest rates. Third, the benefits to the public in the form
of lower rates and reduced mail-rate payments are apparent. Fourth, the
plan might serve as a model for other regulated industries.

The initiative should come from the carriers. They are in a position
to know in what areas reductions would be beneficial. If they are hesitant,
the Board has the power to act. The Board should be selective in applying
the plan. Careful consideration should be given to all relevant factors
to determine whether a reduction of rates in a particular area will result
in a commensurate increase in revenue.

In the absence of a general plan, the Board has endeavored to form policy
and decide cases by turning to the specific objectives, such as "competition,"
which are set forth in the Civil Aeronautics Act. However, these phrases
are not self-explanatory. They become meaningful only as part of a pro-
gram. It has been shown that apart from such a program these objectives
become the subject of fruitless disagreements as to whether the "competi-
tion" is "uneconomic" or the service is "adequate." The recent case of Trans-Pacific Airlines, Ltd. suggests that the Board may have begun to
realize that the public is entitled to more than what the Board has regarded
as "adequate service." The situation summons judicious and bold action.
It is to be hoped that the Board will answer the call.

26 See Cherrington, Objectives and Strategies for Airline Pricing, 18 J. Air
L. & Com. 253 (1951) (need for long-range pricing policies); Magnusson, Obser-
vation on Economic Regulations of the Civil Aeronautics Board, 18 J. Air
L. & Com. 181 (1951) (need for advance statements of policy and interpretation);
Sweeney, Policy Formation by Civil Aeronautics Board, 16 J. Air L. & Com. 127
(1949) (procedure by which policy is formed).

27 See Northwest Airlines, Inc., Certificate of Convenience and Necessity,
1 C.A.A. 573, 579 (1940).

28 The Civil Aeronautics Act provides that with respect to rates the initial
action should come from the carriers. Sec. 404. Nourse, Economic Planning and
Control in Air Transportation, 14 J. Air L. & Com. 436 (1947), suggests the
centralized planning and control which would help effectuate the plan proposed
in this article.

29 Sec. 1002(d), 49 U.S.C. §642(d). This power has been used sparingly.
See Air Passenger Tariff Discount Investigation, 3 C.A.B. 242 (1942); Govern-
ment Travel Discount, 6 C.A.B. 825 (1946).

30 The Board has considered similar plans. See Pioneer Air Lines, 7 C.A.B.
469 (1946); Western Airlines, Mail Rate, 1 C.A.A. 341 (1939).

(A second carrier was permitted to serve the Hawaiian Islands): "By reason
of the monopoly held by parent and subsidiary, Hawaiian was able to charge
whatever fares were necessary to assure its financial stability without regard
to the economy of the traveling public or the necessity of curtailing its costs.
Reference has previously been made to reduction in fares brought about by com-
petition in the Territory. Moreover, the absence of competition permitted Ha-
waiian to operate at unreasonably high load factors without the necessity of
providing additional service and equipment."

The recent inauguration of DC-6, non-stop, coach service to Los Angeles and
New York from Chicago by United, American and Trans World airlines is a
step in the direction indicated in this article.
THE expansion of our military air force during the current national emergency will most certainly lead to an increase in the number of personal damage suits filed against the United States under the Federal Tort Claims Act. The technical nature of the air arm, and its broad scope of operations, is likely to involve the air force in numerous accidents with civilians. In any subsequent litigation the victim on his discovery motions may well face a government claim of privilege as to air force investigation reports of the accident. Reynolds v. United States presents a typical situation.

An air force plane crashed, while carrying four civilian engineers to test secret electronics equipment. Three of the civilians were killed, and their wives brought suits for damages against the United States under the Tort Claims Act. The plaintiffs sought production of the air force investigation report of the accident on a discovery motion under Federal Rule 34. The district court found good cause, and ordered the defendant to surrender the documents. The Attorney General and the Secretary of the Air Force thereupon entered a formal claim of privilege. After an extended hearing on that question, the court ordered the records produced for examination in order to determine "... whether the disclosure would violate the Government's privilege against disclosure of matters involving the national or public interest." The government refused to comply, and the court therefore ruled that the issue of negligence on the part of the air force had been established. A summary hearing on the question of damages followed, and judgment was entered for plaintiffs. On appeal the Court of Appeals for the Third Circuit sustained the rulings of the trial judge and affirmed the decision.

The court indicated that, prior to the grant of a discovery order, the plaintiff must meet the preliminary requirement of a showing of good cause. Since our judicial system remains adversary in nature, the requirement seems a proper one. To demand that an opponent surrender information gleaned through diligent effort would be unconscionable, unless it be neces-

1 28 U.S.C. § 1346, 2671 et seq. (1946). The problem seldom arose during the mobilization and expansion of the military for World War II, for that was before the enactment of the Federal Tort Claims Act. The government was then immune to suit for injuries to civilians, unless it surrendered its immunity in each case. As a result very few damage suits were filed against the United States as tortfeasor, and in such suits as were allowed, the government had the right to specify whether or not it would submit itself to discovery.

2 193 F. 2nd 987 (3d Cir. 1951); 1952 U.S. & C.Avr. R. 96; cert. granted.—U.S. —, 20 L.W. 3263. Other recent cases show the increasing propensity for Air Force accidents to involve civilians. Evans v. United States, 10 F.R.D. 255 (E.D. La. 1950) (military plane crash into field where plaintiff's intestate was picking cotton, mortally wounding her); Cresmer v. United States, 9 F.R.D. 203 (E.D. N.Y. 1949).

3 28 U.S.C. §§1346, 2671 et seq. (1946). The basic allegation of the plaintiffs was wrongful death.

4 FED. R. CIV. P. 34; "Upon motion of any party ... the court in which an action is pending may order any party to produce and permit the inspection of copying ... of any designated documents, paper ... not privileged ..." Reynolds v. United States, supra note 2.

5 The court made this ruling under the authority of Fed. R. Civ. P. 37(b) (2): "If any party or an officer or managing agent of a party refuses to obey an order ... made under Rule 34 to produce any document or other thing for inspection ... the court may make such orders as are just, and among others the following: (1) An order that matters regarding which the questions were asked, or the contents of the paper ... shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

necessary procedure designed to guarantee a just result in litigation. The fact that the government is the defending party should not cause relaxation of the requirement. Rather, the consequent inconvenience to public officers, and expenditures of public funds in transmitting records, should a discovery order be entered against the government, would seem to suggest that in general the court should require a stronger showing of cause by the plaintiff than if a private party were the litigant contesting the motion. However, in the air crash tort case a showing of good cause should be at most a formality. The instrumentality involved in the accident is exclusively in the possession and control of the air force. The military investigating body is certain to be on the scene shortly after the accident, and its investigation and report is likely to be completed before the victim is in a position to understand what has occurred, or before his next of kin have been notified. Furthermore, military expediency will generally demand security guard of the area, immediate demolition of the wreckage, and re-assignment of the surviving personnel. The victim is denied the opportunity of determining the circumstances surrounding the accident, and is placed in a most precarious position, since that information will be vital to his case. Depositions or interrogation of the survivors, providing they can be reached many months after the accident, cannot substitute for the information contained in the report. It may well be that without the report data, or the right to examine or have experts examine the site of the crash, the plaintiff will be unable to establish even the preliminary aspects of his cause of action. If not allowed to examine the investigation report he faces loss of his chance to seek recovery for his injuries.

Confronted with a discovery motion, the government may institute a preliminary claim that it need not submit to discovery as must a private litigant, though the plaintiff demonstrates cause. The theory of the argument runs from the proposition that a sovereign cannot be sued without its consent, therefore, it cannot be made subject to the requirement of discovery in conjunction with a suit in the absence of its express acquiescence. The statute books are devoid of any such consent regulation. However, in the Federal Tort Claims Act, Congress, the one branch of the government which may subject the United States to suit, saw fit to place the government in a position similar to any private defendant in a civil tort action.

8 The good cause requirement has been written into the discovery rules. "Upon motion of any party showing good cause therefor ..." (italics supplied) FED. R. CIV. P. 34.


10 A similar contention was made in Bank Line v. United States, 76 F. Supp. 801 (S.D.N.Y. 1948). There the plaintiff sued the U.S. under the Suits in Admiralty Act for damages to his ship resulting from a collision between ingoing and outbound convoys near Casablanca. The court assumed "... that the government could have annexed to its consent [to be sued] an absolute privilege of non-disclosure of information in its possession. To the extent that it would have made the assertion of some claims against the government futile, it would amount to a constriction of the scope of the government's consent." Id. at 804; see also, O'Neill v. United States, 79 F. Supp. 827, 830 (E.D. Pa. 1948).


12 It appears that originally in the Tort Claims Act a special section dealt with the problem of application of the Federal Rules to suits on tort claims against the United States under the Act. The section was later dropped as unnecessary. For a brief resume of the history see United States v. Yellow Cab Co., 340 U.S. 543, 553 (1951); see also Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950); Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949); Wunderly v. United
Consequently, the Federal Rules of Civil Procedure are made applicable against the United States in proceedings brought under that act. Government documents then become lawfully demandable by the party plaintiff unless the matter demanded is protected by a privilege.13

Should the records contain state,14 military,15 or diplomatic16 secrets they would unquestionably be privileged and not subject to discovery. There the interest of the individual litigant must bow to the superior interest of the public welfare. Air force accident reports, stating testimony as to circumstances surrounding the accident and containing data gleaned from examination of the wreckage, are not likely to contain such confidential information. Faced by a claim of secrecy in the public interest, the courts could adequately protect the national security by making an independent personal examination of the documents in question. In that manner the court would not abdicate to an executive department official its function of determining the admissability of evidence in a law suit.17 It may safely be assumed the judiciary would weigh carefully the public interest prior to issuing a discovery order, which may have the effect of publicizing confidential government records. It is realized that there are situations in which the judge, faced with a wealth of material of a complicated and technical nature, would not be competent to decide whether such matter need be

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13 FED. R. CIV. P. 26(b), 34.
14 Totten v. United States, 92 U.S. 105 (1875), Plaintiff's intestate made a contract whereby he was to be paid $200 a month for secret services in gathering information from the enemy during the Civil War. He was only paid his expenses and his administrator now seeks enforcement of the remainder of the contract. The Court finds the matter too confidential, holding that public policy must preclude establishment of a contract of this type in the courts. The information so disclosed would be detrimental to the State.
16 Kessler v. Best, 121 Fed. 439 (S.D.N.Y. 1903) (documents sought were part of archives of German Consulate); Asiatic Petroleum Co. v. Anglo-Persian Oil Co. (1916) A.C. 522 (letter contained confidential information as to future diplomatic and military course of operations).
17 United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949), aff'd per curiam, 339 U.S. 940 (1950) was an anti-trust action where the defendant sought certain government records. The government contended that the attorney general had the right to determine the question of privilege as to the documents. The court after careful consideration of the matter stated "... to sustain this contention would, in effect, amount to an abdication of the Court's duty to decide the matter ... if the documents were submitted to the Court ... and if it appeared in the Court's judgment, that production of any part thereof would be injurious to the public interest, they would be excluded; otherwise the order to produce for the inspection of defendants would be sustained." Id. at 720-21.
decided not to interfere with the recommendation of the executive department official in charge of the records as to the confidential matter contained therein. The independent judicial examination, however, will assure the litigant of some independent judicial examination, however, will assure the litigant of some

The usual claim of government privilege is not that of state secret, but rather, a right of the executive branch of the government to refuse to disclose to outsiders the results of its housekeeping investigations. The contention stems from the concept of separation of powers inherent in the constitutional organization of our government. From its inception each branch, legislative, executive, and judicial has sought to operate in its own sphere, and to refrain from infringing upon the independent provinces of the others. True, this arbitrary organization has not been consistently maintained in practice, and could not be even if desired. Yet, the courts early decided not to interfere with discretionary acts of executive officials.

Atomic energy matters may be cited as a prime example. The judge, not a scientist, could not readily determine just what information as to the atomic energy program should be unavailable to the public. A leak here might destroy atomic arms leadership in the world. For an extended treatment of government immunity in this all important field, see Haydock, Some Evidentiary Problems Posed by Atomic Energy Security Requirements, 61 HARV. L. REV. 468 (1948). To meet the problem of such restricted data the author suggests the creation of a special court of selected judges to meet from time to time, and handle claims of privilege by the Atomic Energy Commission in regards to evidence sought to be introduced by a party in a law suit.

The connotation presents in clear forceful terms the case for the individual against the government. Ahead of his time as usual, his presentation heralds many of the arguments pro and con now commonplace in the cases where the point is raised.

Perhaps the first word upon the subject occurs in Marbury v. Madison, 1 Cranch 137 (U.S. 1803). There, Attorney General Lincoln objected to answering certain questions posed by the Supreme Court. The Court in requiring Mr. Lincoln to answer stated "... they had no doubt he ought to answer. There was nothing confidential to be disclosed. If there had been, he was not obliged to answer it." Id. at 144. The real problem in the case was whether mandamus could issue against the Secretary of State to force him to deliver up a certain commission to the plaintiff. The only duty of the Secretary was to deliver the commission; there was no discretion to be exercised. Under those circumstances the Court stated, "This then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record..." Id. at 173. The Court then held that the writ, however, should not issue from the Supreme Court. Somewhat later in Kendall v. United States, 12 Pet. 524 (U.S. 1838), we find Mr. Justice Thompson stating, "... the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States, under the Constitution... and... there is nothing growing out of the official character of the party that will exempt him from this writ, if the act to be performed is purely ministerial." Id. at 617. See also, Aaron Burr's Trial, 1 ROBERTSON'S REPT. 178-88 (1875). An earlier edition of the same work contains additional language not found in the 1875 reprint, see II ROBERTSON'S REPT. 555-66 (1808).
would appear that control of departmental records would be within the discretionary authority of the departmental chiefs, with full power to determine whether outsiders should be allowed to peruse the documents.\textsuperscript{23} Congress has by statute seemingly acquiesced in that theory,\textsuperscript{24} and has given impetus to the doctrine that where the government is not a party to the suit the executive branch can with impunity refuse to submit executive records in response to court subpoenas.\textsuperscript{25} If the executive branch institutes a court action, however, it is then considered to waive its immunity on submission of public records.\textsuperscript{26} The United States must be prepared to allow the court and opposing counsel to inspect all relevant documents upon which its complaint is based or face dismissal of its action. That position appears to be logical and in the best interests of the parties. Should the government be not ready to make public its evidence, it should not institute suit. No defendant should be made to defend against evidence of which he has no knowledge.

That rationale will not apply where the United States is made a party defendant to a cause of action. The executive department no longer has control over the decision to bring suit. It cannot then be said to consent to waiver of executive immunity as the price for the privilege of seeking judicial redress of an actionable wrong against the government. Despite the doctrine of separation of powers, Congress admittedly has the power to consent to allow suit to be brought against the United States.\textsuperscript{27} It has been suggested that the power to compel executive officials to produce documents in their control must follow from the broader authority in the legislature to waive sovereign immunity from suit.\textsuperscript{28} The commentators proceeding upon

\textsuperscript{23} Hartranft's Appeal, 85 Pa. 453, 445, 27 Am. Rep. 667 (1877). "We had better at the outset recognize the fact that the executive department is a coordinate branch of government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts." A long line of Attorney Generals have voiced similar opinions, see 25 Opinions of Attorneys General 326 (W. H. Moody 1905); 40 Opinions of Attorneys General 45 (R. H. Jackson 1941).

\textsuperscript{24} 5 U.S.C. § 22 (1948); "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

\textsuperscript{25} The leading case is Boske v. Comingore, 177 U.S. 459 (1900); The State of Kentucky had instituted proceedings against one Block for evasion of state and county liquor taxes. During the course of the trial an internal revenue agent was asked to file certain reports as to liquor production of Block. In consequence of his refusal, the County Court of Carroll County adjudged the agent guilty of contempt. The United States Supreme Court upon habeas corpus petition ordered the agent discharged from custody. "In our opinion the Secretary, under the constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts." A long line of Attorney Generals have voiced similar opinions, see 25 Opinions of Attorneys General 326 (W. H. Moody 1905); 40 Opinions of Attorneys General 45 (R. H. Jackson 1941).

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\textsuperscript{27} See note 10, supra.

\textsuperscript{28} "Ultimately the claim of executive immunity from discovery rests on the separation of powers. Pressed to its logical conclusion that argument would immunize executive agencies from suits altogether. Yet, it is undeniable that
that theory fail to recognize a seemingly fundamental distinction between the greater and lesser power. Practically, if Congress had not the prerogative to authorize actions against the United States, no private litigant could seek redress for wrongs committed under the aegis of government. The policy underlying the extension of congressional power to alleviate the harsh common law rule, that the sovereign cannot be sued without its consent, is clear. That is not to say, however, that the same policy may underlie an extension of power to one of three supposedly equal arms of government to impinge on the rights of the others. The fact that Congress can require the government to submit to suit need not compel the inference that Congress and the courts have the power to force the executive department to surrender records. Especially should that be true where there is nothing in the Constitution or statutes which suggests that Congress has sought to exercise an inferred power to compel production of executive documents in the case of tort suits against the United States. Where Congress has desired to express a policy in regard to executive records, it has known how to do so.29 Absence of a direct expression of this policy in the Federal Tort Claims Act30 would appear to indicate that Congress was satisfied with or felt powerless to change existing executive discretion to refuse to submit official records.

It must be remembered that the court in the Reynolds decision placed to one side the situation where Congress has authorized and the courts have utilized a subpoena directed to an executive department head demanding official records in his control.31 Instead the court issued a discovery order, and in reality gave the executive official a choice to comply or to refuse to submit the department records. Should he decline, the court need not attempt to enforce its order by contempt action, a procedure fraught with constitutional dangers.32 Instead it orders a decree establishing the issues in favor of the plaintiff opponent. It may well be that under the Federal Rules Congress and

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29 "The Court of Claims may call upon any department or agency of the United States for any information or papers it deems necessary. The head of any department or agency may refuse to comply when, in his opinion, compliance will be injurious to the public interest." 28 U.S.C.A § 2504 (1950).

30 "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances..." 28 U.S.C. § 2674 (emphasis supplied). See also note 12, supra.

31 Perhaps the closest decision we have on the point is the recent case of Touhy v. Ragen, 340 U.S. 462 (1951). There a prisoner in a state prison sought habeas corpus in the federal courts. During the proceedings the petitioner requested the court to issue a su'poena duess tecum to a subordinate official in the Department of Justice, ordering him to produce certain department records. The court so ordered, and when the official refused, he was cited for contempt. The Court of Appeals for the Seventh Circuit reversed the contempt adjudication, United States v. Ragen, 180 F. 2d 327 (7th Cir. 1950), and that decision was affirmed by the Supreme Court, Touhy v. Ragen, 340 U.S.462 (1951). The Court, however, limited its holding to the specific fact situation. "We find it unnecessary however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal...we limit our examination to what this record shows, to wit, a refusal by a subordinate..." Id. at 467.

32 Thus, the Court then might be faced with the situation suggested by President Andrew Jackson's alleged remarks on hearing the result of the Supreme Court decision in the case of Worcester v. Georgia, 6 Pet. 515 (U.S. 1832). "Well,
the courts have found a convenient escape hatch from the constitutional dilemma of separation of powers. The executive department head is forced to make the difficult decision whether to press a defense and produce documents or to submit to loss of the case. This is similar to the choice, averred to previously, that the government need make prior to bringing suit on a cause of action.

The question remains whether this form of coercion can avoid the substance of constitutional objection. Congress and the courts have seemingly accomplished in combination that which neither could do directly alone. However, under discovery procedure, and consequent action establishing the issues in favor of the opponent should a discovery order be not obeyed, the court acts only in its traditional sphere of deciding cases. It has not attempted to use the force and power of its process to compel the executive to act in a specified manner. The choice of action or non-action is left to executive officials. The result of their decision governs the future action of the court, and they have been given a free choice with full knowledge of the consequences. This differs from the usual attempt by subpoena, mandamus, or injunction to exact obedience to a directive of the court. The conceptual distinction between a court order directing an official to act in a specified manner and court action taken only after an executive official has pursued a specific course of conduct may be sufficient to sustain the constitutionality of the latter type of approach.

That position would appear to be well taken, since the result seems salutary. It is important to protect the rights of the individual tort victim, injured because of negligent activity on the part of the air force. To present his case the victim needs information contained in the report of the investigating board. To allow the air force to determine alone whether or not it will produce matter, which may well lead to a determination of fault in favor of the tort victim, can only result in constant refusal to submit that information to the court. Some sanction must be imposed to impress the executive official with the magnitude of the problem, otherwise it becomes too easy to discover privilege where in reality none should exist. The principle of loss of the case, if the documents are not produced, removes temptation to take the easy path in an attempt to escape liability. Should a security matter be present, it would appear that the court could well be taken into strict confidence. Furthermore, to allow executive officers to hide behind a veil of immunity and privilege, at times when the national interest does not overwhelmingly demand such inconvenience to the public, could conceivably lead to "... [non]disclosure of records merely because they might prove em-

John Marshall has made his decision, now let him enforce it..." see, 1 Warren, The Supreme Court in United States History, 729-79 (1947).

The alleged constitutional dangers referred to of course presuppose a complete breakdown of inter-departmental working relation between the three branches of government. Such an event is not likely to occur unless anarchy reigns in the land. But the possibility exists and must be recognized.

It may well be that the government would be wise to submit the documents upon discovery motions unless considerations of national defense would preclude attempt to use in evidence information gained from the government reports of the accident, he then can be opposed with a hearsay or opinion evidence objection, which may well be sustained. See Hubsch v. United States, 174 F. 2d 7 (6th Cir. 1949) (army jeep accident case, where testimony of investigating officer and his report were successfully objected to as hearsay). But see Universal Air Lines v. Eastern Air Lines, 188 F. 2d 993, 1951 U.S. Av. R. 20 (D.C. Cir. 1951).

It would appear that this was the reason for placing sanctions in the discovery rules for refusal to submit to the orders of the court. If refusal to submit were left to the individual party, probably no one would ever obey a discovery order.

The liability we are concerned with is the liability of the government body, not of the executive official. Wigmore points out that the securing of protection for the individual officer is not a valid basis for executive immunity in the law of evidence. See 8 Wigmore, § 2378a (3d ed. 1940).
barrassing to government officers."³⁶ In a democratic society information should be open to all, except where its dissemination would endanger the national welfare.

In a great many cases the claim of executive privilege is a result of mere inertia and convenience.³⁷ Subordinate officers acting under general regulations rarely consider merits when faced with demands for documents. Busy with the pressure of routine, the inferior officer has not the time carefully to consider the equities of the particular case. Many times he has little comprehension of the ramifications of his action in approving or disapproving the surrender of documents to the court. His superiors, especially in the military, pressed with matters of national importance, are prone to accept his decision without questioning its propriety. Thus, the claim of privilege develops. There are few situations where it is justified. True, the air force in the Reynolds case did claim knowledge on the part of witnesses, that testimony given before air force investigation boards might be used in later litigation, "... would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety."³⁸ The promotion of the highest degree of flying safety is an important function of our military air force, and wherever possible should be encouraged by other branches of government. But, the protection of the rights of civilians injured by the military is a primary responsibility of the courts. Without the information contained in the military report the civilian it at a distinct disadvantage. To promote recovery for the injured party, where the air force has in fact been negligent, is beneficial to the national interest. Liability is an effective antidote to continued carelessness, as much or more so than information gleaned from military investigations. That factor, when coupled with a basic interest in the dispensation of justice to litigants, suggests that the approach taken in the Reynolds case is proper.

DIGEST OF RECENT CASES

INSURANCE — AVIATION LIABILITY EXCLUSION CLAUSE — INCONTESTABILITY CLAUSE

Jordan v. Western States Life Ins. Co.,

Death of insured resulted from riding in a private plane. The policy had an aviation liability exclusion clause, as well as a two year incontestability clause, the latter as required by North Dakota statute. It was held that this statutory requirement has the effect, after the period of contestability has expired, of nullifying the aviation liability exclusion clause. For this reason there was judgment for the plaintiff. (The court recognized that this result was peculiar to North Dakota, and that absent the statute there would be no conflict between the exclusion and incontestability clauses, referring to Anno. 17 A.L.R. 2d 1043, 1050 (1950).)

AVIATION LIABILITY EXCLUSION CLAUSE — DETERMINATION OF CAUSE OF DEATH

Massachusetts Mutual Life Ins. Co. v. Smith,

This case was noted in the last issue of the Journal (Vol. 19, No. 1). Since then it has been reversed on rehearing on the ground that the insurer

³⁶ Reynolds v. United States, supra note 2 at 995.
³⁷ For a documented exposition of this viewpoint see 8 Wigmore, § 2378a (3d ed. 1940).
³⁸ Reynolds v. United States, supra note 2, at 994.
has not met his burden of disproving the possibility that the death of the insured resulted from a cause other than the aviation hazard.

**AVIATION LIABILITY EXCLUSION CLAUSE — DEATH OF INSURED IN AIRPLANE CRASH WHILE AIRPLANE PASSENGER — INTERPRETATION OF TERM “AERONAUTICS”**


The insured died as a result of the crash of the airplane in which he was a passenger. The policy had a provision for double indemnity in case of accidental death, and had a further provision expressly excluding death resulting from aeronautic flight. The court held, citing *Clapper v. Aetna Life Ins. Co.*, 157 F. 2d 76 (D.C. Cir. 1946), that there was an ambiguity in whether “aeronautic flight” means that the insured actually engages in the operation of the plane, or is merely present in the plane; that such ambiguity must be resolved against the insurer; that hence the beneficiary may collect double indemnity on the insured’s death. The dissenting judge thought that the exclusion clause should be applied because in its wording there was no requirement that the insured participate or engage in aeronautical flight, but only that his death be the result of such flight.

**LABOR LAW — TRANSFER OF AIR CARRIER ROUTE — PROTECTION OF AIR CARRIER EMPLOYEES**

*Western Air Lines, Inc. v. CAB, 194 F. 2d 211, 9th Cir., 1952 U.S. & C.Av.R. 73; (Jan. 31, 1952).*

The CAB retrospectively imposed labor protective provisions as a condition to the transfer by Western to United Air Lines of a certificate for the operation of the Los Angeles-Denver route. The court held that the Board had the statutory power to do this. *CAA §401(i)* provides that transfer of certificates must be approved by the Board as being consistent with the public interest. The court found that conditions for the protection of employees bear a substantial relation to public interest, relying on *United States v. Lowden*, 308 U.S. 225 (1939), a case arising under the Interstate Commerce Act. The court also held that the Board may impose such conditions after the transfer has been made if the necessity for such action arises.

**TORT — TRESPASS — PROPERTY DAMAGE — LOW FLIGHT — CRASH OF AIR FORCE JET PLANE**

*United States v. Gaidys, 194 F. 2d 762; 1952 U.S. & C.Av.R. 76 10th Cir. (Feb. 12, 1952).*

An air force jet plane, while flying at 100 feet, crashed near plaintiff’s house, causing them personal injuries and property damage. The court held that the liability of the United States under the Tort Claims Act was based on trespass. Under modern law mere operation of the plane over plaintiff’s property is not a trespass; however, the plane must be operated at minimum heights as prescribed by the CAB under the power to do so given it by *CAA §1(24)*. Here the pilot violated the CAB regulation, the prescribed minimum height being 1000 feet over cities and 500 feet over other land areas.

**WRONGFUL DEATH ACTIONS — STATE STATUTE EXCLUDING FOREIGN WRONGFUL DEATH ACTION**


A wrongful death action, which was brought in Illinois to recover for the death of a passenger on an air carrier which crashed in Utah, was dismissed by the federal district court for the Northern District of Illinois for lack of
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jurisdiction, because of an Illinois statute which excludes all foreign death actions capable of being prosecuted to judgment in the courts of the state where the death occurred. The court of appeals affirmed this judgment, but the Supreme Court reversed it on the ground that the Illinois statute violated the full faith and credit clause of the Constitution, under the rule of Hughes v. Fetter, 341 U.S. 609 (1951).

ADMINISTRATIVE LAW — CAB DISCRETION TO GRANT OR DENY OPERATING AUTHORITY — RAILROAD CONTROLLED AIR CARRIERS


The CAB, in a 1948 order giving some fifty air freight forwarders temporary operating authority, denied such authority to the petitioner because it was railroad controlled. The Board did this under authority of §408(a)(5) of the CAA which makes it unlawful for a surface carrier to acquire control of an air carrier without CAB approval. The reason that railroad ownership was found undesirable by the Board was that the forwarder’s railroad connection would give it a competitive advantage as well as an incentive to divert potential air freight traffic to the railroad. The court upheld the Board order, holding that this was a matter to be decided by the Board in its expert judgment. It further found that the Board had not acted arbitrarily or discriminatorily, even though in that same 1948 order it had granted temporary operating authority to a railroad controlled railway express agency. In the case of the express agency the court found three factors, absent in petitioner’s case, which justified the Board in granting the express agency’s application: (1) it had been operating in the air freight field since 1929 (while the petitioner was newly organized to operate in this field), and the Board and the court agreed that §408(a)(5) does not apply to control relationships in existence before the passage of the CAA in 1938; (2) it was found that there was a great public need for the express agency’s services in the air freight field, which no other applicant was seeking to meet; (3) it was found that the agency, despite its railroad connections, had consistently encouraged the solicitation and development of air express.

CONTRACTS — LIMITATION OF LIABILITY — REQUIRING NOTICE OF DAMAGE CLAIMS WITHIN 90 DAYS OF THE ACCIDENT AND INSTITUTION OF SUIT WITHIN ONE YEAR — ADEQUACY OF NOTICE OF SUCH PROVISION


Failure to comply with the airline’s tariff provision requiring notice of damage claims within 90 days of the accident and the institution of suit within one year does not bar a damage suit brought within the applicable statute of limitations by a passenger holding a ticket issued subject to conditions of a contract contained in an accompanying bookfolder which merely stated that time limits for giving notice and instituting actions are set forth in the carrier’s tariff. The inclusion of such provision does not operate as a matter of law to preclude the injured passenger from maintaining the action because nowhere in the Act or the CAB regulations is there any authorization or requirement for the inclusion of such a provision in the tariff. Therefore such a provision, to be binding on the passenger, must be distinctly declared and deliberately accepted. The court found the facts to indicate that such was not the case here.